HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978

Article I: Bill of Rights

Hilary Josephs
Curtis Narimatsu
Roderick Rodrigues
Kevin P. H. Sumida

Assisted by Alice Beechert

Legislative Reference Bureau
State Capitol
Honolulu, Hawaii 96813

Price $3.00
May 1978

Richard F. Kahle, Jr.
Editor

Samuel B. K. Chang
Director

TABLE OF CONTENTS

Article I
BILL OF RIGHTS

POLITICAL POWER

Section 1. All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

RIGHTS OF MAN

Section 2. All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

FREEDOM OF RELIGION, SPEECH, PRESS, *ASSEMBLY AND PETITION*

Section 3. No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

DUE PROCESS AND EQUAL PROTECTION

Section 4. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

SEARCHES, SEIZURES AND INVASION OF PRIVACY

Section 5. 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. [Am Const Con 1968 and election Nov 5, 1968]

RIGHTS OF CITIZENS

Section 6. No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

ENLISTMENT, SEGREGATION

Section 7. No citizen shall be denied enlistment in any military organization of this State nor be segregated therein because of race, religious principles or ancestry.

INDICTMENT, DOUBLE JEOPARDY, SELF-INCRIMINATION

Section 8. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against himself.

BAIL, EXCESSIVE PUNISHMENT

Section 9. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment. [Am Const Con 1968 and election Nov 5, 1968]

TRIAL BY JURY, CIVIL CASES

Section 10. In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

RIGHTS OF ACCUSED

Section 11. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days. [Am Const Con 1968 and election Nov 5, 1968]

JURY SERVICE

Section 12. No person shall be disqualified to serve as a juror because of sex.

HABEAS CORPUS AND SUSPENSION OF LAWS

Section 13. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe.

SUPREMACY OF CIVIL POWER

Section 14. The military shall be held in strict subordination to the civil power.

RIGHT TO BEAR ARMS

Section 15. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

QUARTERING OF SOLDIERS

Section 16. No soldier or member of the militia shall, in time of peace, be quartered in any house, without the consent of the owner or occupant, nor in time of war, except in a manner prescribed by law.

IMPRISONMENT FOR DEBT

Section 17. There shall be no imprisonment for debt.

EMINENT DOMAIN

Section 18. Private property shall not be taken or damaged for public use without just compensation. [Am Const Con 1968 and election Nov 5, 1968]

LIMITATIONS ON SPECIAL PRIVILEGES

Section 19. The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities.

CONSTRUCTION

Section 20. The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.

EQUALITY OF RIGHTS

Section [21]. Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section. [L 1972, S B No 1408-72 and election Nov 7, 1972]

Chapter 1
THE BILL OF RIGHTS IN THE STATE AND FEDERAL CONSTITUTIONS

The Bill of Rights is one of the "core" areas found in all state constitutions, as well as the U.S. Constitution. Traditionally, the purpose of the Bill of Rights has been to protect individuals and minorities against the excesses of government, in other words, to act as a restraint upon government action.[1] In the twentieth century, particularly since the 1930's, the government has been increasingly viewed as a provider of services and economic security, and there has been a concomitant demand for new social and economic rights--to medical care, housing, education, and employment.[2] However, the Bill of Rights in Hawaii, as elsewhere, has remained largely a source of negative claims against government interference rather than a source of positive claims upon the government.

The Significance of the Federal Bill of Rights for Hawaii
Application of the Federal Bill of Rights to the States

Before the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments after the Civil War, the guarantees of the federal Bill of Rights applied only to the federal government and did not bind the states.[3] Any limitation on state action had to be found in a state's Bill of Rights. Beginning in the 1920's, the U.S. Supreme Court began to use the Due Process Clause of the Fourteenth Amendment to safeguard against state action the fundamental rights and liberties protected against federal action by the first 8 amendments.[4] The Fourteenth Amendment was an appropriate vehicle because it was addressed directly to the states and was intended to act as a limitation upon them. In pertinent part, it reads as follows:

> ...No State shall make or enforce any law which shall abridge the privileges and 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. (Emphasis added)

The U.S. Supreme Court has consistently rejected the idea that the entire Bill of Rights has been carried over intact or "incorporated" in toto into the Due Process Clause.[5] It has, however, through the doctrine of "selective incorporation", imposed nearly all the guarantees of the first 8 amendments on the states:[6]

(1) The right to compensation for property taken by the state;[7]

(2) The rights of speech, press, and religion covered by the First Amendment;[8]

(3) The Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence seized illegally;[9]

(4) The right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;[10]

(5) The Sixth Amendment rights to counsel,[11] to trial by jury,[12] to a speedy[13] and public[14] trial, to confrontation of opposing witnesses,[15] and to compulsory process for obtaining witnesses;[16]

(6) The Eighth Amendment guarantee against cruel and unusual punishment.[17]

Because of this nationalization of individual rights, and the establishment of a federal "floor" below which the states could not go, the state Bill of Rights lost its place as the primary source of protection against state action.[18] In recent years, as the U.S. Supreme Court has become less solicitous of individual rights, state courts, including the Hawaii Supreme Court, have begun to revitalize the guarantees of fundamental rights as expressed in state constitutions. Twice the Hawaii Supreme Court has accorded a greater measure of protection to criminal defendants than the U.S. Supreme Court had done in similar cases.[19] Since the Hawaii decisions rested on "independent" or "adequate" state constitutional grounds, the U.S. Supreme Court was precluded from review.[20] Therefore, the Hawaii Bill of Rights has resumed a measure of importance, not only in cases where it provides greater relief or greater protection, but also in cases where the U.S. Supreme Court has deliberately left certain areas without precise definition, or where the guarantee is not expressly provided for in the federal Bill of Rights.[21]

The Derivation of the Hawaii Bill of Rights from the Federal Bill of Rights

Aside from the process of "selective incorporation", the federal Bill of Rights has always had special significance for Hawaii. While Hawaii was still a territory, the federal Bill of Rights was applicable to it "as elsewhere in the United States" by virtue of section 5 of the Organic Act.[22] When the Hawaii Constitution was formulated in 1950, as part of the effort to achieve statehood,[23] many provisions of the federal Bill of Rights were taken over verbatim or with little change. It was the intent of the delegates that Hawaii would have the benefit of federal court decisions interpreting these provisions.[24]

Chapter 2
BASIC PRINCIPLES: POPULAR SOVEREIGNTY, INDIVIDUAL EQUALITY, AND SUPREMACY OF THE CIVIL POWER

It is standard practice to include in a state constitution provisions which reflect the democratic nature of government: popular sovereignty, the equality of man, and the subordination of the military to the civil power. Although these provisions are vague, open-ended, and rarely the basis for a judicial decision,[1] they may be defended as a necessary statement of goals and aspirations.

Popular Sovereignty

Article I, section 1, of the Hawaii Constitution provides that:

> All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

Every state constitution, with the exception of New York, declares in the Preamble or the Bill of Rights that the people grant and control the exercise of political power; many constitutions mention in addition the right of the people to alter, reform, or abolish the form of government.[2] This principle, like the notion of inherent rights in sections 2 and 20, reflects the natural law philosophy which heavily influenced the framers of the U.S. Constitution. As delegate Kellerman remarked at the 1950 Constitutional Convention:[3]

> ...[Rousseau's] philosophy was based upon the premise that men lived free and individually in a totally unorganized society...[Government was created] by the voluntary consent of a detached, unorganized group of individual human beings; each having his complete freedom and independence; each agreeing with each other to renounce certain of those complete freedoms and independence for the benefit of obtaining the protection and security of others in a group.

The concept of natural rights which preceded the formation of government also finds expression in section 20 (which is derived from the Ninth Amendment to the U.S. Constitution):

> ...The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.

Those rights which are enumerated are not fundamental because they have been written down; they are mentioned because they are fundamental. Furthermore, they are "but a nucleus or core of a much wider region of private rights, which, though not reduced to black and white, are as fully entitled to the protection of government as if defined in the minutest detail".[4]

Individual Equality

Article I, section 2, carries forward from section 1 the concept that the formation of government did not entail a complete loss of individual independence or the opportunity for self-amelioration. At the same time it emphasized that an individual's exercise of rights should not cause prejudice to those of others, and that the individual has a positive responsibility to preserve both the individual's rights and the rights of others.[5] Where section 2 speaks of equality, it appears that the 1950 Constitutional Convention understood it to mean primarily, if not exclusively, political (as opposed to social or economic) equality:[6]

> All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

In practice, protection of individual equality by the Hawaii Supreme Court has usually been undertaken pursuant to the Equal Protection Clauses of the Hawaii and U.S. Constitutions. Protection of life, liberty, and property has been implemented under the Due Process and Just Compensation Clauses of the Hawaii and U.S. Constitutions.[7]

Section 6 is yet another provision which overlaps with the due process guarantee of section 4:

> No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

It was the understanding of the 1950 Constitutional Convention that "law of the land" meant the same as "due process of law".[8] The only salient differences between the 2 provisions is that section 6 gives special emphasis to voting rights and more narrowly applies to "citizens", rather than "persons".

That the state is to act on the behalf of all, and not for the sake of a hereditary elite, is the purpose of section 19:

> The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities.

This section was not intended to prevent the grant of revocable privileges or immunities such as tax exemptions.[9]

Supremacy of the Civil Power

Several provisions in the Hawaii Constitution, and corresponding sections of the U.S. Constitution, are directed towards the subordination of the military to the civilian power.[10] In addition to the general statement of policy in Article I, section 14, the supremacy of the civilian power is reinforced by section 13, which permits only the legislature to suspend the writ of habeas corpus,[11] and then only under the most extreme circumstances; section 13 corresponds to Article I, section 9, of the U.S. Constitution. Section 16 prohibits the peacetime quartering of soldiers in civilian homes without the consent of the owner or occupant, or quartering in wartime except as provided by the legislature; this section corresponds to the Third Amendment of the U.S. Constitution. Section 15 guarantees the existence of a state militia and the right of individuals to keep and bear arms as members of the militia; it corresponds to the Second Amendment of the U.S. Constitution. Article IV, section 5, makes the governor the commander-in-chief of the armed forces of the state, and is based on Article II, section 2, of the U.S. Constitution.

The subordination of the military has been at issue in cases where civilians have been tried and punished by military tribunals. The general rule is that a military tribunal would not be empowered to act so long as the courts are open and functioning.[12]

Of all the provisions concerning the civilian power, perhaps the most controversial is the one which deals with right to bear arms. The Second Amendment and comparable sections of state constitutions, such as section 15 of the Hawaii Constitution, are frequently pointed to as sources of an individual, personal right to own and use firearms, without interference by federal or state legislation. However, the history of the Second Amendment indicates that its purpose was to restrict the power of the federal government and its standing army, and to prevent the disarmament of state militias. Therefore, the right to keep and bear arms is one enjoyed collectively by members of a state militia as such.[13]

Although the Second Amendment has not been "incorporated" into the due process clause of the Fourteenth Amendment and is not binding on the states, the fact that the Hawaii provision is a word-for-word adaptation makes the history and judicial interpretation of the Second Amendment highly relevant.[14] The U.S. Supreme Court interpretation of the Second Amendment is scanty and ambiguous, but tends to support the collectivist view.[15]

At the 1950 Constitutional Convention, it was the understanding of the delegates that section 15 would not prevent the legislature from imposing reasonable restrictions on the right to keep and bear arms (including absolute prohibitions on certain types of lethal weapons).[16] On the other hand, the delegates appear to have viewed the right to bear arms as encompassing more than service in the militia, and extending to recreation and self-defense.[17] The 1968 Constitutional Convention, to clear up any confusion left by its predecessor, stressed that section 15 referred only to the collective right to bear arms as a member of the state militia, but did not amend section 15.[18]

Chapter 3
FIRST AMENDMENT FREEDOMS

PART I. INTRODUCTION

The First Amendment freedoms refer to those of religion, speech, press, assembly, and petition found in the First Amendment of the United States Constitution. They have been adopted verbatim by Article I, section 3, of the Hawaii Constitution, which reads as follows:

> No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

United States Supreme Court decisions interpreting the First Amendment are, therefore, important to Hawaii for 2 reasons: the Hawaii Constitution has borrowed the wording of the U.S. Constitution; and, the First Amendment guarantees are binding on all the states through the Fourteenth Amendment,[1] establishing a constitutional minimum below which the states cannot fall. Only as the state constitution requires a more rigid separation of church and state, permits greater freedom in the exercise of religion, or offers greater protection for freedom of expression does it acquire independent force.

The basic thrust of the First Amendment--particularly as regards freedom of speech, press, assembly, and petition--is to facilitate the free exchange and circulation of ideas, particularly, but not exclusively, political ideas. Such a system of open communication fulfills a number of socially useful purposes.[2] It is vital to the process of discovering truth, since the "ultimate good desired is better reached by free trade in ideas".[3] It is necessary to the democratic political process: since government derives its legitimacy from the consent of the governed, the citizenry must be fully informed and able to communicate their wishes to the government. Because change can come through discussion and consensus, instead of violence, a system of free expression prevents society from developing a dangerous rigidity. Also, a system of free expression

allows for personal self-fulfillment by allowing individuals to freely "develop their faculties".[4]

It is worthwhile to note that the First Amendment only assumed its present significance within the last half century or so. Issues of individual liberty and the relationship of citizen to government became pressing, and were presented to the Supreme Court for resolution.[5] The Court has had to strike a balance between the free dissemination and acquisition of ideas, and other competing interests such as public safety, social cohesion, and the individual's right to be left alone. At the same time, the Court's task of defining the terms of the First Amendment has been complicated by social and technological change. With the shift from theistic beliefs to those which emphasize human experience, it is no longer so easy to define what "religion" is and what "religious beliefs" merit the protection of the First Amendment. Innovations in the mass media such as television have similarly altered our conceptions of "speech" and "press". Despite social and technological change, however, the Court has been able to address a wide spectrum of issues through the original language of the First Amendment.

PART II. FREEDOM OF RELIGION

Separation of Church and State

Article I, section 3, of the Hawaii Constitution provides in part that "[n]o law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof,..." Following U.S. Supreme Court interpretations of identical language in the U.S. Constitution, this phrase is intended to effect a complete separation of church and state, to make sure that the power and prestige of the government would not be used to encourage acceptance of any creed or religious practice.[6]

The principal controversy surrounding this so-called Establishment Clause is what constitutes government aid to religion. Where government support was ideological and consisted of an official school prayer, the Supreme Court found

an impermissible violation of the Establishment Clause, even though the prayer was nondenominational and pupils who wished to remain silent or be excused from the room could do so.[7] Where the aid consists of material or financial support, the Supreme Court has not formulated any rationale which would lead to clearly predictable results. In its most recent interpretations of the Establishment Clause, the Court has relied on a 3-part test. To pass constitutional muster, a statute authorizing aid to parochial schools must have a secular legislative purpose, such as protecting the health of school children or providing a fertile educational environment. Secondly, the statute must have a principal or primary effect that neither advances nor inhibits religion. Secular, nonideological forms of aid such as diagnostic health services are therefore permissible. Lastly, the statute must not foster excessive government entanglement with religion. Funding of field trips is an impermissible form of aid, because the state would have to continually supervise teachers to ensure that they remained religiously neutral for the duration of the trip.[8]

The Hawaii Constitution creates an even more rigid separation between church and state than does the U.S. Constitution. This is due to the inclusion of the following 2 provisions:

> No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 3 of Article I of this Constitution. (Art. VI, sec. 2)
>
> ...nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution. (Art. IX, sec. 1)

The Hawaii Supreme Court in Spears v. Honda relied on Article IX, section 1, in deciding that bus transportation subsidies to private and sectarian school students were unconstitutional. It pointed out that such subsidies did "support or benefit" nonpublic schools by inducing attendance at those schools and promoted the interests of the private or religious institutions which controlled them.[9]

Further discussion of government aid to private and sectarian schools may be found in Hawaii Constitutional Convention Studies 1978, Article IX: Education.

Free Exercise of Religion

Article I, section 3, further provides that no law shall prohibit the "free exercise" of religion, that is, compel individuals to believe and act in a manner contrary to their individual conscience. The United States Supreme Court has associated the free exercise of religion with a general freedom from ideological conformity.[10]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein.

Religion encompasses those creeds based on a belief in a Supreme Being as well as those which deny the existence of a Supreme Being.[11] Cases involving conscientious objectors have been cited for the proposition that the free exercise clause protects ethical beliefs which do not have any reference to the supernatural.[12]

While it appears well-settled that religious belief is accorded absolute protection against government action, religious conduct is not treated with the same deference. The U.S. Supreme Court has, for example, upheld the conviction of a Mormon guilty of bigamy on the grounds that government was "free to reach actions which were in violation of social duties or subversive of good order".[13]

PART III. SPEECH, PRESS, ASSEMBLY, AND PETITION

Introduction

Despite the absolute language of the First Amendment ("Congress shall make no law...") and of Article I, section 3, of the Hawaii Constitution ("no law shall be enacted..."), it has generally been recognized that government may reasonably regulate the content of expression as well as the conduct or mode of expression (i.e., its time, place, and manner). With respect to the content of expression, the United States Supreme Court has excluded from the protection of the First Amendment: obscenity, defamation, fraudulent assertions, solicitation of crime, subversive advocacy, and "fighting words" which provoke the person addressed to acts of violence.[14]

In the case of political speech the content of which enjoys clear constitutional protection, the government may nonetheless reasonably regulate its conduct. The rights of free speech and assembly do not permit a street meeting at rush hour in the middle of Times Square.[15] In this situation, the importance of public order outweighs the interest of the speaker or the audience in free expression.

The discussion in this part will be concerned both with issues of content and conduct, and will focus on the following questions:[16]

(1) What kind of balance should be struck between freedom of the press and the individual's interest in protecting reputation?

(2) How should the conflict between freedom of the press and the individual's right of privacy be resolved?

(3) What sort of accommodation should be reached between the public's "right to know"--public access to government records"--and the individual's right of privacy?

(4) How may the competing interests of freedom of the press and the fair administration of criminal justice be accommodated?

(5) Is free expression primarily a means of opening the political process to robust debate? If so, should there be a guaranteed right of access to the media for the purpose of increasing political dialogue?

(6) To what extent does the First Amendment protect nonpolitical forms of expression?

(7) To what extent does the First Amendment protect nonverbal forms of communication?

(8) To what extent is freedom of expression valued per se as an incident of individual autonomy and self-fulfillment?

Freedom of the Press and Individual Reputation

The conflict between the First Amendment and the law of defamation has been the subject of numerous U.S. Supreme Court decisions in the last decade or so. Defamation has been defined as an injury to an individual's reputation and good name. A defamatory statement is therefore one which is communicated to a third party and holds the subject up to "hatred, ridicule, or contempt".[17] Beginning with New York Times v. Sullivan, the U.S. Supreme Court has attempted to strike a balance between the need for the media to keep the public informed and the need to protect individuals from defamatory falsehood. If "debate on public issues should be uninhibited, robust, and wide-open",[18] the media should not labor under a burden of continual self-censorship, unable, for fear of suit, to publish unless they could guarantee the truth of their statements.

In extending constitutional protection to the media, the Supreme Court has added to certain existing exceptions to the law of defamation. Where free and open communication is given paramount importance, the plaintiff is barred from recovery regardless of the speaker's motives or knowledge of the falsity of the statement.[19] For example, legislators and witnesses are immune from suit for defamatory statements made in the course of legislative proceedings.[20]

Despite the contribution of the media to public debate, the Supreme Court has not left the individual defenseless against defamatory falsehood. The Court has been especially concerned about the individual when the following factors were present: whether the person qualifies as a "private figure" who does not enjoy pervasive notoriety or who has not actively sought the limelight in a particular controversy; and whether the matter in question is of interest to the

public for entertainment value or is not a matter of legitimate public concern, such as an election.

At present the U.S. Supreme Court and the Hawaii Supreme Court rely upon 2 standards in defamation cases, one of which is protective of the press, the other of which is protective of the individual. The first is the so-called New York Times rule: where the plaintiff is a "public official" or "public figure" the plaintiff is required to prove that the defendant published the defamatory material with knowledge of its falsity or reckless disregard for the truth.[21] Practically speaking, this means the defendant has to be guilty of a gross failure to act (where the defendant had a duty to corroborate or verify, and such verification was not precluded by time constraints or otherwise was inordinately difficult), or the defendant is guilty of deliberate wrongdoing (where the facts discovered should have put the defendant on guard, but yet the defendant took affirmative action to conceal facts or distort their meaning).[22]

It should be noted that even the New York Times rule is not intended to shield the press when the defamatory statement is made about the private life of a public official or public figure. However, it is quite difficult to isolate aspects of a public official's private life which do not have public relevance, such as fitness for office.[23] Where such relevance exists, the media is protected by the New York Times rule.

The other standard upon which the courts rely is the so-called Gertz rule.[24] Where the plaintiff is a "private figure", the standard of proof does not have to be so exacting as knowledge-or-reckless-disregard. Negligence, or failure to act like a reasonable person under the circumstances, would be enough to permit the plaintiff to recover. However, if the publication was merely negligent, the plaintiff still has to prove damage--"impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering".[25]

The difficulty of predicting which standard applies may be illustrated by Time, Inc. v. Firestone.[26] Time magazine erroneously reported that Mrs.

Firestone had been divorced on grounds of adultery and extreme cruelty, where only the latter was true. The U.S. Supreme Court concluded that despite her social prominence, the intense public interest in the divorce proceedings, and her frequent press conferences during the trial, she was not a public figure. Hence, the Gertz rule applied. The Court rejected the notion that all controversies of interest to the public are public controversies, implying that the First Amendment protects the media only in cases of legitimate public interest.[27]

Freedom of the Press and Individual Privacy

The First Amendment privilege of the press to report on matters of legitimate public interest has also been at issue in cases involving invasion of privacy. Invasion of privacy under tort law has much in common with the right of privacy under constitutional law, especially as regards the right to be free from intrusion and the right to avoid disclosure of personal matters (see chapter 8).

Like defamation, invasion of privacy is an offense to "the reasonable sense of personal dignity", but it differs from defamation in important ways. A statement which is an invasion of privacy need not be false, and even if it is, the plaintiff need not demonstrate the public disgrace or ridicule which is the basis of defamation. It is usually sufficient to show that some matter has been made public or a right to solitude invaded in an unreasonable or unjustified manner.[28]

Invasion of privacy has been subdivided into 4 types:[29]

(1) Intentional and unreasonable intrusion upon another's solitude or seclusion.

(2) Publication of a matter which unreasonably places someone in a false, though not necessarily defamatory, light ("false-light invasion of privacy").[30]

(3) Unreasonable publication of a matter concerning another's private life ("public disclosure of private facts").[31]

(4) Commercial appropriation of a name or likeness.[32]

In cases involving false-light invasion of privacy and public disclosure of private facts, the U.S. Supreme Court has upheld the First Amendment privilege of the press.[33] With respect to commercial appropriation, the U.S. Supreme Court, and the Hawaii Supreme Court as well, have upheld the property interest of the individual in the value of the individual's name, likeness, or endeavors and in the benefit of publicity.[34]

It has been argued that the distinction between defamation and invasion of privacy is breaking down, that one's interest in privacy is as important as one's interest in reputation, and that the Supreme Court should use the same standards in both kinds of cases.[35] Some considerations which might apply with equal validity to defamation and invasion of privacy are: the social value of the facts published, the depth of the media's intrusion into ostensibly private affairs, and the extent to which the subject voluntarily acceded to a position of public notoriety.[36]

The Public "Right to Know" and Individual Privacy

The "right to know" is derived from that aspect of the First Amendment which seeks to encourage the informed participation of citizens in the process of government, ensure government accountability, and generally increase public confidence in the political system.[37] This right has assumed greater importance as government operations, particularly those of the executive branch and administrative agencies, have become more comprehensive, complex, and secretive.

Significant progress in opening up government processes to scrutiny and participation has been made on both the federal and state levels. The federal Freedom of Information Act[38] and state open-records laws have established regular channels for public access to information held by administrative agencies. Open-meeting, or sunshine laws, provide for a right to attend the meetings of government agencies.[39] The Montana Constitution even provides

for a "right of participation" in the decision-making of state and local agencies.[40]

A necessary complement of the public right to know is the individual right to control the flow of information concerning physical characteristics, beliefs, and opinions. This point is also touched upon in chapter 8 on the independent right of privacy. It is important to note that the Freedom of Information Act and the vast majority of state open-records laws exempt from disclosure specific types of records, the disclosure of which would constitute an invasion of privacy.[41]

The Montana Constitution, in addition to a general right of privacy,[42] further provides that a public right of access to public records is assured "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure".[43] *It might be possible for the Hawaii Constitution* to reinforce the importance of disclosural privacy with a specific provision such as Montana's, or to subsume disclosural privacy under the general privacy provision.

Freedom of the Press and the Administration of Criminal Justice

Silence Order. The so-called free press-fair trial conflict concerns the tensions between the First Amendment rights associated with a free press and the Sixth Amendment right to a fair trial by an impartial jury. On the one hand, the media has the right to publish, and the public has the right to receive, full reports of criminal proceedings. It is also believed that open publication guards against a miscarriage of justice by subjecting the judicial process to scrutiny and criticism.[44] On the other hand, there exists the danger that a jury or potential jury will be improperly influenced by media reports. The reports may contain opinions and facts inadmissible at trial or which create hostility towards the defendant.[45]

The question of free press/fair trial is of particular interest in light of the fact that the U.S. Supreme Court has reversed convictions because of

presumed media influences. In Sheppard v. Maxwell,[46] for example, massive, pervasive, and prejudicial publicity was thought to have prevented a fair trial consistent with the Due Process Clause of the Fourteenth Amendment.

A number of preventive or curative measures exists to deal with the problem of pre-trial or mid-trial publicity. The choice of proper remedy lies within the discretion of the trial judge, whose decision will not be reversed absent an abuse of discretion which prejudices the accused.[47] The discussion which follows addresses the 2 most extreme methods--use of the silence order to control sources of publicity and sanctions against those who release or publish information. Less drastic measures such as a change of venue are discussed in chapter 6.

The general rule is that where there is no clear threat to the integrity of the trial, the court should refrain from controlling new coverage. The United States Supreme Court recently emphasized that:[48]

> ...prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.

To the extent that a silence order forbids the reporting of evidence presented at a public judicial proceeding, it is plainly unconstitutional.[49] Rather than impose a prohibition, temporary or permanent, on the reporting of information, it is preferable to restrict public statements made to the press by those within the direct control of the court--the police, prosecutor, defense counsel, witnesses; this would of course also apply to the judge.[50] Furthermore, improper influence on the jury may be curbed by strict rules governing the use of the courtroom by news reporters.[51]

Sanctions against news reporters for violating a silence order are probably only justifiable in the face of wilful and flagrant disobedience. The United States Supreme Court has long espoused the position that the contempt[52] power may be justifiably used only when the out-of-court speech or publication constitutes a clear and present danger to the administration of justice. The danger cannot be remote or even probable; it must be immediate. Out-of-court

publications expressing disrespect for the judiciary are insufficient to constitute a clear and present danger.[53]

One study recommends the use of the contempt power only when: (1) the press wilfully publishes a statement designed to affect the outcome of the trial and it threatens to have that effect;[54] or (2) the press has been given access to trial proceedings closed to the public, and violates the conditions upon which access has been granted.[55]

News Reporter's Privilege. The First Amendment does not afford news reporters a privilege against appearing and testifying before state and federal grand juries.[56] It is felt that the public interest in law enforcement and in assuring effective grand jury proceedings outweigh the burden on news gathering.[57]

State legislatures are permitted to fashion their own standards in this area, and half of the states have shield laws which protect news reporters from being required to disclose their confidential sources.[58] There is no statute in Hawaii recognizing the communication between a news reporter and the reporter's source as being privileged.[59] State courts are also permitted to construe their local constitutions to recognize a news reporter's privilege, either partial or absolute, but the Hawaii Supreme Court has declined to recognize the privilege.[60]

Free Expression and Increased Opportunities for Political Dialogue

Because the present-day marketplace of ideas is dominated by the mass media, many speakers lack an effective opportunity to make their views known. Some have argued that, given this monopoly, there should be a compulsory right of access to the media, whether by constitutional interpretation or legislation.[61]

A right of access would serve a number of purposes. It would give a substantial opportunity to be heard to those with dissenting or unorthodox

views. It would give those who are subject to media attention an opportunity to protect their reputations. Also, it would maximize the amount of information available to the public.[62] Various forms of access are possible, ranging from a requirement of free time for political candidates to a requirement that television stations accept paid political advertisements on the same basis as commercial advertisements.[63]

The primary difficulty with a right of access is that it is a departure from our traditional commitment to a free and unfettered press. It would be inconsistent with the First Amendment to have pervasive government control of the media, even though for the purpose of equalizing speech opportunities.[64]

The U.S. Supreme Court has handled the free press/equal access dilemma by permitting government regulation of the electronic media but not of the print media. A newspaper cannot be required to publish without cost the reply of any political candidate criticized in its columns.[65] The broadcast media, however, can be compelled to allow a political candidate time to reply, under the so-called "personal attack" rule.[66] The justification of this difference in treatment is that since only a few interests control the broadcast media, the government can legitimately force them to share a scarce resource with members of the public.[67]

Even as regards the electronic media, however, the U.S. Supreme Court has been concerned with preserving some measure of journalistic independence. For example, it has said that neither the Communications Act of 1934 nor the First Amendment requires broadcasters to accept paid editorial advertisements.[68] This does not seem to foreclose the possibility that Congress might pass legislation to provide this or other access.[69]

The First Amendment and Nonpolitical Forms of Expression

Commercial speech includes both advertising that does "no more than propose a commercial transaction"[70] and nonadvertising such as credit reports and communications with investors.[71] Until quite recently, commercial speech

was one of the numerous exceptions to the First Amendment. It could be regulated or prohibited altogether when it did not contribute to the "free marketplace of ideas" and when it conflicted with the right of others to be left alone.[72] The inferior status of commercial speech was evident in cases such as Breard v. Alexandria,[73] where the U.S. Supreme Court upheld an ordinance prohibiting door-to-door solicitation by uninvited persons selling goods or services. Intrusion by religious advocates, however, was protected by the First Amendment.[74]

The U.S. Supreme Court has recently begun to upgrade the status of commercial expression. For example, the Court has held that a statute which prohibited price advertising of prescription drugs was an infringement of free speech.[75] Even though the advertising did "no more than propose a commercial transaction", it was protected by the First Amendment. The Court frankly acknowledged that the consumer's interest in the free flow of economic information may be of greater importance than an interest in political matters, and that commercial advertising is essential to intelligent and informed economic decision-making.[76]

Although the content of commercial expression may be protected by the First Amendment, the Court has not precluded regulation of its conduct (time, place, and manner). Furthermore, prior censorship which would be impermissible in the case of political speech and news reporting, would be more allowable in the case of commercial expression.[77]

First Amendment Protection of Nonverbal Forms of Communication

The U.S. Supreme Court has been inconsistent in its treatment of symbolic speech, the use of gestures or conduct designed to convey a message. Examples of symbolic speech which the Court has had occasion to review include the wearing of black armbands to protest the Vietnam War[78] and the burning of a draft card on the steps of a courthouse.[79] In the first case, the Court found the mode of communication to be protected by the First Amendment. In the second case, however, the Court concluded that the governmental interest in

administering the selective service system justified an "incidental limitation" on freedom of speech.

It has been observed that the Court's decision in the draft card burning case is part of a general trend towards restricting the "poor person's media"--meetings, marches, and demonstrations. The effect of these limitations has consequences both for freedom of speech and freedom of assembly.[80]

The First Amendment and Individual Autonomy

There are 2 possible views of obscenity and its relation to the First Amendment. If free expression is primarily a means of opening the political process to robust debate, obscenity is properly excluded from the purview of the First Amendment. If freedom of expression is valued per se as an incident of individual autonomy, obscenity is protected by the First Amendment, but may be regulated as to the time, place, and manner of presentation.[81]

As noted earlier, the U.S. Supreme Court has excluded from the protection of the First Amendment several forms of speech. Of these, the Court has taken a much less tolerant stance towards obscenity than it has towards speech which advocates violent overthrow of the government. Where subversive advocacy is involved, the utterance sought to be proscribed must be demonstrated to have a substantially damaging effect.[82] Where obscenity is concerned, there need be no conclusive evidence that it has a potentially corrupting influence on society and a close connection with crime. The state has a right to proscribe obscenity even if these assumptions cannot be proved.[83]

It should be emphasized that the states are not required by the U.S. Constitution to regulate and prosecute obscenity. On the other hand, nothing in the Constitution compels the states to drop all controls on commercialized obscenity.[84] What the standards set by the U.S. Supreme Court accomplish is to set a constitutionally acceptable minimum where a state decides to regulate this area.

With regard to U.S. Supreme Court decisions, the notion that obscenity is not a protected form of expression apparently came from dictum in a 1942 decision.[85] It was not until 1957 that the Supreme Court squarely held for the first time that obscenity was not protected by the freedoms of speech and press.[86] The question left unresolved was how to cull obscenity from the larger category of sexually oriented material.

In the years between 1957 and 1973, when Miller v. California[87] was decided, a majority of Supreme Court justices were unable to agree on a dispositive answer. The most influential definition of obscenity before Miller was formulated by Justice Brennan in Memoirs v. Massachusetts:[88]

(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex;

(2) The material is patently offensive because it affronts contemporary community standards[89] relating to the description or representation of sexual matters; and

(3) The material is utterly without redeeming social value.

This formulation was one of the major sources for the definition of "pornographic" in the Hawaii Penal Code.[90]

The "social value" standard placed a virtually impossible burden on the prosecution since it was very easy for a work to qualify as having some social value and therefore not be obscene. Appellate courts therefore had unlimited discretion in striking down obscenity convictions.[91]

In Miller v. California, a majority of U.S. Supreme Court justices finally were able to agree on the following guidelines for the trier of fact, usually the jury, in determining whether a work was obscene:[92]

(1) Whether the average person, applying contemporary community standards, would find that the work as a whole appeals to the prurient interest;

(2) Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law;[93] and

(3) Whether the work as a whole lacks serious literary, artistic, political, or scientific value.

Although the Miller standard borrowed heavily from the language of Memoirs, there are important differences. The Miller rule attempts to accommodate local variations in tolerance for obscenity, to restore to the trier of fact (usually the jury) the primary role in ascertaining obscenity, and to curb appellate review of obscenity convictions.[94] The traditional signs of obscenity--prurient appeal and patent offensiveness--may be identified according to local community standards, not necessarily according to a uniform national standard.[95] Also, it is presumably more difficult for material to qualify as having "serious value" than a modicum of "social value".[96]

To prevent a chilling effect upon conduct not intended to be proscribed and to provide useful standards for law enforcement, Miller requires state law to specify what conduct is obscene. When individuals are on notice as to what is obscene, they need not engage in excessive self-censorship, suppressing material which would be protected by the First Amendment.[97]

The Miller standard has been criticized as offensive to the Constitution in 2 respects. Discretionary, case-by-case decision-making, permitted under the "community standards" rule, creates uncertainty and will have a chilling effect upon speech protected by the First Amendment.[98] In addition, "community standards" would seem to violate the commerce clause by compelling, e.g., national distributors of films, to adjust to pluralistic standards[99] due to different standards in each state.

Application of the Miller rule in subsequent U.S. Supreme Court decisions has resulted in the following refinements:[100]

(1) The state may proscribe obscenity even where offered to consenting adults, because of its interests in preserving the quality of life, the moral tone of society, and public safety.[101]

(2) While possession of obscene materials in the home is protected by the right of privacy,[102] a consumer who imports such materials for private use[103] or transports them in interstate commerce[104] may be prosecuted. Possession of obscene

materials, even by adults for private use, may thereby be effectively prevented.

(3) Words alone, without pictorial representation, may be proscribed as obscene.[105]

(4) The jury is free to identify and apply community standards unrestrained by judicial and legislative definition, and without regard to expert testimony.

(A) No precise geographical community need be specified by which to measure community standards; the community could be the state, county, or even vicinage from which the jurors are drawn. Indeed, state law is forbidden to define what "contemporary community standards" are.[106]

(B) When the materials at issue are themselves placed in evidence, it is not necessary that the prosecution present expert affirmative evidence as to their being obscene.[107]

(5) Community standards apply even in prosecutions under federal obscenity law.[108]

(6) Despite deference to local variation in what constitutes obscenity, the federal government can still regulate obscenity in a permissive state through its control of the mails and of interstate and foreign commerce.[109]

(7) Juries do not have unbridled discretion in determining what is patently offensive; such determinations are subject to appellate review. Patent offensiveness only applies to hard-core pornography, not to materials which are merely sexually frank. There is also room for appellate review of whether a work lacks "serious value".[110]

(8) Even in the case of erotic films which are of arguably artistic value, the state may regulate the circumstances of their presentation through zoning ordinances.[111]

The Hawaii obscenity statute predates the Miller line of decisions and is based on a more permissive formulation of what constitutes obscenity. It was, however, cited with approval by the U.S. Supreme Court as having the specificity required by the Miller standard, and is therefore not constitutionally offensive in that respect. Since the Miller standard establishes the outer perimeter of state regulation, a wide range of legislative alternatives are open in Hawaii, from complete de-regulation to revision of the statute to conform to the

Miller rule. There is as yet no Hawaii court decision construing the obscenity statute.[112]

PART IV. POSSIBLE APPROACHES TO FIRST AMENDMENT ISSUES

Since the courts have been able to cope with a wide variety of issues through the original language of the First Amendment, it appears that Article I, section 3, of the Hawaii Constitution may be left as it stands.

Insofar as the "right to know" is concerned, it might be desirable to reinforce the importance of Hawaii's open records-open meeting statute with a constitutional provision mandating a right of access to public records. This same provision might include a complementary right of disclosural privacy, or disclosural privacy could be left to a general privacy provision (see chapter 8). A "right of participation" such as that found in the Montana Constitution is also possible.

A number of First Amendment issues, such as right of access to the media, obscenity, and news reporter's privilege, await resolution by the legislative process, whether at the state or federal level.

Chapter 4
DUE PROCESS, EQUAL PROTECTION, AND FREEDOM FROM DISCRIMINATION

Article I, section 4, of the Hawaii Constitution provides that:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights[1] or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Since the Fourteenth Amendment of the U.S. Constitution imposes the guarantees of due process and equal protection upon the states, the Hawaii provision acts merely as a "reaffirmation" of those guarantees.[2] However, it has added freedom from discrimination on the basis of 4 identifying characteristics, or so-called "suspect classifications": race, religion, sex, and ancestry.[3]

Due Process

Due process is understood in 2 senses: procedural and substantive. Procedural due process requires that before the government takes action which will affect a person's "life", "liberty", or "property" interest, the person is entitled to prior notice and an opportunity to be heard before an impartial tribunal.[4] Procedural due process has assumed particular importance in recent years in the areas of administrative law,[5] criminal law,[6] and creditor's remedies.[7] The kind of procedures and type of hearing required vary from one situation to another and depend both on the nature of the government function involved and the private interest affected.[8]

Substantive due process refers to those constitutional rights which are either explicitly mentioned in the text of the constitution, e.g., freedom of speech, or are implied by the constitution as a whole, e.g., the right to interstate mobility (or right to travel) discussed in chapter 9, or may be

derived from traditional and contemporary values, e.g., the right of privacy discussed in chapter 8. These rights are not absolute and may be circumscribed when there is an overriding government interest such as national security. Certain government interference, however, is impermissible regardless of how procedurally fair it may be.[9]

> The First Amendment prohibits the government from censoring a newspaper for political content even if it censors all newspapers equally and even if it affords a full hearing to an editor who complains that the censor has erred.

With respect to both procedural and substantive due process, the U.S. Supreme Court has utilized the Due Process Clause of the Fourteenth Amendment to impose the standards of the federal Bill of Rights on the states.[10]

The only provisions of the first 8 amendments to the U.S. Constitution which have not been made applicable to the states are the Second and Third Amendments, the Fifth Amendment requirement of a grand jury indictment, and the Seventh Amendment.[11]

Equal Protection and Freedom from Discrimination

The thrust of the Equal Protection Clause of the Fourteenth amendment is to prevent the states from treating people in an arbitrarily different manner under their laws.[12] The Equal Protection Clause does not require that everyone be treated in an equal manner, since all laws involve some degree of differential treatment (e.g., the requirement that one be a certain age before qualifying for a driver's license). The Equal Protection Clause does require, however, that classifications in a statute have a reasonable basis (e.g., persons under a certain age are presumed to have neither the physical coordination nor the psychological maturity to drive safely).

The threshhold test of reasonableness under the Equal Protection Clause is as follows:[13]

(1) Did the legislature have a constitutionally permissible purpose in view when it passed the law in question?

(2) Is the classification used reasonably related to the purpose of the law?

This is the test applied to most economic and social regulation, and the U.S. Supreme Court almost invariably finds the requisite reasonableness.[14]

But where the legislation distinguishes on the basis of a "suspect classification",[15] such as race or alienage, or impinges on a "fundamental right",[16] such as the right to vote, the court relies on the "strict scrutiny" test (and nearly always invalidates the law):[17]

(1) Did the legislature have a purpose of overriding importance or "compelling interest" in passing the law?

(2) Were the means chosen necessary to accomplish that purpose or was there a less drastic alternative?

Where the Equal Protection Clause of the U.S. Constitution has been judicially interpreted to apply to certain "suspect classifications", the Hawaii Constitution makes explicit which criteria are "suspect"--race, religion, sex, ancestry.

The discussion which follows will address 2 classifications, neither of which are yet considered suspect under the U.S. Constitition: sex and age. The former of course has already been denominated suspect under the Hawaii Constitution.

Sex as a Quasi-Suspect Classification

Although the U.S. Supreme Court has found unconstitutional certain laws which discriminate against women, sex is not quite a suspect classification under the Fourteenth Amendment and hence the exacting "strict scrutiny" test does not always apply.[18] The reluctance of the U.S. Supreme Court to treat it as suspect and to invalidate most sex-based legislation may be traced to:

(1) The historical purpose of the Fourteenth Amendment to act as a shield against racial discrimination;[19]

(2) A desire not to pre-empt the state legislatures in their decision whether or not to ratify the Equal Rights Amendment (ERA; discussed below).[20]

The Court has also distinguished laws which discriminate on the basis of sex from laws which impact on one sex; the latter need only pass muster under the reasonableness standard.[21] Furthermore, the Court has been inconsistent in its treatment of laws which discriminate "in favor of" women.[22] These laws are felt by some observers to be invidiously discriminatory because a stigma of inferiority attaches to protective legislation.[23]

Due to the reluctance of the U.S. Supreme Court to declare sex a suspect classification under the Fourteenth Amendment, it is thought that the elimination of sex as a permissible factor in determining the legal rights of men and women depends on the ratification of the national Equal Rights Amendment (ERA) and the addition of an ERA to state constitutions.[24]

The national ERA, proposed as the Twenty-Seventh Amendment to the Constitution, reads as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

As of this writing, 35 states have ratified the national ERA;[25] 16 states including Hawaii have an ERA provision in their constitutions.[26]

Arguments For and Against ERA

Arguments advanced in support of the national ERA:[27]

(1) There is the need for a single coherent theory of sexual equality and consistent nationwide application;

(2) Passage and ratification of ERA can be accomplished by a campaign of limited duration,[28] and political energy need not be dissipated in piecemeal reforms of existing laws;

(3) ERA will give a political and psychological boost to legislative reform;

(4) There is need for a concerted attack on sex discrimination, the effect of which will be felt in all areas of the law. Through ERA women will achieve gains in the areas of property rights, marriage, and divorce, the right to engage in an occupation, and freedom from discrimination in employment and education;

(5) The advantages of protective legislation can be extended to men. For example, with respect to child support and interspousal support in case of separation and divorce, both spouses can be made equally liable on the ability-to-pay principle.[29]

It should be emphasized that although the view underlying ERA is that women should be judged as individuals in terms of their own capacities and experience, ERA would not proscribe laws which dealt with physical characteristics unique to one sex or the other. "So long as the law deals only with a characteristic found in all (or some) women but no men, or in all (or some) men but no women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex."[30] Where no unique characteristic obtains, however, laws would be written in terms of "functional" classifications, based on the measurable traits and abilities of people as individuals.[31]

On the other hand, in situations which involved disrobing, sleeping, or performing bodily functions before members of the opposite sex, ERA would be counterbalanced by the right of privacy discussed in chapter 8. Thus, despite ERA, there would continue to be separation of the sexes in public restrooms,

segregation by sex in sleeping quarters of prisons or similar public institutions, and segregation of living quarters in the military.[32]

Arguments raised in opposition to ERA:

(1) Existing laws are adequate to the task of eliminating sex discrimination, and only need to be properly enforced;[33]

(2) Rather than add a vague provision to the Constitution, it would be better to amend existing laws ("specific pills for specific ills");[34]

(3) ERA is merely a symbol of equality and one of uncertain effect;[35]

(4) ERA will have a destructive effect on protective legislation, especially in the areas of labor and family law;[36]

(5) ERA will have a negative effect on the image of American motherhood.[37]

The Impact of the State ERA on Hawaii Law

Although as yet there have been no appellate decisions under the Hawaii ERA,[38] the provision has had a definite impact upon legislative revision.[39] For example, in 1973 the legislature eliminated the requirement that unemployment compensation claimants who left work because of homemaking obligations supply more evidence of availability for work than other claimants.[40] The legislature also deleted the pregnancy disqualification from the unemployment compensation statute,[41] and amended the exclusion of pregnancy from temporary disability insurance.[42] In 1974, the legislature amended the public employee health benefit provisions to extend such benefits to spouses rather than only to widows.[43] The public employment retirement system provisions were amended so that widows and widowers would be treated alike.[44] In 1975, the legislature enacted a Fair Credit Extension Act prohibiting discrimination in credit transactions on the basis of marital status;[45] and discrimination on the basis of marital status was prohibited in addition by amendments to the Fair Employment Practices Law[46] and to the law governing discrimination in real property transactions.[47]

Further opportunities to conform statutory law to ERA remain, in the areas of family law, probate, and criminal law, among others.[48]

Age as a Suspect Classification?

Just as efforts to eliminate racial discrimination provided a useful analogy for the movement against sexual discrimination, sexual equality is supplying an analogy for the elimination of age-based discrimination, particularly as regards mandatory retirement. When the U.S. Supreme Court invalidated mandatory maternity leave and return-to-work rules, on the grounds that individualized determinations were necessary, it also threw into doubt mandatory retirement provisions.[49] The U.S. Supreme Court, however, has declined to view age as a suspect classification or the right to public employment as fundamental, and has upheld compulsory retirement as meeting the reasonableness test.[50]

The Hawaii Supreme Court has found a violation of equal protection where there was a provision permitting the continued employment of a post-65 university faculty member, and the faculty member demonstrated superior competence only to be terminated anyway.[51] The Court nonetheless allowed that "the use of a certain age as cut-off point in employment may be justified when uniformly applied and when used without provision for individual evaluation".[52]

Numerous arguments have been advanced in favor of mandatory retirement, including the comparative inefficiency of older workers, the greater tendency of older workers towards illness and absenteeism, the need to keep the lines of promotion open, and the administrative costs of individualized determinations.[53] It is also maintained that many workers look forward to retirement at 65 or even earlier.[54]

Against compulsory retirement are considerations of individual competence and ability to continue work, financial need, and the loss of self-esteem after forced separation from the work force.[55]

The Hawaii legislature, in the context of employment, has already included age among those classifications considered inherently suspect. It is the stated policy of the legislature in establishing programs on aging to secure equal opportunity in employment for older persons.[56] Also, employers may not refuse to hire, pay discriminatory wages to, or discharge an individual on the basis of age.[57] However, to prohibit mandatory retirement it would appear necessary to add age to those suspect classifications in Article I, section 4,[58] or to ban forced retirement by statute.[59]

Possible Approaches to Equal Protection Issues

The general anti-discriminatory provisions of Article I, section 4, could be expanded to include political and military rights, or the qualifying adjective "civil" removed, empowering the courts to act against any form of discrimination.[60]

Article I contains 3 references to sex discrimination: sections 4, 12, and 21. While these provisions are redundant and could be merged, it can be argued that all should be retained since together they give the principle of sexual equality an emphasis a single provision would not supply. It is not clear whether a prohibition against sex discrimination also encompasses discrimination on the basis of sexual preference or marital status.[61] These might be added as suspect classifications to Article I, section 4.

Other classifications which might be denominated suspect under section 4 are age[62] and physical or mental handicap.[63] For a discussion of the rights of the physically and mentally handicapped, see Hawaii Constitutional Convention Studies 1978, Article VIII: Public Health and Welfare.

Chapter 5
SEARCHES AND SEIZURES

The Hawaii constitutional provision on searches and seizures as set forth below is identical to the Fourth Amendment of the United States Constitution except for the underlined portions below which do not appear in the federal provision:[1]

> Section 5. 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.

The basic purpose of the provisions in the Fourth Amendment of the United States Constitution is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.[2] Thus, reasonable searches are permitted, but unreasonable searches are not permitted. Generally, except for a few specific situations, warrantless searches are considered "per se unreasonable under the Fourth Amendment".[3] The rationale is that a neutral and detached magistrate should make the decision to allow a search rather than the officer "engaged in the competitive enterprise of ferreting out crime"[4] who may have to make a hurried decision, subject only to a review after the fact by hindsight judgment. This strong preference for search warrants has led the U.S. Supreme Court to note that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall".[5]

In order for a search warrant to issue,[6] there must be an affidavit or complaint that sets forth facts establishing probable cause to believe that the goods to be seized are in the place to be searched. The warrant must contain a particular description of both the items to be seized and the place to be searched which need not be of great exactitude, so long as the description is clear enough that nothing is left to the discretion of the officer executing the search.[7]

Probable Cause

Probable cause exists when the facts and circumstances within the officer's knowledge and of which the officer has reasonably trustworthy information are sufficient by themselves to warrant a reasonable belief that an offense has been or is being committed.[8] Probable cause is generally based on a combination of factors each of which may be insufficient by themselves to constitute probable cause but which, viewed as a whole, constitute probable cause.[9]

Probable cause to arrest and probable cause to search are not necessarily the same. For a search, there must be probable cause that the items sought are connected with criminal activity and that they will be found in the place to be searched. For arrest, there must be probable cause that an offense has been or is being committed, and by the person to be arrested. The showing of the probable guilt of a person is not in itself adequate justification for searching the person's premises, and vice versa.[10]

In determining probable cause, it is permissible to use evidence that may not be admissible at trial. For example, prior reputation, including a prior criminal record,[11] may be considered. Hearsay is also permissible, but the application for the warrant must contain the underlying circumstances from which the conclusions of the information are based, and the underlying circumstances from which to believe that the informant is credible and the information reliable.[12] In this area not only the informer's reliability must be established but also the basis for that informer's conclusions must be shown. If these 2 requirements are not satisifed, hearsay may still be useful to determine probable cause if it gives enough detail that is partially corroborated by other sources (e.g., independent police observation) so that it can be concluded that the information gained is reliable.[13]

Warrantless Searches

Despite the strong preference for warrants, some warrantless searches are permissible. Even though a warrant is not required, however, the search must still be conducted in a reasonable manner,[14] although what is reasonable may vary according to the context and type of the search.

Plain View. If there is a valid prior intrusion by the police; for example, if the police have a warrant,[15] are arresting the person, are responding to an emergency, or have some other legitimate reason for being there, the police may lawfully seize incriminating[16] objects falling in their "plain view".[17] The discovery of the evidence in plain view must, however, be inadvertent; the officer cannot know in advance that it is there.[18] Unaided police observations into private premises may be permissible,[19] but unless there is a warrant, the police appear to have no right to peer into people's windows with special equipment not in general use.[20]

Consent. Where a valid consent is given, a warrantless search may be conducted, even though there is no probable cause for the search. Consent is valid when it is voluntary and uncoerced.[21] Voluntariness is determined by examining the circumstances that surround the giving of the consent to search. Knowledge of the right to refuse, the coerciveness of the arrest and interrogation, and the like are factors to be considered in making this determination.[22] Consent given after a show of authority may not be deemed valid. Therefore, a police officer who demands entrance on the basis of police authority[23] or on the basis of a defective or nonexistent warrant[24] cannot justify the search on the basis of consent.

Courts have also recognized the validity of the consent of certain third parties to conduct a search of a suspect's belongings. Where one has a right of occupancy or possession at least equal to that of the person contesting the search,[25] that person may give a valid consent for a search of the object or premises. Each co-inhabitant is deemed to have "assumed the risk that one of their number might permit the common area to be searched".[26]

Search Incident to Arrest. When a custody arrest is made (i.e., for the purpose of taking the suspect to the station), the arresting officer may search the arrestee and the area in the arrestee's immediate control for weapons and evidence.[27] Despite U.S. Supreme Court decisions that have held otherwise,[28] the Hawaii Supreme Court has ruled that, under the state constitution, a search incident to arrest is limited only to what is "reasonably necessary to discover the fruits or instrumentalities of the crime for which the defendant is arrested, or to protect the officer from attack, or to prevent the offender from escaping".[29] For example, where the suspect is arrested for armed robbery, the police would not be justified in opening a small packet found on the arrestee that was not likely to contain a weapon. If, however, in the course of an appropriately limited search, the police inadvertently came across evidence of another crime, they may of course seize it and use it as evidence against the arrestee.[30] Where the search is of a more intrusive nature (i.e., searches that invade the body), a warrant is required unless there are exigent circumstances that threaten the loss of evidence.[31]

Hot Pursuit. Police may make a warrantless entry of premises in hot pursuit of an offender.[32] Once on the premises, the police may lawfully make a thorough search of the house for weapons and for others who might be present. The exigencies of hot pursuit, however, cannot excuse a lack of probable cause, and so for example, if the police follow a fleeing suspect into an apartment house, they may not search any of the apartments unless they had probable cause to believe that the suspect was present in a particular apartment.[33]

Stop and Frisk. A police officer may conduct a stop and frisk if the officer has observed specific conduct on the part of the person to be frisked, or has reliable information, from which the officer can reasonably infer that criminal activity may be afoot and that the person to be frisked is armed and presently dangerous.[34] Under the standard set forth in the leading case of Terry v. Ohio,[35] the officer must make a few initial inquiries before initiating a frisk, and the frisk is limited to a pat down of the suspect's outer clothing for weapons only. The officer can intrude into the suspect's clothing only if during the frisk the officer feels something that could be a weapon. However, there

may be circumstances that could justify a frisk without being preceded by these steps, such as when the officer has reliable information that the suspect has a gun on the suspect's person and, given the character of the neighborhood, the time of night, and the initial actions of the suspect the officer reasonably fears for the officer's safety.[36]

Exigent Circumstances. No amount of probable cause for search can justify a warrantless search or seizure absent exigent circumstances.[37] An automobile, because of its inherent mobility, creates its own exigency (see the automobile exception below). Officers can conduct a warrantless search of a person's belongings "where they have probable cause to believe that the thing to be searched contains contraband and where that thing is threatened with imminent removal [i.e., to another state] or destruction".[38] However, once the defendant is arrested and the defendant's belongings are seized and placed in custody, the exigencies which might have existed can no longer justify a search without a warrant.[39] Consistent with the tendency of the courts to give the greatest protection to the privacy of the dwelling,[40] the "threatened destruction" exception to the warrant requirement for private homes is limited to cases where the goods seized were "in the process of destruction".[41]

Automobiles. Automobiles are not entitled to as much protection as homes or offices,[42] and a search of an automobile is considered far less intrusive on Fourth Amendment rights than a search of one's person or of a building.[43] Furthermore, because a car can be quickly moved out of the locality, it is often impractical to secure a search warrant for a car being operated on the street.[44] Thus, a warrantless search of a vehicle is permissible upon probable cause.[45] The search may be conducted at the place of arrest or at the station house.[46]

It was thought that the "automobile exception" would apply equally to other movable objects like trunks, suitcases, boxes, and the like, since goods in the course of transportation or concealed in a moving vehicle could be readily moved out of the reach of a search warrant.[47] The U.S. Supreme Court has, however, recently refuted this notion. Even for footlockers in the course of transport as part of the defendant's luggage, a warrantless search is not justified. Unlike automobiles, which are susceptible to theft or intrusion by

vandals due to their size and inherent mobility, a footlocker can be safely secured from tampering. Furthermore, a person's expectation of privacy in personal luggage is much greater than in an automobile. Once the defendant is arrested and the luggage was safely transferred to headquarters, then, there is no danger that the luggage or its contents could have been removed before a valid search warrant could be obtained.[48]

Other Searches. Inventory searches of persons to be jailed or of automobiles in lawful police custody are permissible without warrants,[49] as long as they are conducted pursuant to standard police practices and not as a pretext for an investigatory search.[50] Warrantless border searches[51] of persons entering the country[52] are also permissible, if they are conducted at the border or "its functional equivalent" (e.g., an established station near the border, or an airport that is the destination of a nonstop flight from a foreign country).[53] Warrantless searches at the airport for weapons[54] or quarantined plants and fruits[55] are lawful, and warrantless inspections of licensed premises (such as gun and liquor stores) have long been upheld.[56] But unless there is an emergency or the owner consents, routine administrative inspections of residential and commercial premises for fire, health, and safety violations are impermissible without a warrant.[57]

The Exclusionary Rule

The base principle of the Exclusionary Rule is that evidence seized in violation of the defendant's constitutional rights is not admissible at trial. Although the Exclusionary Rule had long been applied where there was a violation of the Fifth Amendment,[58] the rule was first applied to Fourth Amendment violations in Weeks v. United States.[59] There, the Court held that evidence seized by federal officers in violation of the Fourth Amendment would be inadmissible in federal prosecutions. Later, in Mapp v. Ohio,[60] it was held that the Fourteenth Amendment required that the Fourth Amendment guarantees be made binding on the states. Hawaii, however, has always been bound by the Weeks decision, by reason of its first being a territory (and hence subject to federal laws) and later by incorporation of the Fourth Amendment and all federal

cases construing it into the state constitution.[61] The rule has been expanded to require the exclusion of evidence obtained through other constitutional violations.[62]

The rule has been justified on 2 main grounds: to deter police misconduct by removing the incentive to engage in such action, and to preserve the integrity of the judicial process, by refusing to make the courts a party to the illegal actions of the police by not allowing the use of the evidence seized.[63] Since Mapp, however, the deterrence rationale has become the overriding rationale for the rule, and the judicial integrity rationale has moved to a relatively insignificant position.[64]

The Exclusionary Rule is applicable in quasi-criminal proceedings (e.g., forfeiture proceedings, where the object is to penalize for an offense against the law, even though it is a civil proceeding).[65] It is applied to evidence which is "tainted" by the illegal activity of the police--evidence gained not only directly from the illegal police action, but also gained through the use of information acquired from that misconduct[66]--but it is not applied to evidence obtained as a result of a search by a private person.[67]

Exceptions to the Exclusionary Rule

Because the exclusion of otherwise valid evidence often leads to the release of an apparently guilty individual, the courts have generally applied the rule only to those situations where the deterrent effect is greater than the social cost of excluding probative evidence. Accordingly, a number of exceptions to the rule have been developed to prevent the rule from extending beyond the point of diminishing returns.

(1) Independent Source. The U.S. Supreme Court has held that knowledge of facts obtained illegally may nevertheless be used in court if such knowledge is also gained from an independent source.[68] Since there is an independent source for the evidence, the police will not have obtained that evidence by an exploitation of their illegal actions, and the police will thus not

have gained from their illegality. In the court's view, this exception minimized the opportunity for the defendant to receive an undeserved and socially undesirable bonanza due to police mistakes.

Where the discovery of evidence is a result of both illegally and legally obtained information, the evidence may be admitted if the illegal information was so insubstantial that it played only a minimal role in the discovery of the evidence and did not significantly direct the investigation toward the evidence.[69] Even where there was in fact no independent source, evidence may be admitted where it would have been discovered anyway, e.g., through standard police procedures.[70]

(2) Attenuation. If evidence is obtained solely as a result of the illegal actions of the police, the evidence may still be admissible if it has not been obtained by "exploitation of that illegality" and instead is a result of "means sufficiently distinguishable to be purged of the primary taint" of the illegal actions.[71]

For example, in Wong Sun v. United States, the defendant was illegally arrested and then later released. A few days later the defendant voluntarily came back to make a confession. The confessions were held to be admissible because the connection between the arrest and the statement had become so "attenuated as to dissipate the taint".[72] In another case, the defendant was illegally arrested. After being taken into custody, the police went next door to ask the neighbor to take care of the defendant's cat and dog. The tip given by the neighbor leading to the defendant's prosecution in another case was held to be sufficiently "attenuated".[73]

(3) Collateral Use. (a) Parole revocation proceedings. The Exclusionary Rule does not generally apply in parole revocation proceedings. Unless the police knew or had reason to believe that the suspect was a probationer, application of the rule would achieve a deterrent effect "speculative or marginal at best".[74] Thus, potential disruption to the probation system would far outweigh the potential benefits from the application of the rule in such marginal cases. It is thought that it is "extremely important that all reliable evidence

shedding light on the probationer's conduct be available during probation revocation hearings"[75] so a proper determination can be made as to whether the person is ready for integration into society.

(b) Impeachment. Although the U.S. Supreme Court has held that illegally obtained evidence is admissible to impeach the credibility of the defendant,[76] the Hawaii Supreme Court has ruled that Article I, section 8, of the Hawaii Constitution, which protects the accused from self-incrimination, requires that unless Miranda-type warnings[77] were given before a suspect was questioned, statements made by the suspect may not be used either as direct evidence or to impeach the suspect's credibility. The Court felt that to convict a person on the basis of statements procured in violation of the suspect's constitutional rights would be intolerable, and the accused's privilege from self-incrimination must be maintained, even if it necessitates that certain criminals must go free in order to preserve the rights of all persons accused of crimes.[78] Until this ruling is extended to other violations of constitutional rights, evidence obtained as a result of an illegal search and seizure is still admissible to impeach statements made by a defendant under direct examination.[79]

(c) Grand jury proceedings. A grand jury witness may not refuse to answer questions on the ground that the questions are based on evidence obtained from an illegal search. The U.S. Supreme Court felt in this instance, that the minimal additional deterrence to police misconduct would be outweighed by the undue interference with the effective and expeditious discharge of the grand jury's duties.[80]

(4) Standing. Before a defendant can object to the use of illegally obtained evidence, it is well established that the defendant must have "standing" to challenge the constitutional violation. Standing to challenge a Fourth Amendment violation is granted only to those whose rights are violated by the search itself, i.e., in situations where the government unlawfully overheard one's conversation or where the conversation occurred on one's premises. A third party whose rights are not violated by the search itself has no standing to challenge a violation even though the evidence may be personally incriminating.[81]

Anyone legitimately on the premises when a search is conducted may challenge the legality of the search when its fruits are proposed to be used against that person,[82] except a temporary trespasser[83] or burglar who has entered the home and is there when the home is searched.[84] Standing is also granted to a defendant who has a possessory interest in the premises searched, such as the owner or lessee,[85] or to the defendant who has a possessory interest in the property seized.[86]

Where illegal possession is an essential element of the crime charged, the defendant is granted automatic standing.[87] In this instance, the Court reasons that the defendant should not have to be placed in the dilemma of either admitting to the ownership of the contraband in order to be granted standing, or keeping silent and losing the opportunity to challenge the illegal seizure of evidence. Further, the Court felt that the government should not be allowed to take advantage of contradictory positions, i.e., government would deny the defendant possessed the contraband at the pre-trial hearing to determine standing and then claim just the opposite at the trial.[88]

Problems with the Exclusionary Rule

The Exclusionary Rule has been attacked.[89] As a deterrence, the rule is limited only to where the case goes to trial. It has no effect where the charges are dropped, where the defendant pleads guilty, or where a victim of the police misconduct is innocent. Even when the rule is applied, its effect is limited because it does not directly affect the wrongdoers (the police). Instead, it punishes the prosecutor. Further, because of the complexity of the rule as applied, coupled with insufficient communication between prosecutors, police, and the courts, the police may never be cognizant of the application of the rule in a particular case or the reasons for it.

Generally, the rule has been criticized on the following grounds:

(1) Nothing for the innocent; freedom for the guilty. As noted before, the exclusion of otherwise valid evidence often acts to free the guilty, while nothing is done for the victims of illegal but fruitless searches.

(2) The procedures to exclude evidence delay and confuse the principal issue at the trial--the guilt or innocence of the accused. It is not an appropriate forum for inquiring into the actions of a third person (the police officer).

(3) The rule creates pressures on the police officer to give false testimony where an obviously guilty defendant is seeking to suppress clear physical evidence of guilt. For the same reason, it also creates pressure on the courts to weaken the rules governing probable cause to make an arrest, in order to validate the search that followed, and results in making it easier for the police to arrest in the future.

(4) There is danger of a police officer effectively immunizing a criminal from prosecution by deliberately conducting an illegal search.

Specific aspects of the rule have also been criticized. For example, the standing requirement has been attacked on the ground that it permits the police to "ransack, coerce, and illegally seize evidence and information from all but the intended defendant".[90] In addition, the independent source doctrine has been questioned because it allows the police to take illegal shortcuts. Instead of engaging in the standard procedures, the police could conduct an illegal search and then justify it by showing that they would have eventually found the evidence anyway through those procedures.

On the other hand, despite all its apparent shortcomings, the rule may be the only effective existing deterrent to police misconduct.[91] Furthermore, it is argued by some that the rule may indeed be performing its function.[92] They argue there is a greater sense of professionalism in the police departments and prosecutor's offices, and because the Supreme Court carries much moral weight, as well as legal force, the police and prosecutors are more inclined to follow Supreme Court rulings even though there may be ways to circumvent them. Finally, it is argued that the police do eventually find out, through a slow filtering process, the kind of conduct that is permissible and the kind of conduct that is not.[93]

As a federal remedy, the rule is still viable, and the Constitutional Convention may wish to leave the rule as it presently stands. However, the Convention may also wish to consider, as a matter of state constitutional law,

modifications or alternatives to the rule, in order to correct any deficiencies it may perceive. Alternatively, the Convention may wish to modify the application of the Exclusionary Rule or the rules governing searches and seizures to provide more definitive guidance for the Hawaii Supreme Court in light of its tendency in this area to provide greater protection for the accused than that afforded by the U.S. Supreme Court in its interpretation of the U.S. Constitution.[94] Modifications may include elimination of any one of the exceptions to the Exclusionary Rule (e.g., the standing requirement or the independent source doctrine) or strengthening the warrant requirements where warrantless searches are now permitted. Possible alternatives to the rule may include the creation of a cause of action for damages as a result of constitutional violations, or the creation of a review board or an ombudsman to review complaints and make recommendations or take disciplinary action against the offending officers.[95]

Although few, if any, states have adopted any constitutional amendments which address the issues raised in this section, Louisiana does have a provision in its constitution that grants standing to anyone "adversely affected" by an illegal search and seizure.[96] Overall, however, the Convention may wish to consider the wisdom of adopting provisions that may be overruled or made moot by subsequent U.S. Supreme Court decisions. The Florida Constitution[97] and the Model State Constitution[98] are illustrative of this point. Both constitutions provide for a state exclusionary rule, in response to the decision in Weeks. Both provisions have been rendered largely unnecessary by the later decision in Mapp. Of course, if the U.S. Supreme Court takes the unlikely step of abandoning the rule, the provisions will once again assume some importance.

Chapter 6
ADMINISTRATION OF CRIMINAL JUSTICE

PART I. INTRODUCTION

The investigatory and arrest procedures were discussed in chapter 5 on Searches and Seizures. This chapter is addressed to the prosecution of the arrestee, who is guaranteed the following by Article I:

(1) The right to be free from excessive bail, and the possibility of release without bail (on "own recognizance");

(2) The right to a presentment or indictment by a grand jury in the case of all capital or otherwise infamous crimes;

(3) The right to a speedy and public trial by an impartial jury;

(4) The right to be free from excessive fines and cruel or unusual punishment;

(5) The right against double jeopardy; and

(6) The privilege of the writ of habeas corpus.

Other rights of the accused, such as the privilege against self-incrimination and the right to counsel, are covered in chapter 7.

PART II. PROTECTION FROM EXCESSIVE BAIL AND BAIL AS A MATTER OF RIGHT

Issues Raised by Preventive Detention: Overview

The Eighth Amendment of the U.S. Constitution and Article I, section 9, of the Hawaii Constitution provide in part: "Excessive bail shall not be required...." The purpose of bail is not to punish those "who have not yet had their day in court".[1] The primary purposes of bail in a criminal case are to insure the defendant's appearance in court whenever the defendant's presence is required, to relieve the defendant of imprisonment, and to relieve the state of the burden of keeping a defendant pending the trial.[2]

The debate about crime committed by defendants on pretrial release can be broken down into 4 issues:[3]

(1) How serious is the problem--how much crime is committed by defendants on pretrial release?

(2) Is it possible to identify in advance those defendants who are dangerous and likely to commit crimes?

(3) Is some form of preventive detention constitutionally permissible?

(4) Are there methods other than preventive detention which might be used to minimize the problem of crime on bail?

How serious is the problem--how much crime is committed by defendants on pretrial release? The most extensive data in this area come from the District of Columbia.[4] There is, however, no single figure that gives an appropriate picture. The question of how much crime is committed by persons on bail thus depends largely on what kind of crime one is talking about. For the District of Columbia, during 1967 and 1968, the concern clearly was about violent crime. The robbery data showed that:[5]

(1) The arrest rate of indicted robbery defendants on a second robbery charge while on release may be relatively high, perhaps as much as 30 per cent.

(2) The arrest rate of felony defendants, as a group, on robbery charges while on release is much lower, about 2 per cent.

(3) The arrest rate of all criminal defendants, as a group, on robbery charges while on release is even lower still, around 1 per cent.

The data suggest that if the count is made on the basis of a relatively loose measure, such as rearrests, and is made with respect to the most serious defendants, as for example, those who have been indicted, the rate of recidivism tends to be very high. If, on the other hand, the count is made on the basis of a stringent measure, such as convictions or reindictments, and covers a wider group of defendants, such as all felony arrestees, the rate of recidivism tends to be much lower.

Is it possible to identify in advance those defendants who are likely to commit crimes? The problem of making sure that one detains all defendants who will commit crimes is sure to be solved if one is prepared to detain all defendants. Unless all defendants will commit crimes while on release, however, this method detains many persons who will not commit crimes. Unfortunately, predictive measures have been unimpressive.[6] Some observers, noting the general lack of success in parole and probation prediction efforts, where much more extensive work has been carried out, have been much less hopeful.[7]

Is preventive detention constitutional? Where state constitutions and statutes specifically guarantee to criminal defendants the right to bail except in capital cases, it has been held that the doctrine of preventive detention offends such provisions.[8] Thus, in Re Underwood,[9] the California Supreme Court disapproved the view that notwithstanding those constitutional and statutory commands, there existed a public safety exception to the bail right. The Court held itself compelled to the conclusion that the detention of persons dangerous to themselves or others is not contemplated within the state criminal bail system, and that if it became necessary to detain such persons, authorization therefore must be found elsewhere. The Court noted that the process of civil commitment of individuals was well developed under the jurisdiction's law, although no such provision had been invoked in the instant case at the time the motion for release on bail was denied.

Although the Hawaii Constitution does not make bail a matter of right in noncapital cases,[10] that right is given under state statutory authority.[11] Significantly, Hawaii does not provide for preventive detention except in cases where illegal infliction of a wound or other injury may terminate in the death of the person injured.[12] Similarly, no statutory right to bail is allowed where the punishment is imprisonment for life not subject to parole and in cases after conviction where imprisonment is to be for 20 years or more.[13]

The Federal Bail Reform Act of 1966,[14] like its parallel Hawaii provision, grants bail as a matter of right and also distinguishes between freedom prior to an adjudication of guilt and bail after conviction.[15]

Are there methods other than preventive detention which might be used to minimize the problem of crime on bail? Even staunch opponents of preventive detention do not deny that there is some amount of crime being committed by persons on pretrial release,[16] and some attention has been devoted to developing alternative solutions to the problem.

One approach is to increase the use of conditional and supervised pretrial release programs for "high risk" defendants, such as drug abuse counseling and job placement services.

Another approach is to speed up the trial process and thereby reduce the amount of time that defendants spend on pretrial release.[17] This idea played a significant role in the adoption by Congress of the Speedy Trial Act of 1975. This Act, applicable to all federal courts, provides that after 1979 all felony cases must be brought to indictment within 30 days and to trial within 60 days.[18] Other important bail reform measures are discussed below.

Another alternative is release on recognizance, which is given explicit protection under Article I, section 9, of the Hawaii Constitution. Although it is not known how far own recognizance can be extended into the defendant population before the rate of nonappearance or the rate of pretrial crime becomes unacceptable, 15 years of nationwide experience with release on recognizance programs has demonstrated that, for a sizeable percentage of criminal defendants, monetary bail requirements are not necessary to ensure appearance in court.[19] Indeed, it has been observed that cities with the highest rates of pretrial release and the highest rates of nonfinancial release did not have the highest nonappearance rates.[20]

The Federal Bail Reform Act of 1966 designates personal recognizance as the preferred method of pretrial release, unless the officer determines, through the use of discretion, that such a release will not reasonably assure the appearance of the person as required.[21] Even when such a determination is made, however, the officer setting bail must give first priority to creating an acceptable method of nonfinancial release by imposing conditions or restrictions on the defendant's release. Only if nonfinancial conditions will not reasonably

assure the appearance of the person at trial is the officer permitted to require the execution of a bail bond. The Federal Bail Reform Act has since led to the revision of state bail laws to authorize the use of own recognizance, and at least 18 states have followed the federal law in creating a presumption in favor of own recognizance.[22]

The long-term use of nonfinancial releases appears assured. Indeed, since 1971 all evidence points to the fact that the use of nonfinancial releases has continued to expand. Two areas where growth is most evident are in the use of police citation releases and conditional release.

Police release of arrestees on written promises to appear provide the quickest and least restrictive method of release.[23] Since they do not require the employment of additional personnel, police citations also are the least expensive to employ. In addition, field citations reduce police expense in transporting, booking, and jailing arrestees and are, therefore, cost-effective.[24]

"Conditions" in a conditional type release may include assumption of responsibility for the defendant by a member of the community, limitations upon the defendant's travel, residence, and associations, and release under a program of supervision, which may require periodic reporting by the defendant. The danger in conditional release is that the judges may overuse conditions to the neglect of straight own recognizance. Owing to the need to supervise defendants on conditional release, this method of release is considerably more costly than straight own recognizance.[25]

For those defendants for whom nonfinancial release is deemed inadequate to ensure appearance in court, the court may be authorized to set an amount of money which the defendant must post with the court as security. A percentage of that amount may be retained as "costs" with the remainder returned to the defendant when defendant appears for trial. This method of release has withstood the constitutional attack that it discriminates against the poor.[26]

Federal Application

The U.S. Constitution expressly prohibits only excessive bail, and most commentators agree that the Eighth Amendment gives the right to bail to no one, whether juvenile or adult,[27] despite the argument that a prohibition against excessive bail is meaningless without a guarantee of "some" bail.[28] However, the United States Supreme Court has recognized that a defendant in federal court has a right to bail in noncapital cases but only by virtue of the federal statute.[29] Persons charged with a capital offense, or convicted of an offense and awaiting sentence or appeal, may, under 18 U.S.C.A. sec. 3148, be denied release if the court has reason to believe that no one or more conditions of their release would assure that they would not flee or "pose a danger to any other person or to the community", or if it appears that the appeal is frivolous or taken for delay.[30]

In cases made bailable by other provisions of law or where the court exercises its discretion to admit the defendant to bail, the United States Supreme Court has said that under the Eighth Amendment bail "set at a figure higher than an amount reasonably calculated" to insure the presence of an accused is "excessive".[31] However, this is not to say that "every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount".[32] At the very least, judges passing upon bail are obligated to deny such relief only for the strongest of reasons.[33]

Comparative State Provisions

The United States Supreme Court has not held the Eighth Amendment's right to be free from "excessive bail" applicable to the states.[34] The 1950 Hawaii Constitutional Convention adopted the language of the Eighth Amendment bail provision, explaining that adoption of the Eighth Amendment bail provision "...will give this state the benefit of Federal decisions construing the same".[35]

Most of the debate regarding preventive detention has centered around federal legislation and U.S. constitutional construction. Such interpretations

are relevant to any discussion of bail as a matter of right as they well may have an ultimate effect upon state action, especially if the United States Supreme Court determines that Eighth Amendment guarantees require the states as well as the federal government to grant bail as a matter of right in all noncapital cases. Presently, however, this debate is not of significance in the great majority of states; most state constitutional provisions often are more restrictive on the power of their governments to limit bail than is their federal counterpart.[36]

Today, 49 state constitutions have an excessive bail clause similar to the clause in the Eighth Amendment;[37] 40 state constitutions also have a provision creating an absolute right to bail in noncapital cases.[38] These constitutions contain basically the same provision as Colorado's Constitution. The Colorado Constitution provides:[39]

> All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

Only 10 states do not have bail as a matter of right in noncapital cases as a constitutional guarantee. Of these, 5 provides for the right by statute (including Hawaii)[40] and the other 5 have only an excessive bail provision in their constitutions similar to the one in the U.S. Constitution.[41]

Hawaii Application

Hawaii's Constitution adopts the excessive bail provision of the U.S. Constitution.[42] However, Hawaii's Constitution does not have a provision creating an absolute right to bail in noncapital cases. Article I, section 9, of the Hawaii Constitution in part reads:

> Excessive bail shall not be required,.... The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.

The second sentence of Article I, section 9, was added by the 1968 Hawaii Constitutional Convention. The reason for the amendment was to reflect the bail procedure under statutes implementing section 9.[43] Moreover, the amendment "simply clarifies the scope with respect to the requirement of bail and would remove doubts, if any, as to the discretionary powers of the court in the matter of bail".[44]

Hawaii provides for the right to bail in noncapital cases by statute.[45] Since the pertinent Hawaii statutes today are substantially the same as they were at the time of the 1968 Constitutional Convention,[46] the interpretation behind the constitutional amendment appears to provide a constitutional right to bail in noncapital cases. The amendment, assuming it guarantees the right to bail, goes further and provides a less burdensome alternative to bail, that is, it allows dispensing with bail altogether, a practice commonly known as release on own recognizance.[47] However, since the framers of the 1968 amendment did not include the right to bail provision present in Hawaii's statutes, the language of the amendment which reads "may dispense" creates doubt as to whether the provision requires a right to bail as an essential first step before reaching the issue of dispensing with bail. However well-intentioned the framers of the amendment may have been in seeking to expand the rights of the accused, the issue has become muddled because of the absence of a right to bail provision in Article I, section 9. None of the 40 state constitutions which have a provision creating an absolute right to bail in noncapital cases appear to contain language as ambiguous as that found in Hawaii's constitutional provision.[48]

In Hawaii, as in the 40 states which have bail as a matter of right in noncapital cases as a constitutional guarantee and in those other 4 states which provide for the right by statute,[49] while the court may entertain testimony as to the circumstances surrounding the charge for the purpose of determining the amount of bail, the right to bail cannot be denied except in cases involving offenses punishable by imprisonment for life (or in those states which allow capital punishment, for capital offenses).[50]

The Hawaii Supreme Court, following the lead of the United States Supreme Court,[51] has said that an accused has the right to have reasonable bail

set, that is, that amount which is necessary to assure that the defendant will appear for trial.[52] Yet, bail is not excessive merely because the accused is unable to pay it, "'but he is entitled to an opportunity to make it in a reasonable amount.'"[53]

Capital Punishment and Bail

Although Hawaii does not allow capital punishment, it might be noted that in jurisdictions operating under constitutions guaranteeing the right to bail except for capital offenses when the proof is evident or the presumption great,[54] many courts have held that where the death penalty no longer is applicable for the offense charged, the offense no longer is capital, and therefore the ban on bail no longer applies.[55]

Other courts have disagreed with this "punishment" analysis and have adopted the "classification" theory. They reason that their state constitutions classified crimes as capital and noncapital because of the gravity of the crime, and that despite the fact that these crimes no longer are punishable by death, the underlying gravity of the crime still exists.[56]

This controversy emerged after the United States Supreme Court handed down Furman v. Georgia[57] in 1972, interpreted by some courts as outlawing the death penalty.[58] However, courts which adopted the "classification" theory placed great emphasis on the fact that Furman is a judicial rather than a legislative abolition of the death penalty, and that legislative determination of the gravity of capital crimes has not been altered and must be respected.[59]

This debate largely has been mooted, however, by the United States Supreme Court's 1976 Gregg v. Georgia[60] decision which upheld capital punishment.

Possible Constitutional Revision

Although Hawaii by statute has established bail as a matter of right, in those 5 states not having a specific constitutional or statutory guaranty of the right to bail, it has been recognized that a statute authorizing preventive detention under certain circumstances is valid,[61] thus emphasizing the importance of the specific bail guaranty upon the issue of the validity of preventive detention.

The bail system as outlined above generally has been met with approval in Hawaii. Constitutional revision therefore may focus on including as a constitutional right under Article I, section 9, of the Hawaii Constitution an absolute right to bail in noncapital cases. The Constitutional Convention may recognize and approve the clear language of the Colorado constitutional provision, a provision typical of those of 39 other states.[62]

> All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.

Since Hawaii does not allow capital punishment, the words "capital offenses" might be deleted from the provision above and inserted in lieu thereof, the words "offenses punishable by imprisonment for life not subject to parole". The Constitutional Convention also may leave intact the 1968 amendment to Article I, section 9, of the Hawaii Constitution. As proposed, the Hawaii provision would minimize pretrial detention and provide an alternative to bail. Article I, section 9, would read:

> Excessive bail shall not be required,... All persons shall be bailable by sufficient sureties, except for offenses punishable by imprisonment for life not subject to parole, when the proof is evident or the presumption great. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment. (New material underscored)

Adoption of the Colorado constitutional provision would resolve the confusion in the Hawaii Constitution as to the nature of the right to bail.

The Constitutional Convention also may wish to explore various alternatives which might be used to minimize the problem of crime on bail. These include speeding up the trial process and increasing the use of conditional and supervised pretrial release programs for "high risk" defendants. Nonfinancial release, commonly known as release on recognizance, already has been given a constitutional stamp of approval in Hawaii.

Because Hawaii provides for a statutory right to bail, a system which allows preventive detention of suspected dangerous defendants would be fraught with problems in terms of due process. Such a system would be contrary to the whole foundation of our penal system since the laws punish for past offenses, rather than prevent future ones. The public safety exception thus requires a presumption that an accused is guilty rather than innocent.

Leaving aside the constitutional problems involved, to date predictive measures have not been useful in identifying in advance those defendants who likely are to commit crimes. Similarly, 15 years of nationwide experience with release on recognizance programs has demonstrated that money bail requirements, much less preventive detention, do not seem to be necessary to ensure appearance in court. Finally, it is not difficult to imagine how a system such as that described could be abused. The experience in some European countries, and in the juvenile courts of this country, which have systems not too far different from that described, show that it is very easy for the fine language of the statute to be ignored and the requisite finding of dangerousness to be made routinely in a majority of cases.[63]

PART III. PRESENTMENT OR INDICTMENT BY GRAND JURY

The Hawaii constitutional provision dealing with the grand jury provides:[64]

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces when in actual service in time of war or public danger....

The grand jury has been historically regarded as a bulwark of liberty because it acted as an independent body, composed of members of the community which could interpose its judgment between the state and the individual.[65] It stood as a shield for the individual from the excesses of an overly zealous or politically motivated prosecutor.[66]

The grand jury has 2 main functions:[67]

(1) Protective. The grand jury screens the government's case; and, if it finds probable cause to believe the suspect committed a felony, the suspect is indicted and brought to trial; if not, the case is dismissed.

(2) Investigatory. The grand jury is also to independently conduct its own investigation. In this way, a grand jury may initiate investigations where the prosecutor is not zealous enough.

As a practical matter, there seems to be little difference between the 2 functions today because of the domination of the grand jury by the prosecutor. When the grand jury performs its protective function, it simply hears evidence that was prepared beforehand by the prosecutor. In its investigatory capacity, the prosecutor does not present evidence but uses the grand jury to uncover it. In both cases the grand jury hears the testimony of witnesses and sees the evidence the prosecutor chooses to present concerning the subjects the prosecutor chooses to pursue. The grand jury does not usually attempt to independently use its investigatory power.[68]

To perform its functions, the grand jury is granted enormous power. Perhaps due to its image as an independent protector of individual rights, the judicial attitude toward it has been one of great deference.[69] As a result, the grand jury is almost completely unfettered by the procedural rules that apply to other judicial or quasi-judicial bodies. A witness may not be able to object to any question on the grounds of incompetency or irrelevancy,[70] nor can the witness really call upon freedom of the press guarantees.[71] The witness who is a potential defendant has no right to the presence of counsel[72] nor generally of the benefits of open, adversarial procedures.[73]

Because the grand jury carries an aura of impartiality, a grand jury indictment has a far more serious impact on the accused than the filing of an information (a formal charge issued by the prosecutor). The defendant may face a stronger inference of guilt in the minds of the trial jurors, as well as a stronger stigma of guilt in the community.[74] Further, because the grand jury is regarded as an accusatory rather than judicial body, the defendant or potential defendant has few, if any, of the rights during grand jury proceedings that are accorded a defendant during trial. Thus, in addition to being deprived of the right to be represented by counsel, the defendant may not testify, present rebuttal evidence, cross examine witnesses, or even be notified of the proceedings themselves.[75]

Witnesses and defendants are accorded some safeguards. A defendant has a right to an indictment from a fair and impartial grand jury, free from undue influence by the prosecutor.[76] A witness may refuse to answer a question that infringes on a limited number of privileged communications, such as those that fall under the physician-patient privilege[77] or the attorney-client privilege.[78] The witness' right against self-incrimination is also protected,[79] but this right may be circumvented by a grant of immunity from prosecution for matters concerning which the witness testifies. Once that immunity is given, the defendant may not assert the self-incrimination privilege and is obligated to testify or face punishment for contempt of court.[80]

Grand jury proceedings are conducted in secret.[81] Except for grand jury deliberations and votes, disclosure of the proceedings may be made to the prosecutor for use in the performance of the prosecutor's duties. After indictment, the defendant has a right, upon request, to a transcript of that portion of the proceedings which relate to the offense charged in the indictment. But other information may be released only when so directed by the court in conjunction with a judicial proceeding or when permitted by the court at the request of the defendant who has shown that the grand jury proceedings may justify dismissal of the indictment.[82]

Despite the belief held by many that the grand jury acts as a check on prosecutorial excesses and helps to eliminate weak cases (thereby saving time),

critics have asserted that instead of standing between the prosecutor and the defendant, the grand jury simply "rubber stamps" prosecution requests for indictments. The grand jury may at one time have been an independent body, they claim, when it was composed of a body of neighbors familiar with the area under investigation and when, under early common law, the prosecutor was barred from the grand jury room and the grand jurors conducted the examination of witnesses themselves. Today, however, the grand jury is no longer a body of neighbors and the prosecutor is no longer barred from the room. Instead, the grand jury is now an impersonal body, growing increasingly dependent on the prosecutor. The critics point to the high percentage of cases where the grand jury has acceded to the prosecution's requests for indictments and to the high degree of reliance on the prosecutor, who schedules the meetings, determines the agenda and what information is to be presented, examines the witnesses, furnishes the legal advice, and provides the investigative resources.[83] Thus, the critics argue, the prosecutor is generally able to have the grand jury grant the prosecutor's request for indictment. In addition, by presenting a weak case to the grand jury, the prosecutor can manage to have the grand jury refuse to indict. As a result, critics have argued that the air of impartiality which surrounds grand jury proceedings can be used to simply shield the prosecutor from criticism for indicting or for failing to indict.[84]

The secrecy of grand jury proceedings has been justified on the basis that it protects the witnesses from embarrassment, intimidation, or harassment (especially if the witness is a victim of a violent or sexual crime), prevents the defendant from fleeing before an indictment is handed down, and protects the reputations of innocent persons whom the grand jury refuses to indict. Critics counter that the secrecy deprives the defendant of the right to confront witnesses whose testimony will be used to subject the accused to the burden of defending against criminal prosecutions; that in most cases the defendants have already been arrested and later released, and are thus already alerted to the prosecutor's interest in their cases even before the grand jury meets; that they are usually residents in any case and are therefore unlikely to flee; and that very few persons benefit from the secrecy since indictments are returned in most cases submitted. Finally, due to the high visibility and regularity of the

grand jury meetings in Hawaii, the close knit character of most Hawaii communities, and the fact that witnesses are allowed to talk about their testimony, the secrecy of the meetings are rendered almost useless by the highly accurate rumors that result.[85]

The nonadversary approach to the proceedings has also been attacked because the defendant is not able to challenge the witness whose testimony may force the defendant to undergo the expense, emotional suffering, and loss of time involved in defending against a criminal prosecution. They also point out that since defendants can obtain a copy of the grand jury transcripts or be informed of the nature of the charge against them only after indictment, the defense has less time than the prosecutor to prepare and analyze their cases. Supporters argue that the nonadversary approach is more efficient, since time is not wasted in cross-examination by the defense. They also argue that since the witnesses will be subject to cross-examination at trial, they should not be subjected to it twice, especially if the witness is the victim of a sexual crime.[86]

The grand jury has been criticized for its potential for political abuse. On the federal level, grand juries have been accused of being used as an instrument to suppress dissent by severely invading the political and personal privacy of activists seeking social change.[87] Because grand jury proceedings are not subject to the evidentiary rules of relevance and competency, and because a witness may not refuse to answer a question on self-incrimination grounds once immunity has been granted, prosecutors have asked, and witnesses have been forced to answer, overbroad and prying questions like, "describe every person who visited your house in the past six months, what conversations occurred, and who was present when they visited", or, "relate every conversation you had with Smith in 1970".[88] The secrecy and insulation in which the grand jury operates has been especially criticized in the context of this perceived abuse, for the witness is isolated from the support of counsel and the salutary effects of publicity.[89] On the federal level, grand juries have also been accused of abusing their compulsory powers for obtaining evidence by continuing in session long after an indictment is handed down, in order to give government lawyers a means to gather evidence that they would not be able to otherwise obtain under existing rules of procedure.[90]

Overall, the grand jury is supported as an effective body for investigation into official misconduct or inactivity.[91] Since it is free of control by the electorate, it is claimed to be more impartial than investigatory committees (legislative or executive), whose members are either elected or appointed by elected officials, and whose results may be "influenced by political considerations, partiality, and a deliberated lack of thoroughness".[92] The broad subpoena power and secrecy of the proceedings of the grand jury facilitate the gathering of evidence and the taking of testimony (especially where reluctant witnesses are involved), and is important in those cases where the prosecuting attorney has exhausted the other investigatory resources and is still unable to determine whether a crime has been committed or by whom.[93] Further, the grand jury can obtain an indictment against an accused person who cannot be located, thereby preventing the statute of limitations from running. In this way, an accused person cannot escape prosecution by leaving the state until the statute of limitations has expired.[94]

In studying the grand jury provisions of the Hawaii Constitution, the 1978 Constitutional Convention may wish to consider the following:

Elimination of the Grand Jury Requirement. In almost half of the states, there is no grand jury requirement.[95] In many of these states the prosecutor has the discretion to initiate a criminal proceeding by grand jury indictment or by filing an information,[96] but where the prosecutor does not proceed by indictment, a preliminary hearing is sometimes required.[97] Other state constitutions provide that the legislature may modify or abolish the grand jury system.[98]

After an extensive study of the grand jury system in Hawaii, the National Center for State Courts has recommended that Hawaii's grand jury provision be deleted from the Constitution. It does not propose that the grand jury system be abolished, but it recommends that the grand jury be convened only in extraordinary cases upon order of the circuit court following a showing of good cause by the prosecutor.[99] The center recommends that in most cases probable cause be determined at a preliminary examination by the district court.[100] The center argues that this will reduce delay, provide a more competent deter-

mination of probable cause, and eliminate many of the problems that stem from the dependency of the grand jury on the prosecutor, from the secrecy of the grand jury proceedings, and from the inability of the defendant to be accompanied by counsel, cross-examine witnesses, or present rebuttal evidence.[101] Critics of this proposal, however, may question the wisdom of tampering with State Bill of Rights guarantees and whether elimination or serious modification of the grand jury requirements will lead to a weakening of other rights.

Elimination of the Investigatory Function of the Grand Jury. No state seems to have adopted such a measure in their constitutions. As noted above, this alternative would foreclose the potential for abuse as seen on the federal level, yet it might also severely restrict the prosecutor in the investigation of crime and official misconduct. The 1978 Constitutional Convention may also deem this to be an unnecessary measure, since the standard of conduct among Hawaii's prosecuting attorneys appears high, and consequently the instances of prosecutorial abuse are rare.[102]

Retain the Grand Jury in its Present Role, But Provide More Protection for Defendants and Witnesses. Such an alternative may include procedural safeguards at the grand jury proceedings,[103] such as requiring that the witness be given the right to have counsel present, notice of the proceedings, adequate time to prepare for them, and the right to object to irrelevant and prying questions.[104] Another possible amendment may include providing for more grand jury independence.[105] The 1978 Constitutional Convention may wish to consider, however, whether these objectives are better accomplished through legislation or court rules.

PART IV. TRIAL BY JURY IN CRIMINAL CASES

Article I, section 11, provides in part that:

> ...[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to

> which the prosecution may be removed with the consent of the accused....

This provision is based almost exactly on the Sixth Amendment of the U.S. Constitution. Because the Sixth Amendment guarantees have been applied to the states through the Due Process Clause of the Fourteenth Amendment (see chapter 4 on Due Process and Equal Protection), most, but not all, aspects of the jury trial are strictly governed by standards set forth in U.S. Supreme Court interpretations of the Sixth Amendment. Some issues, such as the size of the jury, have been left to the states, and to state supreme court interpretations of local constitutions.

The origins of the right to trial by jury date back to the early English common law. The trial jury became separate from the grand jury in the first half of the fourteenth century; the jury of 12 and the requirement of a unanimous verdict also emerged at this time.[106] Although the jury has evolved over the centuries, and is no longer limited to male property owners,[107] the basic arguments in favor of the right to jury trial have not changed. In Duncan v. Louisiana,[108] the U.S. Supreme Court gave the following justifications: (1) the right is "granted to criminal defendants in order to prevent oppression by the Government" and to give protection "against unfounded criminal charges"; (2) trial by jury is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge"; (3) the right reflects an "insistence upon community participation in the determination of guilt or innocence".

The Right to Jury Trial "in All Criminal Prosecutions"

In Duncan v. Louisiana, the U.S. Supreme Court bound the states to afford a defendant an opportunity for jury trial in all criminal cases where the defendant would have the opportunity in federal court.[109] Despite the seemingly absolute language of "all criminal prosecutions", the Court has limited the right of jury trial to "serious" offenses for which the defendant faces a possible penalty of 6 months or more imprisonment.[110]

Even though the defendant has a right to jury trial, the defendant may waive, or voluntarily relinquish, it according to the terms of Rule 23(b) of the Hawaii Rules of Penal Procedure.[111]

The Right to a "Speedy and Public Trial"

The requirement of a speedy trial was applied to the states by the U.S. Supreme Court in Klopfer v. North Carolina.[112] The rationale behind this guarantee is that it prevents prejudice to the defendant, whose normal routine has been disrupted by the imposition of criminal charges and whose ability to prepare an adequate defense would be undermined by delay.[113] The right to a speedy trial only emerges when the defendant becomes an "accused", through formal indictment or information, or is restrained through arrest and detention.[114]

The right to a speedy trial is relative, and delay a matter of degree.[115] In federal courts, the Speedy Trial Act of 1974[116] provides guidelines for determining whether the right has been violated. The Act imposes certain time limits between arrest and indictment, between arraignment and trial. Delay resulting from, e.g., the unavailability of the defendant or of essential witnesses is not calculated in, nor is delay "where the ends of justice are served". Where the delay is inordinate and inexcusable, the charge is to be dropped, either with prejudice (i.e., subsequent prosecution barred) or without prejudice (subsequent prosecution possible). In Hawaii, Rule 48(b) of the Hawaii Rules of Penal Procedure permits the dismissal of the charge, with or without prejudice, if trial is not commenced within 6 months from the date of arrest or filing of the charge. Certain types of delay are not counted into the 6-month period, including the catch-all delay for "good cause".

The requirement of a public trial was imposed on the states by the U.S. Supreme Court in In re Oliver,[117] and has been recognized by the Hawaii Supreme Court since 1906.[118] "[A] public trial is a trial at which the public is free to attend,"[119] public attendance being an important safeguard of the integrity and impartiality of the courts. Judges, however, are not prevented

from excluding persons "whose conduct or presence in the courtrooms is such that the orderly, fair and impartial functioning of the courts are affected".[120]

The Right to Trial by "an Impartial Jury"

The right to an "impartial jury" is perhaps the most heavily interpreted aspect of the jury trial. United States and Hawaii Supreme Court decisions lead to the conclusion that an "impartial jury" is: (1) one which reflects a fair cross-section of the community; (2) one from which biased jurors have been removed; and (3) one which has been insulated from highly prejudicial publicity.

Fair Cross-Section of the Community. The U.S. Supreme Court has not insisted that the jury rolls or the venire (the panel from which the jury is selected) be a perfect mirror of the community or accurately represent every identifiable group.[121] It does require that the jury be broadly representative and that systematic exclusion of identifiable groups is impermissible.[122]

Jurors may be selected more or less randomly from one or more presumably standard, neutral lists, such as voter registration lists, or may be chosen by selectors exercising "discretion" as to who should serve. Discretionary methods are much more rigorously scrutinized by the courts than random methods, so as to insure that no group is being purposefully eliminated.[123] Almost every court has approved the use of voter lists.[124] In Hawaii, voter lists are used, with optional supplemental lists such as taxpayers' or drivers' license lists. In the First Circuit (Oahu), voter lists are supplemented with names from the telephone book.[125] However, even with the random method of selection, certain groups tend to be underrepresented on juries--blue-collar workers, non-Whites, the young, the elderly, and women.[126]

The underrepresentation of certain groups is due in part to the inadequacy of voter lists as an exclusive source of jurors. It is also due to the fact that the pool of potential jurors is further narrowed by:

(1) Disqualification (e.g., not a citizen of the U.S. or Hawaii, 18 years old, and a resident of the circuit);[127]

(2) Exemption (e.g., is an attorney or practicing physician);[128]

(3) Excuse (e.g., "serious personal hardship" or other "good cause").[129]

The groups underrepresented on juries are those most often assumed by the courts to be inconvenienced by jury service and therefore most often excused.[130]

Elimination of Biased Jurors. After potential jurors are summoned to the courthouse, the pool is narrowed still further by a process of questioning known as voir dire. In Hawaii state courts, the questioning is conducted primarily by the attorneys, rather than by the judge.[131] The attorneys are permitted an unlimited number of "challenges for cause" where they can demonstrate to the judge a "narrowly specified, provable and legally cognizable basis of partiality"[132] such as a relationship to the defendant or admitted racial prejudice.[133] The attorneys also are permitted a limited number of "preemptory challenges", which are exercised without giving a reason, "without inquiry and without being subject to the court's control".[134]

Although the use of preemptory challenges has been criticized for tending to remove those who appear idiosyncratic and also minorities who would make the jury representative,[135] it is nonetheless seen as helpful in weeding out jurors affected by bias, where bias cannot be clearly proved.[136]

Careful jury selection procedures and thorough voir dire inquiry are *especially important in heavily publicized cases. Each prospective juror needs* to be questioned--out of the presence of other prospective jurors--as to whether the juror has been exposed to prejudicial publicity and whether the juror has a fixed opinion as to guilt or innocence.[137] Qualified jurors do not have to be completely ignorant of the facts and issues of the case, but on the other hand, a juror's good-faith assurance of impartiality is not necessarily enough.[138]

Insulation of the Jury from Prejudicial Publicity. Two of the more extreme methods of controlling prejudicial publicity--use of the silence order and sanctions against representatives of the media who violate the order--are discussed in chapter 3 on the First Amendment. Other methods of facilitating an impartial verdict include: (1) continuance; (2) change of venue; (3) cautionary instructions to the jury; (4) sequestration; and (5) restrictions upon public statements made by court-related personnel.

The continuance is a postponement of the trial until the effect of publicity diminishes. It is disadvantageous in that it conflicts with the guarantee of a speedy trial.[139]

The change of venue entails removal of the case to another jurisdiction which has not been affected by the inflammatory publicity. The Hawaii Rules of Penal Procedure, Rule 21(a) permits transfer to another circuit, upon motion of the defendant, where the court is satisfied that there is "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial". The change of venue is of questionable benefit in the event of a major crime publicized statewide.[140] It also compels the defendant to waive the defendant's constitutional right to be tried in the "district wherein the crime shall have been committed".[141] But Article I, section 11, by explicitly allowing for the possibility of a change of venue ("or of such other district..."), is plainly more concerned with the detrimental effects of prejudicial publicity.

It has been argued that careful voir dire inquiry of prospective jurors, followed by instructions to jurors once seated not to read, listen to, or view news reports, will yield an impartial verdict.[142] Sequestration, or isolation of the jury throughout the trial, will effectively prevent exposure to publicity, but has drawbacks in terms of the expense and hardship to jurors.[143] Also, isolation could produce undesirable results during the jury's deliberations such as the domination of the group by one faction or individual.[144]

Rather than impose a silence order on the press, the court can attempt to limit information released to the press by court-related personnel--the police, prosecutor, defense counsel, and witnesses.[145] This, however, interferes with

their First Amendment rights. One court has held that lawyers' comments about pending or imminent litigation can only be proscribed if they pose a "serious and imminent threat" of interference with the fair administration of justice.[146]

Juries of Less than Twelve/Less than Unanimous Verdicts

Since 1970, the U.S. Supreme Court has been promoting 2 important changes in the structure and functioning of the jury: (1) reducing the number of jurors, as a means of obtaining efficiency and economy; (2) allowing majority, instead of unanimous, verdicts, as a means of reducing the time and difficulty of deliberations.[147] In a series of decisions, the Court has ruled that the traditions of juries of 12 and unanimous verdicts are not required by the constitution. Juries of less than 12 have been approved in state criminal cases,[148] and in federal civil cases.[149] Less than unanimous verdicts have been allowed in state criminal cases (and by implication, in state civil cases) but disallowed for all federal cases.[150] The Court has yet to decide whether a jury of less than 12 and a majority verdict together would pass constitutional muster.

The Court is of the view that a jury of less than 12 still fulfills the requirements of a jury:[151] (1) "large enough to promote group deliberation"; (2) "free from outside attempts at intimidation"; (3) able to "provide a fair possibility for obtaining a representative cross-section of the community". However, there is some evidence that smaller juries are less representative, less reliable (the more jurors, the less random error), and more erratic in their verdicts.[152] Roughly, the same arguments apply to the question of majority verdicts.[153]

It is also questionable whether smaller juries save time and money, or at least whether the savings are significant enough to warrant the change. Smaller juries are less prone to "hang"--or be unable to reach a unanimous verdict--but perhaps a "hung" jury is an indication of some substantial, unresolved controversy and shows that the government has not proved its case against a criminal defendant beyond a reasonable doubt.[154]

A number of states have reduced the size of the jury in civil and misdemeanor cases,[155] and 81 out of 94 federal districts have adopted 6-person juries in civil cases.[156] But only 4 states have juries of less than 12 in major felony cases. The state supreme courts of Alabama, California, and Rhode Island have interpreted their state constitutions to require a jury of 12.[157]

The debates at the 1950 Constitutional Convention indicate that the delegates understood the jury to be a jury of 12[158] and that a criminal defendant had a right to a unanimous verdict.[159] Court rules, of course, might permit, with the consent of the defendant, waiver of a jury trial, stipulation to a jury of less than 12, or stipulation to less than a unanimous verdict in all but capital cases.[160] Even though assumptions about jury size and unanimity are no longer as settled as they once were, it would appear that Article I, section 11, still presumes the right to a jury of 12 and a unanimous verdict.[161]

PART V. EXCESSIVE FINES AND CRUEL OR UNUSUAL PUNISHMENT

Prohibitions against the imposition of excessive fines or the infliction of cruel or unusual punishment limit the power of the legislature and the courts to impose sentences on those convicted of crimes. Proper sentencing, whether in the imposition of imprisonment, fine, or a combination of these, seeks to accomplish the following, often inconsistent, goals: (1) retribution; (2) rehabilitation of the offender; (3) deterrence, both with respect to the convicted individual and others who might commit the same offense; (4) isolation of those who pose a danger to society.[162]

Excessive Fines

Excessive fines are specifically prohibited by nearly all state constitutions.[163] The Hawaii Supreme Court has yet to pass on the question of what constitutes "excessiveness". But it has relied on the Equal Protection Clauses of the United States and Hawaii Constitutions to declare unconstitutional

a statute providing for imprisonment where the person could not afford to pay the fine.[164] The Hawaii Penal Code is in keeping with this decision, and does not permit imprisonment where there is an inability to pay.[165]

Cruel and Unusual Punishment

The Hawaii and U.S. Constitutions have similar provisions prohibiting cruel and unusual punishment. The Hawaii provision reads in part:[166]

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted:

The Eighth Amendment of the U.S. Constitution is similar except that the phrase is constructed in a conjunctive manner so that cruel and unusual punishment is prohibited.[167] Hawaii's disjunctive construction of the phrase does not necessarily mean that delegates intended a broader or narrower scope of protection. The phrase has remained unchanged since the 1950 Constitutional Convention where a report explained that it was modeled after the Eighth Amendment so that Hawaii would have the benefit of federal decisions construing the amendment.[168] The Eighth Amendment protections against cruel and unusual punishment are also applicable to the states through the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[169]

Federal Application. When the phrase "cruel and unusual" punishment was included in the U.S. Constitution, it was intended primarily with proscribing torturous and barbaric methods of punishment[170] such as pillorying, disemboweling, decapitation, drowning, and quartering.[171] At the beginning of this century, however, the U.S. Supreme Court rejected this limited interpretation and said in Weems v. United States that the amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice".[172] Later, in Trop v. Dulles, a standard was established that all future punishments must meet:[173]

> The (Eighth) Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society.

The rule following from these 2 cases is that the Eighth Amendment may be used to insist that criminal sanctions be in proportion to the offense.[174] A result of this rule has been that the U.S. Supreme Court has declared that certain activities or physical activities should not be treated as crimes. For example, in Robinson v. California,[175] the U.S. Supreme Court found the Eighth Amendment was violated when a California law made it a criminal offense to be in the mere state of narcotic addiction, a condition the Court felt was a sickness.

Hawaii Application. Since the 1968 Constitutional Convention, few cases have discussed the Hawaii provisions. However, in State v. Iaukea,[176] the Hawaii Supreme Court rejected arguments that a state law providing life imprisonment for a multiple felony offender violated this provision of the Hawaii Constitution. Although the Court acknowledged that an appropriate standard for judging whether a sentence violated this provision of the Hawaii Constitution was whether the sentence would "shock the conscience of reasonable persons or outrage the moral sense of the community in light of the developing concepts of decency", the Court felt that the punishment of life imprisonment for an adult multiple felony offender did not violate this standard.[177] The Hawaii Court found in another case that the imposition of penalties for the mere possession of marijuana did not violate the constitutional guarantees against cruel or unusual punishment.[178]

The Death Penalty: Cruel and Unusual Punishment?

Addressing the issue of whether the death penalty violated the Eighth Amendment protection against cruel and unusual punishment, the U.S. Supreme Court recently upheld the death penalty for murder but struck down the imposition of that sentence for rape because the penalty was disproportionate to the crime.

In the 1976 landmark case of Gregg v. Georgia, the Court ruled that the death penalty "does not invariably violate the Constitution" nor can its infliction for the crime of murder be considered cruel and unusual.[179] The Court justified its decision by pointing out that the framers of the U.S. Constitution were well aware of the use of the death penalty for murder when the provision was being drafted. Further, for 2 centuries, the Supreme Court has consistently acknowledged that the penalty of death for murder was not invalid per se.[180]

More importantly, the Court believed that the use of the penalty did not run contrary to its previous holdings that criminal sanctions must meet contemporary standards of decency. As evidence, the Court pointed to the actions of the Congress and 35 states which reenacted capital punishment legislation during the 4 years preceding the Gregg decision due to an earlier court decision[181] which caused these states to modify their statutes imposing the death penalty. Other evidence used by the Court to indicate that the death penalty met the "contemporary standards of decency" were jury verdicts. "The jury is also a significant and reliable objective index of contemporary values because it is so directly involved".[182] The Court in Gregg also dwelt on the penological justification of the death penalty. Essentially, the Court accepted retribution as "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate wrongs", and also that the death penalty was still a significant deterrent.[183]

Explicit in the Gregg decision was the belief that the criminal sanctions must be proportioned to the crime.[184] When the U.S. Supreme Court reviewed the use of the death penalty in 1977 for the crime of rape of an adult woman, in Coker v. Georgia, it declared that the infliction of the death penalty was unconstitutional stating that although "rape is without a doubt deserving of serious punishment...it does not compare with murder, which involves the unjustified taking of a life".[185] In Coker, the Court reasoned that Georgia law authorizing the death penalty in certain circumstances for rape and murder gave no consideration to the harm done to the victim. "Life is over for the victim of the murderer", said the Court.[186] Particularly disturbing was that a rapist could be executed if there was a previous felony record, the rape was committed

while in the commission of another capital felony, or if the crime was committed in an outrageous or wantonly vile or horrible or inhumane manner.[187] But a murderer, absent these aggravating circumstance or others authorized by law, could not be sentenced to death.[188] Further, the Court implied that the death penalty for rape would not meet the "contemporary standards of decency test" as only Georgia out of the 35 states having a death penalty provided that sanction for the crime of rape.[189]

Sentencing Procedure in Imposing the Death Penalty. As important as the constitutional validity of the death penalty are the procedures used by the states in determining whether the penalty should be imposed on a particular offender. Earlier in 1972, the U.S. Supreme Court found in Furman v. Georgia[190] that the state's death penalty procedures were unconstitutional because of the substantial risk that it would be imposed in an arbitrary and capricious manner.[191] The Court in Furman required that the sentencing authority's discretion, whether judge or jury, be properly guided and limited in the matter of whether a human life should be taken or spared.[192] This could be done, said the Court in Gregg, "by a carefully drafted statute that ensures the sentencing authority is given adequate information and guidance".[193] In Woodson v. North Carolina,[194] a decision that accompanied Gregg, the Court reiterated this desire by stating:[195]

> ...the fundamental respect for humanity underlying the Eighth Amendment,...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

The Gregg decision approved a death penalty sentencing procedure which separates sentencing from the actual trial so that the sentencing authority may be apprised of all information, not admissible or relevant at the trial, but which provides the authority with all considerations that should be weighed in its decision to impose execution.[196] The sentencing authority is required to find the existence of one statutory aggravating circumstance before sentencing a person to death and Georgia's law also provides an additional safeguard by

requiring automatic review of death sentences by the state supreme court. Generally, state statutes have been upheld if the law provides for the consideration of both mitigating and aggravating circumstances as part of the death penalty sentencing procedure. In Roberts v. Louisiana,[197] state law providing for the execution of a murderer of a peace officer was declared invalid because it did not provide for the consideration of mitigating circumstances such as the youth of the offender, the absence of previous convictions, the influence of drugs or alcohol, or extreme emotional disturbance, and the existence of circumstances which the offender reasonably believed provided moral justification.[198]

Summary

The U.S. Supreme Court has established the rule for interpreting the cruel and unusual punishment provision of the U.S. Constitution. This rule states that a criminal sanction is unconstitutional if it makes no measurable contribution to acceptable goals of punishment or if the punishment is grossly out of proportion to the severity of the crime. Further, the Court has given emphasis and importance to the procedures used in imposing the most extreme punishment of death. Within this framework, the states must consider their provisions for cruel and unusual punishment.

State Constitutional Provisions. The recent U.S. Supreme Court decisions interpreting the Eighth Amendment provide the basis for states to decide whether or not to enact death penalty legislation. For states with similar constitutional provisions or which rely on federal decisions to construe their own amendment, the infliction of the death penalty in some instances appears not to be a cruel and unusual punishment. State laws are subject to the U.S. Supreme Court's constitutional concerns regarding sentencing procedures. Currently, at least 35 states have enacted the death penalty legislation[199] and in Hawaii, bills have been introduced reinstituting capital punishment in both the Eighth and Ninth Legislatures.[200]

Attention must also be given to the role that state supreme courts may have as to whether the death penalty can be used in their states. As the final unreviewable authority of their own state constitutions, they may find different protections under provisions that are textually similar to the U.S. Constitution.

For example, in 1972 the California Supreme Court in People v. Anderson[201] declared that California's constitutional provision prohibiting cruel or unusual punishment was violated by the state's use of the death penalty. Interpreting the California provision, which is identical to Hawaii's, the California Court found the death penalty to be a cruel punishment because of its infrequent use and that retribution was not a valid social purpose of an enlightened contemporary society.[202]

The California Supreme Court decision meant that a state constitutional amendment was needed for the death penalty. Later that same year, California voters approved a constitutional amendment placed on the ballot by the initiative process that negated the findings of the court. The amendment gave effect to all statutes declared unconstitutional by the Anderson decision and specifically stated that the death penalty did not constitute cruel or unusual punishment.[203]

The 1968 Hawaii Constitutional Convention specifically addressed the issue of capital punishment. A floor amendment was offered that would prohibit the death penalty. The amendment read:[204]

> Excessive bail shall not be required nor excessive fines imposed, nor cruel, unusual or capital punishment inflicted. (Emphasis added)

Although the motion was defeated, it did not mean that delegates were in favor of capital punishment. Some of the opponents of the amendment believed that because state law already abolished the use of that penalty, it was unnecessary to address the matter.[205]

The few states that mention the death penalty in their constitutions mention them in a context separate from their cruel and/or unusual punishment provisions. These appear to be either authorization for the legislature to enact

capital punishment laws or provide procedural protection rather than making explicit provision for, or abolishment of, the death penalty. Montana's Constitution explicitly states that the power of the legislature to authorize the death penalty shall not be affected by the desire for criminal sanctions that are in keeping with the principles of reformation and prevention.[206] A similar provision in North Carolina's Constitution provides the state's General Assembly with the authority to enact capital punishment laws but only for the crimes of murder, arson, burglary, and rape.[207] Three states have provisions that deal with the provision of a trial by jury for all crimes for which the death penalty is authorized. The legislature in New Hampshire is prevented from enacting any laws which will take away the right to a trial by jury,[208] and in Arizona[209] and Louisiana,[210] a mandatory jury size of 12 is required for all offenders charged with crimes in which execution can be imposed. Eleven states have provisions similar to Hawaii's which require that no one shall answer for a capital crime (or a crime with the punishment of death) unless initially indicted by the grand jury.[211]

PART VI. DOUBLE JEOPARDY

The Fifth Amendment of the U.S. Constitution, which was made binding on the states in 1969,[212] provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb". Article I, section 8, of the Hawaii Constitution has an identical provision, except for the deletion of the phrase "life and limb" from the end of the passage.

The rationale for the double jeopardy provision is that the state, with its vastly greater resources, should not be allowed to subject an individual to the repeated embarrassment, expense, and ordeal of defending a charge for the same alleged offense.[213] The individual should not be forced to live in a continual state of anxiety and insecurity, and the state should not be permitted to enhance the possibility of convicting an innocent person by repeated prosecutions.[214]

Once jeopardy attaches,[215] that is, once the defendant is put to trial, the defendant can raise a double jeopardy claim at a second trial even if the first trial ended without a final judgment (e.g., a mistrial was declared). However, the double jeopardy claim cannot be raised where the defendant wins a reversal upon appeal[216] or in certain unusual situations where the public interest in a fair trial requires that a mistrial be declared and the defendant be subjected to a second trial.[217] Where a jury convicts on a lesser charge, the defendant is deemed to have been acquitted of the higher charge. Accordingly, if the defendant appeals a conviction and wins a reversal, the second trial must be limited to the lower charge.[218]

The doctrine of double jeopardy prohibits not only the relitigation of criminal offenses, but also includes the relitigation of specific issues already adjudicated at the first trial. Consequently, where a factual issue that is an essential element of a second charge was the basis for acquittal of the first charge, the defendant may not be tried on that second charge. For example, a defendant who was charged with robbing a victim and then acquitted on the ground that the defendant had not participated in the event could not be tried for the robbery of the victim's companion.[219]

"Jeopardy of life or limb" generally refers to criminal prosecutions. It does not apply to proceedings that are remedial and not "essentially criminal" in nature.[220] Although not usually applicable to civil trials, the doctrine may be invoked in civil proceedings where the stigma and loss of liberty are similar to a criminal trial.[221]

One area of controversy in the area of double jeopardy is the so-called "dual sovereign" problem. Under our federal system of government, there are 2 independent sovereigns--the state and federal governments--each responsible for the enforcement of their own laws. Because there are 2 sets of laws, the same act may produce 2 offenses. Therefore, each sovereign can choose to prosecute separately, under its own laws for the same conduct, and the defendant cannot claim double jeopardy.[222]

The doctrine of dual sovereignty has been supported by 2 policy considerations. First, there is the danger of encroachment by each sovereign on the enforcement of its own laws; federal prosecution for a lesser charge could deprive the state of the opportunity to prosecute for a far greater offense arising out of the same act, and vice versa. For example, the same act may make the defendant liable for prosecution for murder under state law and also for prosecution for federal civil rights violations. If dual prosecutions were barred, federal prosecution for the lesser civil rights charge could preclude state prosecution for murder. Secondly, there are potentially substantial difficulties involved in determining when one offense is similar enough to bar prosecution for another.

Critics of the doctrine have pointed out that the rationale for prohibiting successive prosecution by the same sovereign applies as well to successive prosecution by different sovereigns. They argue that the doctrine erodes respect and support for the judicial process by undermining the "social value of certainty".[223] As a practical matter, however, the dual sovereign doctrine may not have as serious consequences as feared, for the federal government has voluntarily refrained from reprosecution after most state convictions,[224] and many states including Hawaii[225] bar state prosecution after conviction by the federal government for the same criminal act in many instances.[226]

PART VII. HABEAS CORPUS

Suspension of the Writ

Federal Application. Article I, section 9, clause 2, of the U.S. Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The main purpose of a prisoner's petition for a writ of habeas corpus is to gain immediate relief from illegal confinement. The petition tests whether the

prisoner has been deprived of liberty without due process. The clause is not a limitation upon the states, but only upon the federal government.[227] The clause carefully lists circumstances which may justify suspension of the privilege of the writ. However, the primary issue historically has been who has the power to suspend. In England, suspension was by parliament.[228] A well-noted suspension of the writ in America was by President Lincoln in 1861.[229] One authority has said that the framers of the U.S. Constitution may have consciously omitted mentioning which branch of government is authorized to suspend the writ.[230] The framers may have left the question open for subsequent resolution; or, familiar with the historical background of the writ, they may have understood the power of suspension to be a legislative one and therefore failed to indicate the repository of the power.[231]

One commentator has set forth 3 possible constructions of the clause:[232]

> First, it can be read to give exclusive suspension power to Congress. The location of the habeas corpus clause in article I lends strong support to this position. However, Congress is often in recess or adjournment; if an emergency arises which might justify suspension of the writ, it may be cumbersome at the very least to summon legislators to Washington to decide if suspension is warranted. At worst, the emergency may have assumed disastrous proportions before legislative resolution of the suspension question would be possible. Manifestly, these factors militate in favor of a second construction granting exclusively to the executive branch the power to suspend the writ. The President can more conveniently and quickly make the factual determinations contemplated by the habeas corpus clause. Convenience and speed, however, can lead to arbitrariness and oppression if the power of suspension is lodged in the President alone; reposing the suspension power in Congress would provide the assurance of popular participation in such a grave and sensitive decision. A third construction is that the suspension power is "concurrent" as between the President and Congress, so that the President might act in the absence of congressional provision.

The United States Supreme Court never has been faced with the question of specifying who has the power to suspend the writ[233] History, however, has shown that in time of war even justices not otherwise prone to condoning severe restrictions on liberty have supported the executive:[234]

> Precedent now supports executive suspension of the writ, and when the time unhappily comes when the writ is again suspended, these precedents will no doubt be invoked. If the need is dire enough, constitutional argument, however well founded, will be disregarded. It is no answer to speak of the ends not jusfifying the means; for when society's existence is threatened, or believed to be threatened, questions of ends or means cease to be relevant unless government is to acquiesce in its own downfall in the name of principle. There is little precedent for that.

Hawaii Application. Article I, section 13, of the Hawaii Constitution, drawn up by the 1950 Hawaii Constitutional Convention and unchanged since that time, reads:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in the cases of rebellion or invasion the public safety may require it.
>
> The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe.

The first sentence is identical with the language of Article I, section 9, of the U.S. Constitution and thus carries with it federal judicial interpretations as to when a suspension may take place.[235] The second sentence "makes it perfectly clear that that power [suspension of the writ] resides in the legislature, not in the executive".[236] Underlying this theme is the assumption, not without merit,[237] that this provision:[238]

> ...would not in any respect interfere with the power of the federal government in case of a national emergency operating under the appropriate section of the Federal Constitution to suspend the privilege of the writ of habeas corpus by action of the Congress.

One framer has noted:[239]

> You'll recall [that] during [World War II] we enacted the Hawaii Defense Act, and that had a very questionable provision in it, authorizing the governor to suspend laws. Now traditionally that has been the anathema of democratic processes. It went back to the reign of George the Third, where George the Third endeavored to and did in fact suspend acts of the Parliament.

There have not been many proposals to change this section of the Constitution, since the question of who suspends the writ is, at this time, situated behind the central issue which occupies center stage. The reasons for and the manner in which the lower federal courts have intruded into the administration of state criminal justice.[240]

Habeas Corpus and the Exclusionary Rule

History of the Writ. Although the writ of habeas corpus specifically is mentioned in the U.S. Constitution, early decisions required that any prisoner's right to such a writ must be established by Congress.[241] Originally, the right to file a writ of habeas corpus was granted only to prisoners held in federal custody, and the scope of the writ was limited to consideration of whether the sentencing court had jurisdiction over the subject.[242] It was not until the Habeas Corpus Act of 1867 that the writ was extended to a state prisoner who was "restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States...."[243] However, the scope of the writ was not expanded beyond an inquiry into the sentencing court's jurisdiction.[244] This restriction was removed in the 1953 case, Brown v. Allen,[245] where the U.S. Supreme Court concluded that regardless of the adequacy of the state court's procedure, the federal courts could review or rehear a state prisoner's federal claim and decide the case on the merits.[246] Finally, in Fay v. Noia,[247] a 1963 case, the Court held that the requirement in 28 U.S.C.A. sec. 2254, that a state prisoner exhaust all state remedies before application for federal habeas relief would be granted, refers only to failure to exhaust remedies still open to the applicant at the time of the application.

Federal habeas corpus petitions flourished under the expanded powers of the writ.[248] Moreover, the 1963 case, Townsend v. Sain[249] required that a federal court grant an evidentiary hearing to a habeas corpus applicant in a specific set of circumstances,[250] many of which determined whether the state court appeared to have given the applicant a "full and fair" hearing.

Exclusionary Rule. The Exclusionary Rule refers to in-court suppression of evidence obtained in violation of the right to be free from unreasonable searches and seizures. The foundation for the Exclusionary Rule was laid in the 1886 Boyd v. United States[251] case where the Court prevented federal authorities from confiscating private books and papers. In the 1921 Gouled v. United States[252] case, illegally seized evidence was barred from the federal courts. However, it was not until Mapp v. Ohio,[253] a 1961 case, that the Exclusionary Rule was held applicable to the states.

Although Mapp emphasized that the Exclusionary Rule was "constitutional in origin",[254] the Court departed from this rule in the 1974 United States v. Calandra case, explaining that the Exclusionary Rule:[255]

> ...is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved....

For a more extensive discussion of the Exclusionary Rule, see chapter 5 of this study.

The need for broad habeas corpus relief has been recognized by the U.S. Supreme Court as a safeguard against "intolerable restraints" of those who have been "grievously wronged" by society.[256] However, the availability of broad habeas corpus review for purposes other than to protect the innocent has been criticized.[257] In particular, the irrelevance of the exclusion of evidence obtained in violation of the Fourth Amendment to the reliability of trial as a truth-finding process has been noted as a reason for withdrawing claims based on the Exclusionary Rule from broad collateral habeas corpus relief.[258]

By the early 1970's the substantive scope of habeas corpus and the scope of the Exclusionary Rule were ripe for review. However, the precise question of whether an illegal search and seizure claim properly is cognizable under the federal habeas corpus statute[259] did not come before the Court until Stone v. Powell,[260] in 1976. Stone held that unless a state prisoner can show denial of an opportunity for a full and fair litigation of a Fourth Amendment claim in the state system, a state prisoner may not be granted federal habeas corpus relief

on the ground that evidence obtained in an unconstitutional search and seizure was introduced at the prisoner's trial. The Court recognized the deterrent purpose of the Exclusionary Rule, but stated:[261]

> ...[D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. (Emphasis added)

Previous to Stone, however, the Supreme Court itself decided many of the Exclusionary Rule cases on certiorari from federal habeas corpus proceedings involving state prisoners.[262] This course of federal habeas corpus review of state search and seizure cases was set forth in the 1969 Kaufman v. United States case in which the court said that it was unable to restrict:[263]

> ...access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners.

Stone shifted the focus of the federal district court in habeas corpus proceedings from an inquiry into Fourth Amendment claims to a consideration of whether the defendant's claim was fully and fairly litigated. Although Stone "has set a precedent seemingly compelled by the violence of these times",[264] it is questionable whether this shift significantly will reduce the burden on the federal judicial system:[265]

> After [Stone], the reviewing court must check the record of the state court proceedings to determine if the defendant was afforded a full and fair trial; previously, the district court examined the record to decide if the state court had correctly applied the exclusionary rule. In fact, the district court's review of the fourth amendment claims was never a severe burden. One of the most time-consuming activities is the holding of an evidentiary hearing; the decision in the instant case still requires this hearing when the state record does not meet the Townsend criteria. Thus, the federal courts will still have to spend the same amount of time holding evidentiary trials and reviewing state court records.

The impact of the Supreme Court's decision in Stone is sure to be strongly felt. Apparently, for the first time, the Court has issued a blanket

restriction on use of the writ for specific constitutional violations. In effect, the Fourth Amendment is deemed applicable to the states through incorporation by the Fourteenth Amendment, except when it comes to federal collateral attacks on criminal convictions. It appears from the Court's language that Mapp and the Exclusionary Rule soon will be reconsidered.[266]

One of the strongest objections to removing a state prisoner's federal collateral remedy stems from concern that state judges may be unsympathetic to federally created rights.[267] The critical importance of Stone is that it employs a balancing test which weighs the need of society to determine accurately the guilt or innocence of the defendant in a criminal trial against the need of the individual to be protected from police encroachment on Fourth Amendment rights. In this sense, the instant case uses the framework of the appellate process to set a boundary beyond which the court will refuse to find a deterrent effect on the police community.[268] As a result, there has been a trend that shifts the emphasis from protecting defendants' rights to a consideration of the needs of society regarding law enforcement.[269] Perhaps legislatures, discerning this trend, will either find alternative means of protecting defendants' rights or will write into law the Exclusionary Rule.[270]

Hawaii Application. Because suppression of evidence "may be the sole means to gain an acquittal or dismissal of the charge",[271] perhaps:[272]

> ...the writ of habeas corpus should [not] be any less available to those convicted of state crimes where they allege Fourth Amendment violations than where other constitutional issues are presented to the federal court.

The time for appeal is limited.[273] After it has expired, a defendant's major weapon for release is the habeas writ. Indeed, federal habeas corpus petitions by state prisoners nationwide rose from 5,339 in 1966 to 7,843 in 1975, a 46.9 per cent increase.[274]

Possible Approaches to Defendant's Rights Issues

General Suggestions. The Constitutional Convention, in light of Stone, may wish to find alternative means of protecting defendants' rights. Those discussed below at present have not been incorporated into Hawaii law:[275]

(1) A joint liability plan, under which both the applicable governmental unit and the police officer are liable;

(2) Waiver of sovereign immunity as to tort damages caused by its employees for an illegal search and seizure (and modification of traditional tort actions);

(3) Training police more effectively so that the Exclusionary Rule can have its desired effect;

(4) Courts using their injunctive form of relief in addition to a court monitor to insure that the order is implemented; these monitors would be objective observers who would aid federal judges in the enforcement of their injunctive orders; and

(5) Setting up an administrative appeals board to complement other alternative remedies.

Privacy Claim. Another possible alternative to the Exclusionary Rule is restricting limitations upon the rule (such as "standing" and the "open field test") by basing a claim on privacy rather than that of search and seizure.[276] Indeed, in 1968, Article I, section 5, of the Hawaii Constitution was amended to prohibit not only unreasonable searches and seizures but also unreasonable invasions of privacy.[277] Commentators and judges disillusioned with the Exclusionary Rule could note that the constitutional privacy provision is to be given broad interpretation and is to provide judges with more flexibility in safeguarding individuals' rights.[278]

After this constitutional revision, the 1972 Hawaii legislature added to its statutes certain privacy provisions.[279] However, these statutory provisions are limited in scope and protect only against mechanical or electronic eavesdropping or surveillance and wiretapping[280] and do not meet the broad scope of the privacy guarantee implemented by the 1968 constitutional framers:[281]

> Your Committee believes that a specific protection against communications interception in the Constitution may be somewhat narrow and limiting and therefore recommends a broader protection in terms of right of privacy.... Your Committee is of the opinion that inclusion of the term "invasions of privacy" will effectively protect the individual's wishes for privacy as a legitimate social interest. The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of those areas of a person's life which is defined as necessary to insure "man's individuality and human dignity." Your Committee urges the adoption of this amendment. (Emphasis added)

Despite the privacy amendment in 1968, to date no Hawaii cases have decided an exclusionary rule issue through the conduit of the privacy guarantee embedded in the Hawaii Constitution. For a more extensive discussion of privacy, see chapter 8 of this study.

Constitutional Exclusionary Rule. To date only one state has followed the lead of the Model State Constitution[282] and adopted a constitutional Exclusionary Rule. Article I, section 12, of the Florida Constitution was amended in 1968 to provide in part:

> Articles or information obtained in violation of this right [to be free from unreasonable searches and seizures] shall not be admissible in evidence.

Although adoption of this rule could secure the precedents prior to Stone,[283] the Constitutional Convention, as an alternative measure, may wish to devise specific limitations upon the Exclusionary Rule, such as Louisiana has done with regard to the issue of standing:[284]

> Any person adversely affected by a search or seizure conducted in violation of this Section [right to privacy] shall have standing to raise its illegality in the appropriate court.

Summary. The Stone case has set forth a rule that will place reliance on the states to protect defendants' rights. Once a search and seizure issue fairly is litigated, there is no recourse to the federal courts. The Constitutional Convention therefore may wish to focus on including as constitutional rights:

(1) Any one or more of several general proposals, more fully described earlier, such as governmental unit--police officer joint liability plans, waiver of sovereign immunity as to tort damages caused by its employees for an illegal search and seizure (and modification of traditional tort damages), and the utilization of court monitors;

(2) Restricting limitations upon the Exclusionary Rule (such as "standing" and the "open field test") by basing a claim on privacy rather than that of search and seizure, such as Louisiana has done; and

(3) Adopting a constitutional Exclusionary Rule, or, alternatively, imposing restrictions on specific limitations upon the Exclusionary Rule.

Chapter 7
RIGHTS AND PRIVILEGES OF THE ACCUSED

PART I. INTRODUCTION

The previous chapter on the administration of criminal justice discussed the institutional framework which an accused faces upon being arrested. This chapter is directed to the various rights and privileges which are guaranteed to the accused as the accused faces the criminal justice system. Much of the discussion in this chapter focuses on the changes effected by the United States Supreme Court.

PART II. SELF-INCRIMINATION

Scope and Effect

Article I, section 8, of the Hawaii Constitution provides in part:

> ...nor shall any person be compelled in any criminal case to be a witness against himself.

This provision is derived from the Fifth Amendment of the U.S. Constitution, and its adoption by the 1950 Constitutional Convention was intended to give:[1]

> ...to this State the benefit of Federal decisions construing the same.

This provision was not discussed at the 1968 Constitutional Convention. The privilege against self-incrimination is found in the constitutions of 48 states, with the 2 exceptions being Iowa and New Jersey, both of which guarantee the privilege in statutes.[2] Hawaii also provides for a statutory privilege against self-incrimination.[3] The privilege appears to have been a major factor in forming the law relating to police interrogations as well as the conduct of the formal trial.

The history of the privilege against self-incrimination has been thoroughly documented,[4] and the policy justifications for the adoption, extension, and contraction of the privilege have been discussed and debated.[5] The privilege against self-incrimination, even as a limited privilege, is not found in the Magna Carta, the Petition of Right, the Bill of Rights of 1689, or other basic English sources of this country's constitution.[6] It appears to have had its origin in a protest against the inquisitorial methods of interrogating accused persons in the late seventeenth century,[7] when the English Courts adopted as a rule of evidence the maxim:[8]

No one shall be compelled to accuse himself.

Thus, the privilege had its beginnings with a change in the English criminal procedure that seems to have been founded upon no statute or judicial opinion. It seems to have emerged as a result of a general and silent acquiescence by the courts to popular demand. Hence, a maxim which in England was a mere rule of evidence became clothed in this country with the strength of a constitutional enactment.[9]

Current recognized policies underlying the privilege reflect:[10]

> ...many of our fundamental values and most noble aspirations: Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play,...; and our realization that the privilege, while sometimes a "shelter to the guilty," is often "a protection of the innocent."

Although the Fifth Amendment privilege, or a similar provision, previously was a part of state law in most jurisdictions, the federal constitutional provision was held binding upon the states in a 1964 case, Malloy v. Hogan.[11]

In a 1971 case, State v. Grahovac,[12] the Hawaii Supreme Court held that state safeguards for the right against self-incrimination must at least comport

with the United States Supreme Court standards, but the state is free to go beyond such requisites in protecting one's right of silence under the Hawaii Constitution. Since the Fifth Amendment privilege is applicable to the states by way of the Fourteenth Amendment,[13] the relevant provision in the Hawaii Constitution, Article I, section 8, has an important legal effect only if it provides relief greater than that afforded by federal law interpreting the federal provision. The Hawaii Supreme Court is the final arbiter of the meaning of those provisions of the Hawaii Constitution which provide safeguards above that required by the federal Bill of Rights.[14]

Convention Review

The Constitutional Convention may wish to review various issues which have been raised involving the scope and effect of the privilege against self-incrimination.

Clarification of the Language. The clause "in any criminal case" of Article I, section 8, of the Hawaii Constitution would seem to suggest that compelling an individual to be a witness against oneself is proscribed only at the individual's criminal trial. The United States District Court for the district of Hawaii[15] and the United States Supreme Court,[16] however, have held that in order to protect fully the rights of the accused at trial, the privilege must be extended to certain other proceedings. These include grand jury proceedings,[17] police custodial interrogations,[18] and even to activities outside the criminal process, such as civil proceedings.[19]

The self-incrimination provision embraced by the Model State Constitution[20] is not limited to testimony in criminal cases. The privilege extends to any kind of hearing where testimony is given and thus comports with recent federal decisions construing the same. The model provision reads:

> No person shall be compelled to give testimony which might tend to incriminate him.

Incrimination under the Laws of a Different Sovereign. Until recently, a state grant of immunity from state prosecution barred assertion of the privilege even though the testimony would incriminate the witness under federal law and vice-versa.

In the 1964 case, Murphy v. Waterfront Commission,[21] the United States Supreme Court held that the privilege may be asserted whenever the testimony would incriminate under either state or federal law. The Court also explained that under an exclusionary rule, testimony obtained in state proceedings under a grant of state immunity (and the fruits of that testimony) may not be used in federal prosecutions, and vice versa.[22]

The Convention may wish to explore the issue of giving the Murphy rule substantive expression in the Constitution, as it presently is not provided in our state statutes.[23]

"Use" vs. "Transactional" Immunity. Since the privilege against self-incrimination protects only against criminal conviction, the state may render the privilege inoperable by removing the possibility of criminal conviction. This can be done by granting the defendant "immunity" from prosecution.

In an 1892 case, Counselman v. Hitchcock,[24] the United States Supreme Court was faced with the question of the type of immunity necessary to protect the privilege. "Use" immunity guarantees only that the testimony and evidence obtained by use of the testimony will not be used.[25] "Transactional" immunity, on the other hand, serves as an absolute bar to prosecution of offenses testified to.[26] The government contended that use of immunity, granted under the Federal Immunity Act of 1868,[27] was sufficient to protect the Fifth Amendment right.

The Court rejected this argument and ordered to be discharged a witness who was in custody for refusal to answer questions after the statutory immunity was granted. The Court's opinion in part read:[28]

> [W]e are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.

Very shortly after the Counselman decision, Congress drafted a transactional immunity statute designed to protect a person compelled to testify from prosecution:[29]

> ...for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence.

In a 1964 case, Murphy v. Waterfront Commission,[30] the Supreme Court indicated that at least in some circumstances a grant of transactional immunity was not required. Murphy involved the possible federal use of evidence obtained after state immunity was granted in a state investigative hearing. After holding that a state cannot compel testimony from a witness threatened with subsequent federal prosecution, the Court concluded:[31]

> [I]n order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. (Emphasis added)

In the 1972 case, Kastigar v. United States,[32] the Supreme Court upheld the constitutionality of Title II of the Organized Crime Control Act of 1970,[33] which provided only for use immunity. Thus, a witness compelled to testify subsequently could be prosecuted but no direct or indirect use of the witness' compelled testimony could be made. The Court held the statute valid on the ground that transactional immunity affords broader protection than the constitutional privilege requires, and thus,[34]

> ...such immunity from use and derivative use is co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.

The Court warned, however, that although the witness can be prosecuted, incriminating evidence must be secured from a legitimate source wholly independent of the compelled testimony.[35]

Chapter 621C, Hawaii Revised Statutes, provides for transactional and use immunity except in a prosecution for an offense arising out of a failure to comply with directions to testify or produce evidence, or for perjury committed while testifying under the grant of immunity.[36] Enacted in 1971,[37] this provision in part reads:[38]

> A witness who asserts his privilege against self-incrimination before a court or grand jury may be directed to testify or produce other information as provided in this chapter. He shall not thereafter be excused from testifying or producing other information on the ground that his testimony or other information required of him may tend to incriminate him, but he shall not be prosecuted or punished in any criminal action or proceeding for or on account of any act, transaction, matter or thing concerning which he is so directed to testify or produce other information, except that he may be prosecuted for perjury or any other offense constituting a failure to comply with such direction. (Emphasis added)

"Other information" mentioned in the provision above includes:[39]

> ...any book, paper, document, record, recordation, tangible object or other material.

No Hawaii case to date has addressed the application of chapter 621C. Convention discussion may possibly focus on the strengths and weaknesses, if any, of the extension of federal protection by transactional immunity as provided for in this state.

The Boundary of Protected "Testimonial" Activity. "To be a witness" means the act of testifying or giving testimony. In a 1966 case, Schmerber v. California,[40] the U.S. Supreme Court limited the privilege to evidence that is testimonial or communicative in nature. The privilege offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in Court, to stand, to assume a stance, to walk, or to make a particular gesture.

The Convention might consider expanding the scope of testimonial activity, as seemingly powerful minorities of the U.S. Supreme Court in 2 cases have proposed,[41] and as one commentator has alluded to.[42] The Convention also might weigh the interests of society against that of the accused under the Schmerber formulation. At least one commentator has placed greater weight on the interests of the government in getting the information required to fulfill its responsibilities in today's "complex society". He has drawn up a proposed federal constitutional amendment which reads in part:[43]

> The clause of the fifth amendment to the Constitution of the United States, "nor shall be compelled in any criminal case to be a witness against himself," shall not be construed to prohibit:
>
> > Requiring a person lawfully arrested for or charged with crime to identify himself and make himself available for visual and auditory investigation and for reasonable scientific and medical tests, provided the assistance of counsel has been afforded except when urgency otherwise requires.

Compulsory Production of Documents. Certain documents, such as business records, letters, or a diary, may be testimonial or communicative and can be as incriminating as the spoken word. The historic function of the privilege has been to protect a natural individual from compulsory incrimination through the individual's own testimony or personal records.[44]

The suggestion that private papers were shielded from forced disclosure first was made in the 1886 case, Boyd v. United States.[45] Since that time, the Court has held that the Fifth Amendment does not bar production of records not in defendant's possession.[46] In 2 recent cases, Fisher v. United States[47] and Andresen v. Maryland,[48] the Court has announced that the privilege does not apply to the forcible seizure, with valid search warrants, of an attorney's incriminating business records from the attorney's office.

While the Andresen decision appears to recognize the incriminatory effect of seized documents, it nevertheless draws a distinction between the methods used to discover evidence. The Court explains that the Fifth Amendment privilege covers production of evidence by subpoena but not procurement by seizure. The Court appears to reason that a lawful search does not involve "compulsion" because the witness is not forced to:[49]

> ...aid in the discovery, production, or authentication of incriminating evidence.

In effect, the Andresen and Fisher decisions appear to limit Boyd significantly by refusing to find any suggestion of compulsion in the lawful seizure of papers. While it may be true that an individual is not forced to perform the testimonial act of producing papers seized pursuant to a valid search warrant, in his dissenting opinion Justice Brennan concludes that a search warrant, like a subpoena, merely is a means of using the legal process to force a person to disclose self-incriminating knowledge:[50]

> [A] privilege protecting against the compelled production of testimonial material is a hollow guarantee where production of that material may be secured through the expedient of search and seizure.

The Convention might explore whether the Andresen and Fisher rule appear to detract from "fair consideration" of the impact of the seizure or compulsory production of documents on one's right to remain silent. On the other hand, the Convention also might consider whether the Boyd decision perhaps was a literal reading of the amendment and unsupported by any sound policy. One commentator has drafted a U.S. constitutional amendment which excludes both subpoenas and search warrants from Fifth Amendment protection and is not limited to incriminating documents:[51]

> The clause of the fifth amendment to the Constitution of the United States, "nor shall be compelled in any criminal case to be a witness against himself," shall not be construed to prohibit:
>
> > Compulsory production, in response to reasonable subpoena or similar process, of any goods or chattels, including books, papers and other writings.

Since it appears to be clear, however, that a state constitutional amendment must at least comport with the United States Supreme Court standards, convention proposals may not filter in standards set below what Andresen and Fisher require. The proposed amendment above seems to reach beyond the factual limitations in the 2 cases, that of affording Fifth Amendment protection against subpoenas limited to documentary evidence.

"Target" Witness vs. "Ordinary" Witness. In a 1976 case, Garner v. United States,[52] which involved incriminating information on an income tax return, the Court held that where an ordinary witness, one not an accused, answers the questions of a government official, the witness' responses conclusively are deemed voluntary or not compelled because there is no inquisitorial process directed against such witness. The Court further held, however, that a witness may lose the benefit of the privilege without making a knowing and intelligent waiver. Thus, a witness who is unaware that the witness can refuse to answer incriminating questions apparently cannot later argue for suppression of testimony on the ground that the witness did not knowingly and intelligently waive the privilege.

The Court did not appear to desire limitation of Garner's rights to taxpayer cases alone. The Garner test, however, may not be adaptable to grand jury proceedings. The fact that a witness is subpoenaed to testify before a grand jury often suggests some suspicion on the part of the government that the witness is implicated in illegal activities. Thus, the witness may be a probable defendant and would seem to be entitled to protections more analogous to those of an accused than those of an ordinary witness.

In a 1976 case, United States v. Mandujano,[53] however, the Court appeared to indicate willingness to apply the Garner rule to all grand jury witnesses, whether or not the prosecutor knows that the witness' answers may incriminate the witness. This indication was suggested in a 1977 case, United States v. Washington,[54] in which the Court held that:[55]

> ...witnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential defendant warnings add nothing of value to protection of Fifth Amendment rights.

Convention discussion might focus on expanding the Miranda safeguards to include target witnesses or virtual defendants in grand jury proceedings, or at the very least, that the target witness be advised of the witness' right to refuse to answer questions. Another possible topic for discussion is to grant

formal immunity to the target witness in a grand jury proceeding. The Convention also may wish to explore the possibility of requiring warnings under the due process clause to insure fair proceedings. This proposal was rejected as unnecessary in a 1977 case decided by the United States Supreme Court, United States v. Wong.[56]

Imposition of Burdens upon the Exercise of the Privilege. A person has the right to assert the privilege and remain silent without suffering any penalty for such silence. "Penalty" in this context means the imposition of any sanction which makes assertion of the privilege "costly" and is not restricted to a fine or imprisonment.[57]

In economic penalty cases, the threat of being fired or losing government licenses or contracts for refusal to testify compels a person to incriminate oneself. In a 1973 case, Lefkowitz v. Turley,[58] the Court held that a witness cannot be forced to execute a waiver of immunity prior to testifying by the threat of job loss. In a 1968 case, however, Gardner v. Broderick,[59] the Court had held that a state employee can be fired for failure to answer questions relating to the performance of the employee's official duties.

In a 1976 case, Baxter v. Palmigiano,[60] the Court held that a prison disciplinary board permissibly may draw an inference of guilt from an inmate's refusal to testify. The Court distinguished Griffin v. California,[61] which had held that neither the prosecutor nor the judge could urge the jury to draw such an inference from a criminal defendant's refusal to testify at the defendant's trial. Although the Court appeared to recognize the inherent compulsion in the prison board's drawing of an adverse inference, it was not the same type of penalty prohibited by the Fifth Amendment. Since only a civil proceeding was involved, no compelled testimony was being used against the accused in a criminal proceeding.

These announcements by the Court apparently stand in sharp contrast to the view expressed in a 1967 case, Spevack v. Klein,[62] where the Court held that an attorney who refused to testify at a bar disciplinary proceeding could not be penalized by disbarment for invoking the privilege. The Court explained

that "penalty" is not restricted to fine or imprisonment. It means the imposition of any sanction which makes assertion of the Fifth Amendment privilege costly.[63]

The Convention may wish to debate the merits and drawbacks, if any, of the Gardner formulation. At least one commentator has proposed the following U.S. Constitutional amendment:[64]

> The clause of the fifth amendment to the Constitution of the United States, "nor shall be compelled in any criminal case to be a witness against himself," shall not be construed to prohibit:
>
> > Dismissal, suspension, or other discipline of any officer or employee of the United States, a state, or any agency or subdivision thereof, or any person licensed by any of them, for refusal, after warning of the consequences, to answer a relevant question concerning his official or professional conduct in an investigation relating thereto, or the introduction in evidence of any answer given to any such question, provided that such person shall have been afforded the assistance of counsel.

The Convention may wish to explore the strengths of the societal interest involved and the apparent fairness of the disciplinary process at issue in the Baxter case. No Hawaii statute, court rule, or judicial authority has addressed this issue.

Interrogation, Confessions, and Incriminating Statements

At common law, a confession was required to be voluntary as a matter of evidence law, and in a 1936 case, Brown v. Mississippi,[65] this became a requirement of due process of law. Initially, the decisions stressed the unreliability of an involuntary confession, but later cases argued that the due process prohibition against use of an involuntary confession rests upon more than a desire to assure reliability. This prohibition, much like the privilege against self-incrimination, rests upon the premise that coercing a person to give testimonial evidence later used to convict that person of a crime is inconsistent with the required respect for that person's dignity as a human being, whether or not the evidence is a reliable indicator of guilt.

In the 30 years following the Brown case, the "voluntariness" doctrine developed. In a 1961 case, Culombe v. Connecticut,[66] the Court held that even in the absence of force or threats, a statement will be involuntary if, considering the totality of the circumstances, the defendant's will as to whether or not to confess was overborne. It is necessary to consider the pressures upon the defendant, whether intentionally applied or not, and the defendant's own subjective characteristics that affect defendant's ability to resist. This requires consideration of characteristics such as age, sex, physical health and strength, psychological condition, education, and prior experience with the law.

One aspect of the voluntariness test which might render a confession involuntary are promises of benefit by a person in authority. Another aspect of the voluntariness test, deceit during interrogation, however, might not render a confession involuntary.

In the landmark 1966 case, Miranda v. Arizona,[67] the United States Supreme Court concluded that the traditional voluntariness test was inadequate to protect those accused from the subtle danger posed by custodial interrogation. It also was the first case to hold that the privilege against self-incrimination applied to police interrogation techniques.

It may be noted that the Miranda requirements are separate and distinct from the voluntariness rule, although the 2 may overlap, as where both a waiver of Miranda rights and the statement are challenged as involuntary. In that situation, the waiver must be voluntary in the same sense that a confession must be, except that the court has indicated that a waiver induced by trickery would be involuntary. Thus, the standard for a "voluntary" waiver appears to be stricter than that applicable under the voluntariness test for statements.

Special problems in applying Miranda involve the concept of "custody" under Miranda, the right of the police to reapproach the defendant, and the prohibition against use of illegally obtained statements for impeachment purposes.

Convention Review

Due Process Requirement of Voluntariness: Promises of Benefits by Person in Authority. In a 1964 case, Malloy v. Hogan, the Court held that a statement is "involuntary" as violative of the Due Process Clause if it has been obtained "by direct or implied promises".[68] It is not entirely clear, however, what promises are sufficient to invalidate a confession. A confession or statement may be involuntary if made in response to representations that such a statement would benefit the defendant in the case.[69] Thus, in a 1963 case, Shotwell Mfg. Co. v. United States, the Court held:[70]

> It is of course a constitutional principle of long standing that the prosecution "must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment.

If the interrogators merely encourage the defendant to tell the truth, however, this is not a promise of a specific benefit and has no effect upon the admissibility of the statement.[71] Although Hawaii appears to have adhered to the Miranda pronouncements and thus appears to have "relegated" the voluntariness standard to secondary status, the Convention nevertheless may wish to discuss what promises may be sufficient to invalidate a confession.

Deception under the Voluntariness Standard. The U.S. Supreme Court has held that interrogation intentionally deceiving the defendant will not, by itself, invalidate an otherwise admissible statement.[72] Deception is, however, a factor that may be taken into consideration in determining whether the situation considered as a whole caused the defendant's will to be overborne.[73]

The Court also has appeared to suggest that a waiver must be voluntary in the same sense that a confession must be, except that the Court has indicated that a waiver induced by trickery would be involuntary.[74]

The American Law Institute's Model Code of Pre-Arraignment Procedure appears to condemn the use of deceptive techniques in eliciting incriminating statements. Its model provision in part reads:[75]

> No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise cooperate by:
>
> * * *
>
> (b) any...method which, in light of such person's age, intelligence and mental and physical condition, unfairly undermines his ability to make a choice whether to make a statement or otherwise cooperate.

The Convention may wish to discuss the question of extending the protection of the voluntary waiver rule, which does not appear to allow the use of deceptive police techniques to elicit incriminating statements, to the voluntary confession standard.

The Concept of "Custody" under Miranda. "Custody" consists of a deprivation of liberty under the Miranda formulation. It need not occur in the police station.[76] Miranda applies to a person detained and interrogated in the person's own bedroom.[77] Questioning a suspect in a police station, however, has been held not to be custodial as the suspect remains "free to leave".[78] Moreover, the Court has held that no "custody" is involved where 2 "special agents" of the Internal Revenue Service interviewed an individual at the individual's home and failed to give him the Miranda warnings, although their suspicions had focused upon him as the suspect in a tax fraud case.[79] The fact that suspicion had focused on the individual is not controlling.

The delegates may wish to discuss the Supreme Court's apparent limitation upon the scope of the "custody" concept. The Court presently appears to require actual arrest before Miranda warnings may be given. The American Law Institute's Model Code of Pre-Arraignment Procedure provides that lesser warnings than that required under Miranda would suffice when a suspect is not in custody but is subjected to a highly coercive atmosphere:[80]

> (2) Questioning of Suspects: Required Warning. If a law enforcement officer, acting pursuant to this Section, suspects or has reasonable cause to suspect that a person may have committed a crime, he shall, as promptly as is reasonable under the circumstances and in any case prior to engaging in sustained questioning of that person, take such steps as are reasonable under the circumstances to make clear that no legal obligation exists to respond to the questioning. If the questioning takes place at a police station, prosecutor's office, or other similar place, the person to be questioned shall first be informed that he may promptly communicate with counsel, relatives or friends, and that counsel, relatives or friends may have access to him as provided in Section 140.7.
>
> (3) Warning to Persons Asked to Appear at a Police Station. If a law enforcement officer acting pursuant to this Section requests any person to come to or remain at a police station, prosecutor's office or other similar place, he shall take such steps as are reasonable under the circumstances to make clear that there is no legal obligation to comply with such request.

Mr. Justice Brennan in a dissenting opinion said that interrogation under conditions having the practical consequences of compelling the taxpayer to make disclosures, and interrogation in "custody" having the same consequence, are "peas from the same pod". He favors a 3-part test in finding unlawful coercion:[81]

> Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without prior warnings. (Emphasis added)

Right of Police to Reapproach Defendant. In Miranda, the Court ruled that if a person in police custody indicates in any manner, at any time prior to or during questioning, that the person wishes to remain silent, the interrogation must cease.[82] This rule, however, does not squarely decide whether successive police interrogations, each conducted after the proper Miranda warnings, are permissible. This ambiguity appeared to be resolved in a 1975 case, Michigan v. Mosley,[83] in which the Court held that when police seek to question a suspect concerning one crime and the suspect indicates no desire for a lawyer but refuses to discuss that crime, officers later may reapproach the suspect and ask if the suspect would be willing to discuss another crime, as

long as this is done in a noncoercive manner. Whether police may reapproach a suspect and ask that the suspect reconsider refusal to talk until a lawyer is present is undecided.

The Convention may consider the fashioning of guidelines regarding the resumption of questioning. Justice Brennan, dissenting in Michigan v. Mosley, stated:[84]

> The fashioning of guidelines for this case is an easy task. Adequate procedures are readily available. Michigan law requires that the suspect be arraigned before a judicial officer "without unnecessary delay," certainly not a burdensome requirement. Alternatively, a requirement that resumption of questioning should await appointment and arrival of counsel for the suspect would be an acceptable and readily satisfied precondition to resumption. Miranda expressly held that "[t]he presence of counsel...would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege (against self-incrimination)." The Court expediently bypasses this alternative in its search for circumstances where renewed questioning would be permissible.

Prohibition Against Use of Illegally Obtained Statements for Impeachment Purposes. Under the Miranda guidelines, if the police failed to give warnings and obtain a waiver, the prosecution would be barred from using any statements of the accused, whether inculpatory or exculpatory, either in its case-in-chief or on cross-examination.[85] In Harris v. New York,[86] however, the Court rejected this approach. It appeared to narrow the scope of the Exclusionary Rule by allowing illegally obtained statements to be admitted for impeachment purposes if the defendant chooses to testify in defendant's own defense.

In a 1971 case, State v. Santiago,[87] the Hawaii Supreme Court rejected the Harris v. New York holding and applied the earlier protections secured by Miranda. The Hawaii Court ruled that Article I, section 8, of the Hawaii Constitution made statements inadmissible under the Miranda rules inadmissible for any purpose, including impeachment. At least 3 state supreme courts have followed the Hawaii approach, 2 of them providing protection under their state constitutions, and the third court finding protection under a state statutory guarantee.[88]

The delegates may wish to consider whether the ascertainment of truth through presentation of as much pertinent evidence as possible outweighs the policy considerations such as police deterrence.

Delay in Presentation. The Supreme Court has held that any statement given by a defendant in custody made before defendant has been taken before a magistrate, as required by Rule 5(a) of the Federal Rules of Criminal Procedure, is inadmissible if, at the time of the statement, the delay had become "unreasonable". This is the McNabb-Mallory rule.[89] It is not a constitutional decision, and is not binding upon the states.

The McNabb-Mallory rule has been modified by a federal statute which directs that a confession made within 6 hours of arrest or detention be admitted if found to be voluntary, despite delay in presenting the suspect before a magistrate.[90]

Hawaii has a prompt arraignment statute which imposes a 48-hour time limit within which a person arrested must be produced before a magistrate.[91] The Hawaii Supreme Court, however, appears to have loosely interpreted the term "unlawful detention" under that statute. In a 1964 case, Kitashiro v. State,[92] the Court rejected defendant's contention that a confession was inadmissible as it was obtained following unlawful arrest and during detention in excess of the 48-hour time limit. The decision turned upon the "voluntariness" of the confession and the presence of counsel:[93]

> It remains the rule in this jurisdiction that a confession obtained during unlawful delay between arrest and production before a magistrate is not ipso facto inadmissible.... [I]rrespective of the lawfulness or unlawfulness of the arrests and subsequent detention under the rule applicable in this jurisdiction it is decisive of this branch of the case that that confession plainly was voluntary and there was no denial of the right to counsel.

The Convention may wish to determine whether a confession "absolutely" is inadmissible if obtained following arrest and during detention in excess of the 48-hour time limit.

PART III. THE RIGHT TO HAVE ASSISTANCE OF COUNSEL

Section 11 of Article I of the Hawaii Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days.

The first part of this provision was copied verbatim from the Sixth Amendment of the U.S. Constitution and is thus intended to give the state the benefit of federal decisions construing the same language.[94] The last sentence was added by the 1968 Constitutional Convention to expand the rights granted under previous U.S. Supreme Court decisions (see below).[95] The right of a defendant to retain privately the services of counsel in criminal trials has rarely been a subject of litigation,[96] and the U.S. Supreme Court has characterized the right as "unqualified".[97] A "necessary corollary" of that right is the right to be granted a reasonable opportunity to employ and consult with counsel.[98]

Most cases dealing with the right to counsel provision have been centered around the duty of the state to appoint counsel, at its expense, to assist the indigent defendant.[99] Expansion of the right to counsel in this area began primarily in 1932 when the U.S. Supreme Court in Powell v. Alabama[100] held that the Due Process clause of the Fourteenth Amendment required the states to appoint counsel to indigent defendants in certain capital cases. In Gideon v. Wainwright,[101] the Court held that the states must make appointed counsel available to indigent defendants in all criminal cases. Because this right was thought to apply only to felony prosecutions,[102] the 1968 Constitutional Convention amended section 11 of the Hawaii Constitution to provide for all indigent defendants "charged with an offense punishable by imprisonment for more than sixty days".

In 1972, the U.S. Supreme Court in Argersinger v. Hamlin[103] held that the right to appointed counsel applied to indigent defendants even in misdemeanor cases, where there is a possibility of imprisonment. A defendant not represented by counsel may not be imprisoned for any length of time, even

though the law permits it.[104] Whether this right presently extends or will be extended to civil cases that impose imprisonment or to criminal cases that do not impose imprisonment but impose, for example, a heavy fine, is not clear. The *1968 Convention did not extend the right to nonimprisonment cases*, possibly out of a concern over the potential costs of providing counsel for so many indigent defendants.[105]

In general, the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against the defendant.[106] It is this point that marks the commencement of the "criminal prosecution" to which the guarantees of the Sixth Amendment apply. Once the adversary judicial proceedings have been initiated, appointed counsel is necessary for all those "critical" stages of the criminal proceedings "where substantial rights of a criminal accused may be affected"[107] and therefore where the "guiding hand of counsel"[108] is necessary to protect those rights. Besides a trial, the right to counsel has been held applicable to such "critical" stages as at post indictment lineups[109] and arraignments.[110]

The basic rationale behind the Sixth Amendment right to appointed counsel in criminal proceedings is that because a lay person is unfamiliar with the complexity of the law, an unrepresented defendant would have to face an experienced prosecutor without the knowledge and skills with which to prepare adequately a defense.[111] A defendant may be convicted "because he does not know how to establish his innocence".[112] The assistance of counsel, then, is necessary to assure a fair trial. Furthermore, the Sixth Amendment is applied to certain stages of the pretrial proceedings because the law enforcement machinery often involves "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality".[113]

These "critical stages", however, include only those "trial-like" confrontations where the defendant is faced with the "intricacies of the law" or the possibility of being overpowered by a skilled prosecutor.[114] Thus, for example, although the Sixth Amendment requires the presence of counsel at post indictment lineups (see above), it does not require counsel at photographic

displays conducted (in the absence of the accused) to identify the offender because it does not involve a "confrontation" of the accused and the prosecutorial process.[115] Even where such a confrontation may be involved, the Sixth Amendment does not require the presence of counsel where the subsequent trial would cure any defects which might arise from the confrontation.[116] In this way, the taking of fingerprint, hair, clothing, and blood samples from the defendant were not deemed "critical" where the procedures are standardized and the knowledge of the techniques is sufficiently available so that the government's case can be adequately challenged during cross-examination at trial and by the presentation of expert witnesses for the defense.[117] Similarly, the taking of handwriting samples from the accused would not be a critical stage of the criminal proceedings since the samples can be challenged at trial by presenting more handwriting samples for analysis and comparison.[118]

The Sixth Amendment is not the only constitutional provision that guarantees a right to appointed counsel. The right may be held necessary to protect other constitutional rights[119] or to insure a fair hearing as required by the Due Process Clause of the Fifth and Fourteenth Amendments of the U. S. Constitution.[120] In addition, it is possible that the right to appointed counsel may be based, in some contexts, on the Equal Protection Clause of the Fourteenth Amendment.[121]

The right to the assistance of counsel may be waived by the defendant if it is voluntarily and knowingly made.[122] The accused, however, cannot be "threatened, tricked, or cajoled" into a waiver.[123] Waiver will not be lightly presumed and a trial judge must "indulge in every reasonable presumption against waiver",[124] regardless of whether it is made at trial or at some "critical" pretrial proceeding.[125] Furthermore, the record must show that the accused was advised of the right to counsel (and at no cost if the accused was indigent) but clearly declined to exercise the right.[126] Finally, the state has the burden of proving that the defendant voluntarily and intelligently waived counsel.[127]

It is clear that the courts have set high standards in this area and require that the accused be fully aware of the ramifications of refusing the

assistance of counsel. The trial judge, before accepting the waiver, must make an effort to "explain what his rejection of counsel really entails",[128] which may include an explanation of the nature of the charges, the statutory offenses included within them, the range of possible punishments, possible defenses, and other facts which give the accused a "broad understanding of the whole matter".[129] There are no rigid formulas to follow in determining whether a defendant has made a valid waiver, and the courts must look to the totality of the facts and circumstances of each case. Relevant factors might include age, education, mental capacity of the defendant,[130] the background and experience of the defendant, and the defendant's conduct of the alleged waiver.[131]

Waiver of Counsel and the Right to Proceed Pro Se

Although an accused was permitted to waive counsel at pretrial proceedings,[132] it was not clear until 1975 whether a defendant had a constitutional right to dispense with counsel at trial and proceed pro se, that is, to represent oneself.[133] For Hawaii and the other states in the federal Ninth Circuit, the right to represent oneself was long held to be constitutionally protected,[134] but this had not been universally accepted.[135]

In 1975, the U.S. Supreme Court in Faretta v. California[136] held that the right of self-representation is guaranteed by the Sixth Amendment of the U.S. Constitution. The Court found that the right had a historical justification in the English and colonial jurisprudence from which the Sixth Amendment emerged. Moreover, although there was no explicit language in the Constitution guaranteeing this right, the Court thought it was "necessarily implied by the structure of the Sixth Amendment".[137] The Court noted that the guarantees of the Sixth Amendment (e.g., right to jury trials, right to a speedy trial, etc.) are given directly to the "accused", not to the accused's counsel. Likewise, the Sixth Amendment speaks of the "assistance" of counsel, which indicate that counsel "shall be an aid to a willing defendant--not an organ of the state interposed between an unwilling defendant and his right to defend himself personally".[138] An unwanted counsel does not really "represent" the defendant, and so the defense presented by such counsel would not be the

"defense guaranteed by the Constitution, for, in a very real sense, it [would not be] his defense".[139]

The Court recognized that this decision seemed to be inconsistent with prior decisions[140] that declared the assistance of counsel to be essential to insure a fair trial. For if counsel is necessary to a fair trial, how can a defendant who proceeds without one be justly convicted? The Court felt, however, that the founders of the Constitution placed a higher value on the right of free choice and that choice must be honored, even if it ultimately leads to the defendant's detriment. Moreover, when counsel is forced on an unwilling and uncooperative defendant, the "potential advantages of a lawyer's training and experience can be realized, if at all, only imperfectly".[141] In some cases (e.g., where the defendant is represented by harassed and overworked public defenders), the defendant may even be able to conduct a more effective defense. Since the defendant, and not the lawyer or the state, will bear the consequences of conviction, the defendant must be free to decide "whether, in his particular case counsel is to his advantage".[142]

As in other contexts, when the pro se defendant waives counsel, the waiver must be "knowing and intelligent".[143] Thus, the defendant should be made aware of the nature of the charges and the penalties involved,[144] and basic rights should be discussed.[145] The defendant need not have the skill and experience of a lawyer in order to make a valid waiver, but "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open".[146]

The waiver, however, must be both timely and unequivocal: timely, in order to assure the judicious and orderly conduct at trial;[147] unequivocal, so that the defendant cannot later turn around and claim that counsel was not really waived.[148] Further, the right of self-representation "is not a license to abuse the dignity of the courtroom" and a court may terminate self-representation if the defendant "deliberately engages in serious and obstructionist conduct".[149]

Effective Assistance of Counsel

The right to the assistance of counsel carries with it the guarantee that such assistance be effective.[150] The right to the effective assistance of counsel is protected not only by the U.S. Constitution, but by the Hawaii Constitution as well.[151]

What constitutes a denial of the effective assistance of counsel is not entirely clear, since the U.S. Supreme Court has yet to squarely deal with the issue. Traditionally, the lower courts have asked whether the conduct of counsel was so inadequate as to render the trial a "farce" or a "mockery of justice",[152] which generally meant that courts would find that a defendant was denied the effective assistance of counsel only in the most extreme cases. Although the federal Court of Appeals for the Ninth Circuit (which includes Hawaii) still abides by this permissive standard,[153] the Supreme Court of Hawaii has followed the trend followed by most of the other federal Courts of Appeals[154] and by many state courts[155] to adopt a more stringent standard: to be "effective", counsel's assistance must be "within the range of competence demanded of attorneys in criminal cases".[156] This involves a 2-step process. First, the conduct of the counsel must be examined to determine whether it appears to be unreasonable. Second, this conduct, if it seems to be unreasonable, will be examined further to determine "whether counsel's action was the result of informed judgement or constitutionally inadequate preparation".[157] If counsel's action, viewed as a whole, appears to be reasonable, or if although appearing to be unreasonable is the result of an informed judgment, ineffective assistance of counsel will not be found.[158]

A primary requirement of an effective counsel is that counsel "conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf,...both at pretrial proceedings...and at trial".[159] This necessarily means that the defendant's lawyer must be allowed adequate time to prepare for the trial. When counsel is appointed late, the lack of sufficient time to prepare may be held to be a denial of the effective assistance of counsel.[160] The length of time counsel had to prepare, however, "is not, per se, dispositive of the

issue",[161] and prejudice to the defendant's case must be shown in order for the defendant to successfully claim a denial of the effective assistance of counsel.[162] When a defendant at trial objects to counsel on the basis of inadequate representation, the trial judge must hold a hearing to determine the merits of the defendant's objection.[163] At its discretion, the trial court may order a change in court-appointed counsel, and may postpone the trial in order to allow the new counsel to prepare. The Court, however, is generally not required to do either,[164] and a defendant will not be permitted to "impede the course of justice or blockade the orderly flow of business in our court system".[165]

A lawyer may represent 2 or more defendants at the same time, as long as there is no conflict of interest between the defendants. Where there is a conflict of interest, the co-defendants are deemed to have been deprived of the effective assistance of counsel, regardless of whether the defendants can show prejudice to their cases.[166] The test for determining whether joint representation deprived one or both defendants of effective counsel is: "did the representation deprive either or both of the defendants of the undivided loyalty of counsel? Did counsel have to, or did he in fact 'slight the defense of one defendant for that of another'?"[167]

Government or court action may also form the basis for a claim that the defendant was denied effective counsel. For example, gross surreptitious governmental infiltration ("spying") into the legal camp of the defense during or in preparation of a trial may violate this right.[168] Court restrictions that prevent defense counsel from fully and fairly participating in the adversary fact-finding process may likewise be held a denial of the effective assistance of counsel. Thus, for example, restrictions on the right of counsel to decide when the defendant would take the stand or which prohibit counsel from putting the defendant on the stand, or which prohibit counsel from making a closing summation may be held invalid.[169] Further, a judge's unwarranted remarks which demean the defendant's counsel in the presence of the jury may also compromise the defendant's right to the effective assistance of counsel.[170]

Other Types of Assistance

The U.S. Supreme Court has held that free transcripts must be provided for indigent defendants appealing from various proceedings[171] and cannot be conditioned on a prior determination that the appeal is not frivolous.[172] Free transcripts may be required even in certain cases where the defendant is not seeking to appeal from the transcribed proceedings but instead requests the transcripts to prepare for trial.[173]

Defendants may also under certain circumstances be granted an allowance for investigative expenses or the appointment of an investigator in order to assure effective preparation by the defendant's attorney.[174] In addition, under section 802-7 of the Hawaii Revised Statutes, the state may provide for investigative, expert, or other services upon a showing that they are necessary for an adequate defense and that the defendant is otherwise financially unable to obtain them.

Effective Assistance and the Pro Se Defendant

If a defendant's conviction can be challenged on the ground of the denial of the effective assistance of counsel, can a pro se defendant raise a similar claim? That is, where a conviction can be overturned because the performance of the defendant's counsel was of such a minimal quality as to deny the defendant the effective assistance of counsel, can a conviction be similarly overturned where the performance of a pro se defendant was so incompetent as to deny the defendant of a similar right? The U.S. Supreme Court has indicated that the pro se defendant does not have a right to effective representation,[175] and so, unlike a defendant represented by counsel, a defendant who proceeds pro se cannot later complain of a violation of the Sixth Amendment right to counsel because of "bad tactics, errors of judgement, lack of skill, mistake, carelessness, incompetence, inexperience, or failure to prepare when the opportunity was available".[176] Presumably, the rationale is that, having "knowingly and intelligently" waived the assistance of experienced and learned counsel, the defendant knew and accepted the possibility that the defendant's

lack of experience and training would seriously hamper the effectiveness of the defense. The defendant must therefore choose between the assistance of counsel, who must meet a minimum competency standard, and proceeding pro se, which has no minimum standard at all.[177]

A related problem lies in the situation in which the pro se defendant is jailed before the trial. In this type of case a critical question is whether there exists a constitutional right to an adequate opportunity to prepare. If an unrepresented defendant operates under severe handicaps at trial, an uncounseled defendant who has not been allowed to adequately prepare is surely at an even greater disadvantage. Although there are no relevant cases which have directly addressed this issue, at least one commentator strongly suggests that the U.S. Constitution requires that a jailed pro se defendant be allowed to adequately prepare for trial. There is a practical problem of granting such a right, however, as jails are ill-equipped to provide the services and materials necessary to prepare a defense (e.g., an adequate law library), or the manpower to supervise prisoners who must use outside facilities or who want to conduct outside investigations.[178]

Standby Counsel

The appointment of standby counsel for those indigents who choose to represent themselves has been suggested as a possible solution to many of the problems outlined above.[179] Standby counsel can aid the jailed indigent defendant by making the necessary preparations for a defense (e.g., legal research, witness interviews, etc.) that the defendant would be prevented from doing. Further, standby counsel can help meet the problem of assuring the pro se defendant of an adequate defense. Instead of a "sink or swim" approach, the pro se defendant would be able to conduct a more competent defense with the advice and guidance of the standby counsel. In addition, if a pro se defendant's right to self-representation is terminated for disruptive conduct, or if the defendant begins to realize in mid-trial that the case is too complicated to handle, the standby counsel can quickly assume the conduct of the trial, with little or no disturbance to the proceedings. The use of standby counsel has

been recommended by the American Bar Association,[180] especially where the trial is long or complicated, or involves multiple defendants. No court seems to have accepted the view that there is a right to standby counsel.[181] Many courts, however, commonly appoint such standby counsel,[182] but only at their discretion.[183]

In the area of the right to counsel, the Convention may wish to consider the following issues:

(1) Whether a pro se defendant should have the right to be able to adequately prepare for trial.

(2) Whether a right to standby counsel for indigent pro se defendants should be guaranteed by the Hawaii Constitution.

(3) Whether a pro se defendant is entitled to certain minimum standards of competency.[184]

(4) Whether the right to counsel should be expanded to other contexts that involve substantial detriment to the defendant (e.g., at civil trials where imprisonment is imposed or at criminal trials where heavy fines are imposed).[185]

PART IV. NATURE AND CAUSE OF THE ACCUSATION

The Sixth Amendment to the U.S. Constitution and section 11 of Article I of the Hawaii Constitution both provide:

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation;...

This provision was adopted by the 1950 Constitutional Convention but was not discussed at the 1968 Convention. The 1950 Convention reported that Article I, section 11:[186]

> ...will give to this State the benefit of the decisions of the Federal Courts construing the same language,...

The United States Supreme Court has not held that this Sixth Amendment right is applicable to the states.

The effect of the constitutional right to be informed of the nature and cause of the accusation commences with the statutes fixing or declaring the crime.[187] The Hawaii Supreme Court has held:[188]

> It is necessary in...criminal offenses, that the indictment, information or complaint, set forth all the essential facts, ingredients and elements of the offense charged, with certainty, and describe and identify the same sufficiently to put the defendant on notice as to what he is required to defend.

The reason for requiring that the accusation be certain, definite, and specific is so the accused will be able to prepare intelligently the accused's defense and to prevent the accused from being tried a second time for the same offense after being once put in jeopardy.[189]

In a 1967 case, State v. Taylor,[190] the Hawaii Supreme Court applied a test similar to that announced by the Court in Territory of Hawaii v. Henriques. The Court quoted with approval a 1952 United States Supreme Court case, Boyce Motor Lines v. United States,[191] and applied the following statement in upholding a Hawaii penal statute which prohibited the depositing of any goods, wares, or merchandise upon city sidewalks:[192]

> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. (Emphasis added)

The Hawaii Supreme Court stated that resort to common understanding and practices as the standard in a penal statute is not prohibited.[193] It went on

to say that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.[194] The Court concluded with a quotation from a 1963 United States Supreme Court case:[195]

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.

PART V. RIGHT OF CONFRONTATION

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....

The above provision is found in the Sixth Amendment of the U.S. Constitution and in section 11 of Article I of the Hawaii Constitution. The Hawaii provision was adopted by the 1950 Constitutional Convention but was not discussed at the 1968 Convention.

The Sixth Amendment right of a defendant to be confronted with the witnesses against defendant was held binding on the states in a 1965 case, Pointer v. Texas.[196] The Model State Constitution provides for a right of confrontation,[197] as do the constitutions of 47 states. The 3 states which do not have this provision are Idaho, Nevada, and North Dakota.

Research does not reveal precisely what the founders of the U.S. Constitution meant when they drafted the confrontation clause,[198] but scholars at least seem to agree that the drafters intended it as a constitutional barrier against such:[199]

> ...flagrant abuses as trial by anonymous accusers.

One commentator has stated that:[200]

> It would appear then that the sixth amendment requires, at a minimum, that the government make at least some efforts to confront the accused with witnesses. To say that the confrontation clause places no control over what evidence the government uses judicially but merely grants to the defendant the right to be present and challenge such evidence as the government chooses to introduce, or the right to call witnesses on his own behalf, is to deny the confrontation clause its intended function.

With regard to the question of defendant's right to disclosure of an informant's identity, an informant can play 2 distinct roles. Which role an informant actually plays determines the extent to which the prosecution constitutionally is required to make information concerning the informant available to the defendant. Where the informant may be the source of information giving an officer probable cause to arrest defendant, the prosecution is not obligated to reveal the informant's identity, because the governmental interest in encouraging informers outweighs the likelihood that the information materially will aid the defendant.[201]

If the informant's testimony is relevant to the issue of guilt and conviction, however, it appears that the government must reveal the informant's identity and address to enable defendant to confront the witness.[202]

In the case of a disruptive defendant, in a 1970 case, Illinois v. Allen,[203] the U.S. Supreme Court held that a defendant who disrupts the courtroom does not have an absolute right to remain present and confront witnesses. The right of confrontation requires only that the trial judge exercise reasonable discretion in determining which means to use to deal with such a person. Some avenues that may be available are:[204]

(1) Binding the defendant and keeping defendant in the courtroom;

(2) Removing defendant from the courtroom for the trial, and perhaps providing defendant with access to the trial, as by a microphone;

(3) Threatening defendant with contempt.

With regard to the use of out-of-court statements, the general rule is that if 2 persons are tried together and one has given a confession that implicates the other, the confrontation clause bars use of that statement, even with instructions to the jury to consider it only as going to the guilt of the "confessing" defendant.[205] Such a statement may be admitted, however, if the co-defendant takes the stand and submits to cross-examination concerning the reliability of the confession.[206] This rule applies even if when the alleged confessor takes the stand, the confessor denies making the confession.[207]

The confrontation clause prohibits use of out-of-court statements of persons not testifying unless the prosecution has made a good-faith effort to secure the attendance of the witness at trial and failed, and the defendant has had an adequate opportunity to subject the witness to sufficient cross-examination to test the accuracy of the statement.[208]

Where out-of-court statements of persons who testify are introduced, such prior statements may be admitted if defendant had an adequate opportunity to test the reliability of such statements by cross-examination at trial, or if the statement was given under conditions providing reasonable assurances of accuracy, such as at a preliminary hearing.[209]

With regard to the waiver of the right to confrontation by pleading guilty, the Supreme Court has recognized that due process requires that the record of the receipt of a guilty plea affirmatively show that the plea was intelligent and voluntary.[210] It also must demonstrate that defendant was aware of defendant's rights at trial and knowingly and intelligently waived them. These rights include the right to a jury trial, the right to confront witnesses, the privilege against self-incrimination, and the right to have guilt proved beyond a reasonable doubt.

The Supreme Court also has recognized that the record must show that defendant was aware of the maximum penalties that might be imposed upon conviction and that defendant understood at least the critical elements of the offense charged.[211] Moreover, the Court has recognized that a plea is involuntary if produced by actual or threatened physical harm or by mental

coercion overbearing the will of the defendant.[212] It appears to be fairly well-settled that a defendant who enters a guilty plea has a right to have that bargain honored.[213] Thus, if the prosecution fails to honor it, defendant is entitled to relief, as by permitting defendant to withdraw defendant's guilty plea.

With regard to the effect of a guilty plea and defendant's later ability to attack the conviction, the United States Supreme Court has recognized that a defendant who pleads guilty nevertheless may attack the conviction by later asserting violation of a right that has nothing to do with defendant's guilt or innocence of the crime.[214]

Most of the controversy involving the right to confrontation has centered around the applicability of that right to particular proceedings. In the state criminal trial area, the U.S. Supreme Court has announced that if a defense investigator testifies at trial, the trial court may at that time order the defense to disclose a report by that investigator, if disclosure is limited to those portions of the report relevant to the investigator's in-court testimony.[215]

With regard to quasi-criminal or noncriminal proceedings, because of apparent differences in the facts of particular cases, the Supreme Court has reached differing results as to whether the right of confrontation is applicable. For example, in employment termination situations, the Supreme Court has affirmed a federal circuit court decision holding that compliance with the Sixth Amendment, including the right to confrontation, is not a prerequisite to the dismissal of a federal employee.[216] The Supreme Court has recognized, on the other hand, that due process guarantees the right of confrontation in connection with a person's application for admission to the practice of law.[217]

Where commission investigations are involved, the Supreme Court on one hand has held that the right of confrontation constitutionally is not required in proceedings by a federal civil rights commission.[218] The Court also has held, however, that where a state labor-management commission of inquiry allegedly made actual findings that specific individuals were guilty of crimes in the labor-management field, due process required the commission to afford a person being

investigated the right to confront and cross-examine the witnesses against the person.[219]

Hawaii appears to have recognized the right of confrontation as early as 1886.[220] In addition to the confrontation clause embodied in the Hawaii Constitution, Hawaii also provides for a statutory right of confrontation.[221]

Very few Hawaii cases have dealt with the confrontation clause. Those that do fall into 2 categories: those which involve the issue of admitting documentary evidence and those which involve the issue of waiver of trial rights by pleading guilty. With regard to the use of documentary evidence, in a 1969 case, State v. Adrian,[222] a hotel cashier was charged with embezzling money belonging to her employer. The state as an essential part of its case introduced letters and receipts submitted by out-of-court witnesses which were marked "paid" and which bore defendant's initials. The Hawaii Supreme Court held that the state failed to make a good faith effort to obtain the presence of absent witnesses, and therefore denied defendant her right to be confronted with the witnesses against her.

In a 1973 case, State v. Faafiti,[223] the Hawaii Supreme Court held that in a prosecution for aggravated battery upon a serviceman, admission of transcribed testimony of the serviceman at the preliminary hearing did not violate defendant's right of confrontation. Its holding rested upon the ground that the witness had been questioned extensively and thoroughly by the defense attorney at the preliminary hearing, and that the state had made a good faith effort to secure the attendance at trial of that witness and had failed.

The Hawaii Supreme Court generally has followed federal law involving the issue of the waiver of the right to confrontation by pleading guilty. Hawaii, however, appears to provide protection above that provided by the federal courts in at least 2 respects. First, under the ruling of a 1974 case, Carvalho v. Olim,[224] the defendant must be informed of the defenses which are available to the defendant. This is not required under federal law. Second, under Rule 11(c)(2) of the Hawaii Rules of Criminal Procedure, the defendant must be able to understand the maximum penalty provided by law, and the maximum sentence

of extended term of imprisonment, which may be imposed for the offense to which the plea is offered. Rule 11(c)(1) of the Federal Rules of Criminal Procedure provides only that the defendant understand the mandatory minimum penalty provided by law, if any, and the maximum penalty provided by law.

PART VI. COMPULSORY PROCESS FOR OBTAINING WITNESSES

Article I, section 11, of the Hawaii Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor;...

This provision is derived from the Sixth Amendment of the U.S. Constitution. Like the right of confrontation, this provision appears to have caused little controversy. Forty-eight states have a compulsory process provision in their constitutions. Only Nevada and New York do not provide for compulsory process. The Model State Constitution contains a compulsory process provision.[225]

Hawaii's constitutional provision on compulsory process has been implemented by a statutory guarantee of compulsory process[226] and a court rule providing substantially the same.[227] Moreover, in a 1970 case, State v. Leong,[228] the Hawaii Supreme Court held that a witness violating an order excluding witnesses from the courtroom still should be allowed to testify to guarantee to the accused the accused's constitutional right to compulsory process for obtaining witnesses. The Court's opinion in part read:[229]

> To hold that the [compulsory process] provision merely gives an accused the right to the issuance of subpoenas to compel attendance of witnesses who may testify in his favor, but that it does not entitle an accused to the testimony of witnesses so subpoenaed because of their actions or behavior in court, we believe, would make this right hollow and worthless.

The defendant's right of compulsory process is a companion and counterpart to the Sixth Amendment right of confrontation. It differs in one

significant respect, however, from the Confrontation Clause. The Confrontation Clause is designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused. Compulsory process, on the other hand, comes into play at the close of the prosecution's case. It operates exclusively at the defendant's initiative and appears to provide the defendant with affirmative aid in presenting defendant's defense.[230]

Until 1967 the United States Supreme Court addressed the Compulsory Process Clause only 5 times.[231] Prior to 1967 some courts implied that compulsory process refers only to the means for securing the attendance of witnesses at trial and that it does not deal with their competence to testify.[232] This narrow view appears to have been put to rest in a 1967 case, Washington v. Texas,[233] in which the United States Supreme Court held that the right to produce witnesses includes the right to have them heard, and that this right is binding on the states.

In the Washington case, the defendant sought to call as a witness a person who had been charged and convicted for participation in the same offense for which defendant was being tried. State law provided that those charged or convicted as participants in the same crime could not testify in favor of each other. The United States Supreme Court held that application of the statute violated defendant's right to compulsory process for securing the attendance of witnesses.

Chapter 8
RIGHT OF PRIVACY

The Origins of the Right to Privacy

The development of a constitutional right of privacy by the U.S. Supreme Court began with the decision Griswold v. Connecticut.[1] There the Supreme Court invalidated a state statute which prohibited the use of contraceptives by married couples. In subsequent decisions, a right of privacy, or "zone of privacy", has been gradually expanded to encompass 3 general types of interests:[2]

(1) The right of an individual to be free in the individual's private affairs from governmental surveillance and intrusion.

(2) The right of an individual to avoid disclosure of personal matters.

(3) The right of an individual to be independent in making certain types of important decisions in matters relating to marriage, procreation, contraception, family relationships, and child-rearing and education.

All 3 of these interests have been viewed as facets of a fundamental, if not easily defined, individual liberty. It has been variously described as "the right to be let alone--the most comprehensive of rights and the right most valued by civilized men",[3] and as "a freedom from all substantial arbitrary impositions and purposeless restraints".[4]

Unlike, for example, the right to a speedy and public trial, the right of privacy is nowhere explicitly mentioned in the U.S. Constitution. Therefore, in Griswold, although 7 justices agreed that a right deserving of constitutional protection had been asserted, no more than 3 could agree on any one theory about its origins.[5] Altogether, 3 rationales were advanced in support of a right of privacy:

(1) Certain unenumerated rights may be found in the "penumbra" of special constitutional guarantees. The use of contraceptives by married couples is protected by a penumbral right of association derived by the First Amendment and a penumbral right to be free of unreasonable searches and seizures derived from the Fourth Amendment.[6]

(2) The Ninth Amendment ("the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people") is authority for the proposition that the "liberty" protected by the Fifth and Fourteenth Amendments is not restricted to rights explicitly mentioned in the first 8 amendments.[7]

(3) The right of privacy is part of the "liberty" guaranteed in the Due Process Clause of the Fourteenth Amendment.[8]

The third rationale has had the most lasting significance.[9] However, the absence of an explicit right of privacy in the Constitution, and the obligation of the Court to supply complex theoretical justifications for it, perhaps accounts for the Court's tentative and inconsistent development of the right of privacy. The Court has followed a process of accretion in deciding "privacy" cases: it will enumerate general areas in which earlier privacy claims have been upheld, then merely announce whether the claim under review is sufficiently similar.[10]

Interests Protected by the Right of Privacy

Freedom from Intrusion. The first interest associated with the right of privacy--protection from government intrusion--is the subject of the Fourth Amendment. The government may not invade one's home, office, automobile, person, or effects without a warrant or a determination of probable cause that criminal activity is afoot.[11] It is not altogether clear whether the Fourth--and Fifth--Amendments give absolute protection to a core of private communications, papers, and effects, or whether no material or communication can be absolutely protected so long as the search, seizure, and disclosure are procedurally proper.[12] Recent Supreme Court decisions have tended to stress the manner in which evidence is seized rather than the nature of the evidence taken. The Court has even permitted seizure by warrant of private papers stored in an individual's desk.[13]

Nor is it clear to what extent privacy is a function of being at home, and whether certain activities are permissible in the home which would be impermissible elsewhere. In Griswold, the view of "man's home as his castle" was explained in the following terms:[14]

> The Fourth and Fifth Amendments were described in Boyd v. United States...as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life".... Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

The notion that the home is a unique locus of privacy was repeated in Stanley v. Georgia.[15] The possession and viewing of obscene materials in the home was protected simply because the individual was at home. However, subsequent decisions, such as Paris Adult Theatre I v. Slaton,[16] emphasized that no penumbra of privacy surrounds obscene materials outside the home, or the viewer when the viewer goes to a local theater to watch a film with other consenting adults.[17]

The idea of the home as a special locus of privacy immune to government intrusion is difficult to reconcile with other decisions of the Supreme Court which speak of privacy as inhering in people rather than places. In Katz v. United States,[18] the criminal defendant complained that evidence against him had been obtained by the use of a "bugging" device attached to the outside of a public telephone booth. The Court upheld his contention that his "reasonable expectation of privacy" had been violated:[19]

> ...The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not the 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.

Freedom from Disclosure. The second interest associated with the right of privacy--the right of an individual to avoid disclosure of personal matters--grew out of a concern with the gossip-mongering of yellow journalism.[20] The

conflict between freedom of the press and an individual's desire to avoid the public eye is still present and is discussed in greater detail under "invasion of privacy" in chapter 3 on the First Amendment.

But, in recent years, informational, or disclosural, privacy has taken on another dimension--maintaining control over the flow of personal information to the government.[21] With the growth of government regulation and services, there is more occasion for the government to request information. With rapid advances in computer science, there is greater ease in acquisition, retention, and interagency transfer of information.[22] If left unregulated, information-handling can lead to abuse: improper dissemination, for example, may result in the denial of employment or promotion if the information is given to someone who does not have a legitimate need for it, or if the information is released in incomplete or erroneous form.[23]

Just as the protection of privacy has become increasingly important, the right of access to information held by the government has also become necessary. Both are a consequence of the fact that government operations are numerous, complex, and in many instances removed from public scrutiny.[24] An inevitable conflict arises between the individual's right of disclosural privacy and the right of public and press to have access to governmental information.[25] This topic is discussed in greater detail under the heading "right to know" in chapter 3 on the First Amendment.

On the whole, courts have found no constitutional infringement of privacy when personal information is gathered by the government for a valid purpose.[26] The collection and retention of even highly sensitive health and medical records has been permitted where the state has demonstrated a strong need. However, courts are receptive to "privacy" arguments as to the assurance of confidentiality.[27] A case in point is the recent Supreme Court decision, Whalen v. Roe.[28] The Court held that the New York statute requiring patient identification for those receiving certain addictive drugs did not infringe upon any right of privacy. On the other hand, the Court noted in dictum that there is a threat to privacy implicit in the accumulation of vast amounts of personal information in data banks and other government files. Here it did not have to

reach the question of implicit danger since there had been no unauthorized disclosure and the system had adequate security provisions.[29]

Courts have also been reluctant to find a right of disclosural privacy where an individual has been suspected of involvement in crime (or has been convicted), or in situations where the information is a matter of public record. In Paul v. Davis,[30] both elements were present. The police commissioner had authorized dissemination of a circular alleging that Davis was an "active shoplifter". Davis had been arraigned on a shoplifting charge, but pleaded not guilty, and the charge was ultimately dropped. The Supreme Court concluded that the dissemination of the police circular did not infringe upon any constitutional right of privacy.[31]

> ...[Davis'] claim is based not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest.

The courts may be more sympathetic to a claim of informational privacy where it is conjoined with another constitutional claim. In White v. Davis,[32] the California Supreme Court held that the stationing of undercover agents in classrooms and meetings of university-sponsored organizations violated the First Amendment, the state constitutional right of privacy, and possibly the federal right of privacy.

Personal Autonomy. The third aspect of the right of privacy is personal autonomy in matters involving family life and procreation. After Griswold, the Supreme Court next had occasion to address this question in Eisenstadt v. Baird.[33] In that case, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons.

In Roe v. Wade,[34] the Court continued to emphasize the individual's right to make important decisions concerning procreation, even outside the socially approved context of marriage. In Roe, the Court upheld the right of a pregnant woman, in consultation with her physician, to undergo an elective abortion during the first trimester of pregnancy. After the first trimester,

however, the state's interest in maternal health would justify regulation of where and by whom an abortion could be performed. Also, after the point of viability (24-28 weeks after conception), the state's interest in the "potential life" of the fetus would permit prohibition of abortion except to save the life or health of the mother.[35]

After Roe, the trend of Supreme Court decisions has been to invalidate laws or regulations which impede free choice in matters of procreation.[36] On the other hand, the Court has not required the state to subsidize the fundamental right of choice in the bearing of children.[37]

The Right of Privacy in the Hawaii Constitution

After the 1968 Constitutional Convention, Article I, section 5, was amended to include the underscored phrases:

> 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.

In the debates of the committee of the whole, "invasions of privacy" was discussed mainly in the context of wiretapping and electronic surveillance, along with "or the communications sought to be intercepted".[38] However, Report No. 55 seemed to take a broader view of its applicability:[39]

> The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of those areas of a person's life which are defined as necessary to insure "man's individuality and human dignity".

Delegate Larson in his opening statement also took a less restrictive reading of the concept of privacy, including by way of illustration, confidentiality of information and marital privacy.[40]

In interpreting this provision, the Hawaii Supreme Court has yet to definitely commit itself to either the narrow or broad view. Part of the explanation may lie in the fact that the "privacy" cases which have come before the Hawaii Supreme Court have been both different and less varied than those handled by the United States Supreme Court. The vast majority of cases have involved either warrantless searches or possession of marijuana for personal use. The United States Supreme Court deals with the former simply by giving a contemporary meaning to "unreasonable searches and seizures", and has avoided dealing with the latter type of case altogether.[41] One Hawaii case involved an arrest for nude sunbathing on a public beach;[42] another dealt with sex education films shown with an excusal system which permitted parents to have their children excused.[43] In neither case did the Hawaii Supreme Court find an infringement of the right to privacy.

Although the Hawaii Supreme Court has asserted that "invasions of privacy" was added to the Constitution specifically to protect against wiretapping and electronic surveillance,[44] it has on other occasions acknowledged that the provision was not so limited in effect, merely by considering "privacy" claims in other situations. However, the Court has been careful not to grant constitutional protection to the possession of marijuana, whether by excluding the use and possession of euphoric drugs from the scope of a fundamental right of privacy,[45] or by finding that the right of privacy is not so fundamental after all:[46]

> While our State Constitution has a right of privacy provision, we do not find in that provision any intent to elevate the right of privacy to the equivalent of a first amendment right.

As though by contrast, the Court went on to discuss Alaska's separate privacy provision and its invocation in a case involving the sale of marijuana. There, the state was required to demonstrate a compelling interest in regulating the activity, and the statute did not enjoy a presumption of constitutionality. The Hawaii Supreme Court suggests that it might adopt a more expansive interpretation of the right of privacy--encompassing the possession of marijuana--if Hawaii's constitutional provision were, like Alaska's, unitary and distinct.[47]

The Future Development of the Right of Privacy

As yet, individual autonomy in matters of family and procreation has not been enlarged into a general freedom to choose one's life-style, where life-style is the "capacity to craft one's intimate, personal existence in the manner one sees fit".[48] Where the Supreme Court has sustained individual choice of life-style, it has been, on the whole, in the context of traditional, socially accepted modes of behavior.

For example, the freedom of related individuals to live communally, as an extended family, was upheld in Moore v. East Cleveland.[49] A group of unrelated individuals does not have this right; according to Village of Belle Terre v. Boraas,[50] a community may exclude such groups as detrimental to its peace and quiet.

In the area of consensual sexual conduct, the Supreme Court has sustained the constitutionality of sodomy statutes as applied to homosexuals.[51] The issue has not been raised in Hawaii since all forms of consensual sexual behavior are left unregulated.[52]

In the context of political protest, the Supreme Court has recognized choices in the area of dress as constituting "symbolic speech", deserving of First Amendment protection. This is discussed further under the heading "symbolic speech" in chapter 3 on the First Amendment. But, outside of the political context, the Supreme Court has not acknowledged a fundamental freedom of choice with respect to personal appearance.[53]

With respect to the possession and use of marijuana, the Supreme Court has yet to make a definite statement. It has hinted that it would defer to legislative judgment, and give a presumption of constitutionality to statutes restricting the use of marijuana.[54] However, where a state constitution includes a right of privacy, a state supreme court could uphold the individual right to possess marijuana for personal use.[55]

The Supreme Court has also yet to rule on the so-called "right to die". The right of privacy, with its emphasis on independent decision-making and human dignity, has provided a rationale for the termination of medical treatment in cases involving progressive, debilitating illness or imminent death.[56] This argument was accepted by the New Jersey Supreme Court in the celebrated case of In re Quinlan.[57]

Possible Approaches to Privacy Issues

At present, 8 states in addition to Hawaii provide for a right of privacy.[58] In 3 states,[59] the right is, as in Hawaii, enumerated in the provision which covers searches and seizures. In one state,[60] it is enumerated in the opening section on inalienable rights (comparable to Hawaii Constitution, Article I, section 2). In the remaining 4 states,[61] the right of privacy is a separate provision.

Since the right of privacy has already been considerably defined by the judiciary, and is one of the major new concepts in constitutional law, it may be important to dignify the right by giving it separate treatment. The Alaska provision is particularly noteworthy in that it not only recognizes the right but also mandates the legislature to further develop it.

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Arguments For and Against a Separate Right of Privacy in the Hawaii Constitution

Pro

(1) An essential purpose of the Bill of Rights is to create sanctuaries of individual behavior free from unwarranted governmental interference. A separate right of privacy would be consonant with this purpose.

(2) General constitutional protection of privacy would encourage the courts to interpret existing statutes and regulations that affect privacy with greater sensitivity to the individual's

interest. Present statutes regulating information-handling for example show some but not enough consideration for privacy interests.[62]

(3) A constitutional provision would give the courts a broad mandate to develop the right through case law. Judicial definition of the contours of the right of privacy would be as comprehensive and effective as a right enacted by the legislature.[63]

Con

(1) A constitutional provision might generate the assumption that the government should exercise its power up to the limits of the individual's right to resist.[64]

(2) A right of privacy tied to a constitutional provision is inherently inflexible and difficult to change.[65]

(3) The judicial development of a right of privacy would be limited by the individual litigation context, by the types of cases which happened to come before the court.[66] [This is already apparent in Hawaii case law interpreting Article I, section 5.] A more comprehensive approach by the legislature is necessary.

Chapter 9
THE INDIGENT AND THE RIGHT TO GOVERNMENT SERVICES

Introduction

American rights have been historically rooted in negative claims against government restrictions or interference with respect to civil and political liberties. The Bill of Rights has limited the power of government to act arbitrarily or even to act at all through such guarantees as free speech, free press, and religious liberties. In recent years, the traditional conception of rights as encompassing only restraints upon governmental action has been challenged because of 2 significant developments: (1) the affirmative involvement of government in the provision of services that promote a person's economic security and well-being; and (2) the increased use of government regulation designed to inhibit access to these services.

Emerging Social and Economic Rights

Through a growing range of statutory enactments, states aided by the federal government have increasingly become vested with the responsibility of providing needed services to the less fortunate. These services generally include basic necessities like income assistance, medical care, education, employment, and housing.

Acceptance of government's role as a provider of such services is due to the belief that these services are vital to the livelihood of economically deprived segments of our society.[1] It is now widely recognized that the inability to independently obtain these necessities is often the result of social rather than individual circumstances.[2] Further, that inability could be, as Professor Frank I. Michelman believes, "gravely prejudicial to one's chances for a decent life...."[3]

It is the recognition of these factors that has generated public discussion about the possibilities of including positive statements concerning economic and social rights in a constitution. Unlike the traditional rights enumerated in a constitution, they are positive rights because they are a claim upon rather than against government.[4]

Past discussions concerning the inclusion of positive rights were mainly concerned with the appropriateness of including a complex economic issue in the constitution. When attempts were made in the 1968 Constitutional Convention to provide a right to economic security,[5] several delegates expressed the opinion that the task of creating such guarantees belongs to the legislature. Annual legislative sessions made them better equipped to determine the level of aid that the state was capable of offering and the manner in which it should be provided.[6] Those supporting an economic security right believed that its inclusion would demonstrate Hawaii's concern for the indigent,[7] and prohibit the state from providing assistance that is below the minimum standard of living.[8]

Government Regulation of Economic and Social Services

The amendment was defeated primarily because there seemed to be no urgency for the inclusion of such economic rights in the Hawaii Constitution. It was pointed out that levels of payment were increasing,[9] and at that time, the federal government had made a substantial commitment to the poor through the "War on Poverty". But since the 1968 Constitutional Convention, many states and local governments have become concerned with the perils brought by population growth and its corresponding effect on government-sponsored services. A number of laws have been implemented to control growth including limiting access to these services.[10] One legal commentator gives this description of the crisis facing many cities:[11]

> Cities and their residents have found, however, that growth is a mixed blessing which creates new and serious problems of its own. Demand for municipal services increases at a rate beyond what can be efficiently provided, causing levels of service to decrease while costs to both the city and the taxpayer rise.... Growth brings increases in per capita crime, pollution, traffic congestion, mental

> illness, and family breakdown, and shortages of vital resources such as water and energy. High demand for housing often results in decreased competition among builders, resulting in large amounts of housing which is marginal both in quality and in style. In short, the quality of life declines, and concurrently, the ability of the municipality to cope with the problems diminishes.

In Hawaii, where the state offers many of the services of municipal governments, overpopulation and its correlative burden on state services has been identified as one of the most important and pressing problems.[12] Long-range plans are being developed to provide some control over the state's birth rate and for dispersing the population throughout the state.[13] Another factor, in-migration, has received more immediate attention. It now contributes more to the overpopulation problem than resident births.[14] One of the methods used to help deter newcomers from settling is a one-year residency requirement enacted in Hawaii in 1977 as a condition for employment in the public sector.[15] Although no final decision has been handed down at the time of this writing, it has been suggested by one legal scholar that the state's residency law may be held valid if it is perceived as a part of a "comprehensive scheme to preserve the environmental, aesthetic, and cultural values of the community".[16] Along similar lines, the Alaska Supreme Court upheld a state law providing employment preferences for jobs on the Alaska pipeline.[17]

Protecting the Poor Under the Fourteenth Amendment

Current efforts to safeguard the poor's access to services have been primarily accomplished under the Fourteenth Amendment of the U.S. Constitution.[18] Under the Due Process Clause, the emphasis has been to assure that the indigent received adequate and fair treatment in the receipt of services. For example, should a state find that an indigent is no longer eligible for welfare benefits, the indigent's right to due process is violated if benefits are terminated prior to holding an evidentiary hearing to determine if such action is warranted.[19]

The equal protection standard has been used primarily when a fundamental right is violated or if a law or government practice creates a

suspect classification. The fundamental right issue was involved in Harper v. Board of Elections[20] where the right to vote was contingent upon the payment of a poll tax, a condition the Court said was unconstitutional. Laws which seek to exclude certain segments of the society from participating in welfare programs are an unconstitutional classification regarding that segment unless the state shows a compelling state interest.[21] Thus, laws denying welfare benefits to aliens[22] and illegitimate children[23] have been declared unconstitutional in the absence of a compelling state interest.

The equal protection standard has more recently been intertwined with another fundamental right: the right to travel. The freedom to move and settle in a place of one's own choosing without interference has long been recognized and protected in the United States. Although the U.S. Constitution has no provision which explicitly deals with a person's right to interstate travel, it was expressly provided for in Article 4 of the Articles of Confederation that people of each state shall have free ingress and egress to and from any other state.[24]

Throughout the years, a number of U.S. constitutional provisions have been cited as a basis for the right. In Crandall v. Nevada,[25] a case involving the right of a state to levy a tax on all persons leaving by common carrier, the court found that the tax was an unconstitutional infringement on the right to travel which is protected by national citizenship. Another later case, involving a law making it a misdemeanor to bring a nonresident indigent into the state used the Commerce Clause in Article I, section 8, of the U.S. Constitution as a source of the right to travel.[26]

In recent years, the court has refrained from placing the right in any particular clause of the U.S. Constitution. In Guest v. United States, it was stated:[27]

> The reason [there is no mention of the right], it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of a stronger federal Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

* * *

> Although there has been recurring differences in emphasis within the court as to the source of the constitutional right to interstate travel, there is no need here to canvas those differences further. All have agreed that the right exists.

The involvement of the right to travel with the Equal Protection Clause is primarily due to the state's use of durational residency requirements for certain services. In the 1969 case of Shapiro v. Thompson,[28] the Court held that the denial of welfare benefits to persons who had not met a one-year residency requirement was an unconstitutional penalty on a nonresident who had exercised the fundamental right to travel. The Court stated that the equal protection standard must be used because the law created 2 classes: those who reside in the state for more than a year and are eligible for benefits; and those who have resided for less than a year and do not qualify for such benefits. The Court mandated that the state must show that the continuance of the class is necessary to promote a compelling state interest, a burden that the Court felt that the state failed to sustain.[29]

Unlike previous cases involving the right to travel, Shapiro signaled the U.S. Supreme Court's willingness to strike down laws which indirectly impinge that right. Along similar reasoning, durational residency requirements were struck down for voting[30] and for the right of an indigent to receive free local government-sponsored medical care in Memorial Hospital v. Maricopa County.[31]

The U.S. Supreme Court's holdings in these 3 cases do not appear to completely invalidate the use of durational residency requirements. In Shapiro, the Court stated that its holdings against durational residency requirements for welfare could not be used to imply the unconstitutionality of waiting periods or residency requirements for other services.[32] In 1975, the Court upheld a state law requiring one-year residency as a condition for obtaining a divorce decree.[33] Similarly, the Court upheld a state's interest in charging higher tuition rates for nonresidents in a state university system.[34] In this case, the Court recognized that a state has a legitimate interest in protecting and preserving both the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition

basis. The Court also noted a distinction between waiting periods and continuing residency laws and has upheld the latter. In McCarthy v. Philadelphia Civil Service Commission,[35] a municipal regulation requiring city employees to be residents was held to be constitutional and not in violation of a person's right of interstate travel.

In Hawaii, there have been 3 significant opinions relating to the use of durational requirements. The Hawaii Supreme Court in 1972 declared constitutionally valid a statute which prohibited granting a divorce decree unless a person was domiciled or physically present within the state for one year before making an application.[36] The Court did not find particularly relevant the holdings of the Shapiro case. While in Shapiro, the statute was specifically intended to exclude the indigent and withhold assistance that was necessary to their immediate needs, the Court found that residency requirements for divorce were concerned with the establishment of domicile and that no "necessity of life" was involved. Moreover, the Court felt that the probability that the residence requirement would actually deter the exercise of the right to travel was too remote to render the statute invalid.[37]

In that same year, the Hawaii court also struck down a 3-year residency requirement for public employment because the law created an arbitrary classification without a rational relationship to a person's capabilities of performing the task and the law operated irrationally without reference to a legitimate state objective.[38] Finally, an attorney general's opinion stated that a 90-day durational requirement for abortion in Hawaii was invalid.[39]

Future Prospects of Protecting the Poor

In Maricopa, the Court's decision to declare a durational requirement for free nonemergency medical care unconstitutional seemed to rely more on the fact that a fundamental service was involved rather than the right to travel.[40] Legal commentators have suggested that this may have signaled the Court's recognition that basic necessities of life like medical care are fundamental rights protected by the Fourteenth Amendment.[41] A few years prior to the decision,

Professor Michelman suggested a minimum protection against economic hazard theory under the Fourteenth Amendment. In short, he advocated that there was an affirmative obligation of government to furnish citizens with the basic necessities of life such as income to procure food, clothing, shelter, and health care.[42]

The creation of a fundamental right to such services, however, has consistently been repudiated by the U.S. Supreme Court. It refrained from finding a fundamental right to either housing or welfare in Lindsey v. Normet[43] and in Dandridge v. Williams.[44] In Dandridge, the U.S. Supreme Court upheld a Maryland law placing a limit on the amount of welfare payments available regardless of family size. The Court acknowledged the state's power in the area of economic and social regulation by approving the 2 legislative purposes for the law--encouragement of employment and avoidance of adverse income discrepancies between welfare families and families of the working poor.[45]

Two other cases have also had a bearing on the relevance of an indigent's inability to afford or command needed services. In San Antonio Independent School District v. Rodriguez,[46] the Court refused to find that the state's system of school financing based on property tax deprived students in districts with low tax rates of equal protection. The Court here refused to recognize wealth as a basis for finding a suspect classification necessary for invoking the equal protection standard. The decision went on to say: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[47] In Maher v. Roe,[48] state regulation limiting medical benefits to those abortions that are "medically necessary" and not covering nontherapeutic abortions was found not to violate the constitution where indigents are involved. "....This Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."[49]

In these 3 cases, the Court places the responsibility for such rights with the appropriate legislative bodies. The recognition that these rights are properly the concern of legislative authority rather than the judiciary receive some support in this statement about the prospect of the judiciary guaranteeing a right to welfare:[50]

> Courts simply have no reliable way to calculate whether welfare benefits ultimately encourage or diminish effort on the part of a recipient, or how much higher welfare levels and broader eligibility standards depress the incentives of other relatively disadvantaged persons to find jobs and seek training, or whether and when cumulative redistributive effects lessen the productivity of those in professional and business leadership upon whose drive and creativity the jobs and well-being of many others may depend,...

The addition of such rights to the state constitution may be appropriate only if the legislature has the authority to provide the manner in which the right can be asserted. While there are no state constitutions which provide such positive rights, the amendment for economic security presented in the 1968 Constitutional Convention may serve as a model:

> The rights of the people to economic security, sufficient to live in dignity, shall not be violated. The legislature shall provide protection against the loss or inadequacy of income and otherwise implement this section.

For a further discussion on the subject matter of this chapter, see Hawaii Constitutional Convention Studies 1978, Article VIII: Public Health and Welfare.

Chapter 10
MISCELLANEOUS PROVISIONS

PART I. TRIAL BY JURY IN CIVIL CASES

Article I, section 10, of the Hawaii Constitution provides that:

> In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

This provision is derived from the Seventh Amendment of the U.S. Constitution, one of the few of the first 8 amendments which are not binding on the states.[1] The right of trial by jury in civil cases is seen to be less important than the corresponding right in criminal cases, and consequently, the U.S. Supreme Court has not seen fit to impose minimal federal standards in the civil area. Nonetheless, in Hawaii, because the state constitution and rules of procedure are patterned closely after their federal counterparts, the Hawaii Supreme Court would find U.S. Supreme Court interpretations of the Seventh Amendment and the federal rules of procedure highly persuasive.[2]

One difference between the Seventh Amendment and Article I, section 10, involves the amount in controversy. Where the former requires a minimum amount of $20, the latter has raised the figure to $100. At the 1950 Constitutional Convention this figure was decided upon because a one-day jury trial cost the state at least that much.[3] Although the Convention wished to reduce the availability of jury trial, it considered and rejected a minimum of $500.[4] As a matter of practice, it would appear that all or nearly all jury trials involve an amount well in excess of either figure.[5]

The right of jury trial in civil cases is limited to suits "at common law", and does not extend to "equitable" proceedings such as divorce, adoption, guardianship, or probate.[6] But in a case involving both legal and equitable issues, the right to a jury trial on the legal issues is preserved.[7]

Where the right to trial by jury in a criminal case can only be waived (i.e. relinquished) by the defendant with the approval of the court,[8] a party in a civil suit may lose the right to trial by jury simply by failing to ask for one within the applicable time limit.[9]

Another difference between the Seventh Amendment and Article I, section 10, is that the latter expressly permits the legislature to provide for less than unanimous verdicts.[10] The legislature has implemented this provision by allowing a verdict to be returned when five-sixths of the jurors agree.[11] This is in keeping with a trend observed by more than half the states, permitting majority verdicts in civil cases.[12] Under the Hawaii Rules of Civil Procedure,[13] the parties may stipulate to a majority of less than five-sixths.

The controversy surrounding juries of less than 12 has of course involved civil, as well as criminal, cases. A discussion of the arguments for and against smaller juries can be found in chapter 6 on the administration of criminal justice. The 6-person jury is now the rule rather than the exception in federal civil cases.[14] Hawaii state court juries are usually juries of 12, even though both the criminal and civil rules of procedure permit stipulation to a number less than 12.[15]

A study of the trial jury in Hawaii has recommended that the right to jury trial in civil cases not be changed, e.g., by eliminating the right in certain types of cases. Civil jury trials here are relatively infrequent; a relatively small saving would be achieved by limiting the right; there is a lack of interest in changing the right by judges and jurors.[16] The study also recommends that the size of the jury in civil cases not be compulsorily reduced. If it is reduced, a jury of 8 could be tried on an experimental basis and the majority verdict by five-sixths retained.[17]

PART II. IMPRISONMENT FOR DEBT

Article I, section 17, of the Hawaii Constitution, framed by the 1950 Hawaii Constitutional Convention and unchanged since that time, provides:

> There shall be no imprisonment for debt.

The 1950 framers explicitly interpreted this provision as applying only to contract obligations and not to issues of equal protection involving imprisonment of indigent defendants[18] for failure to pay fines:[19]

> It is clear, of course, that the prohibition of imprisonment for debt does not apply to imprisonment for failure to pay a fine imposed under the criminal laws, or to imprisonment for contempt of court for unjustified failure to comply with a court order for the payment of money, such as alimony, which practices are now legal even under the Territorial Organic Act which prohibits imprisonment for debt.

The delegates discussed the inclusion in this section of an additional provision to provide that:[20]

> There shall be no imprisonment for debt and a reasonable amount of the property of individuals may be exempted from seizure or sale for payment of any debt or liabilities. (Proposed material underscored)

The inclusion of this section, as one delegate put it, was to serve both as a constitutional basis for legislation and as a restriction on legislative arbitrariness:[21]

> Probably if it was not [sic] so stated in the Constitution, the legislature might go ahead and make all property subject for attachment for the payment of debts. If the states in the Union, as we know, can provide for imprisonment of debts, certainly I believe in those states there's no exemption at all. And this is a constitutional basis for legislation. And I believe provision in the Constitution here would be a safeguard from any future legislatures from going astray.

The Constitutional Convention, however, rejected the proposal, stating that:[22]

> ...because the legislature under its general powers may enact laws providing for such reasonable exemptions,...specific authorization for such laws in the constitution is unnecessary.

One delegate also remarked that the legislature:[23]

> ...would then be free, as it is under existing law, to make such exemptions as it may choose, limiting garnishments, limiting the amount of attachment, providing that household furniture will be exempt.

The U.S. Constitution does not have any provision which prohibits imprisonment for debt, however, all but 13 state constitutions contain provisions which, although varying in terminology and application, prohibit imprisonment for debt.[24] The power of the state to abolish imprisonment for debt was recognized by the United States Supreme Court in the 1827 Mason v. Haile case.[25]

Although the Hawaii Supreme Court never has been faced with the question of what is a debt within the meaning of Article I, section 17, of the Hawaii Constitution, there seems to be no heated discussion among the authorities, which commonly hold that the debt within such a constitutional provision arises exclusively out of the power to contract.[26]

The consensus appears to be that constitutional guarantees against imprisonment for debt have as their purpose the prevention of the useless and often cruel imprisonment of persons who, having honestly become indebted to another, are unable to pay as they undertook and promised.[27] The spirit of such provisions, explained one court in 1976, is to protect an honest debtor who is poor and has nothing with which to pay, so that the debtor should not be at the mercy of creditors if insolvency is bona fide.[28] Indeed, one California appeals court in 1968 in a case involving the constitutional provision that no person shall be imprisoned for debt reiterated the familiar doctrine that every doubt should be resolved in favor of the liberty of the citizen with respect to constitutional provisions.[29]

In 8 state constitutions,[30] besides Hawaii's, the power of the state to abolish imprisonment for debt altogether is absolute and contains within its terms no exceptions. These states are Alabama, California, Georgia, Mississippi, New Mexico, South Dakota, Tennessee, and Texas. California's

constitutional provision expressly includes within its proscription on imprisonment for debt, tortious acts, and peactime militia fines[31] and thus appears to be broader in scope than Hawaii's constitutional provision which appears to restrict itself to moneys due under contract or as damages for breach of any formal contractual obligation.[32] California's provision reads in part:[33]

> A person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine.

A constitutional prohibition against imprisonment for debt may apply in rare cases to criminal proceedings where the criminal statute declares the nonpayment of an obligation to be a crime. The validity of such a statute, however, is dependent upon whether the legislative objective is consistent with such a constitutional guaranty.[34] Thus, the Supreme Court of Missouri in 1916 held that such a constitutional provision cannot be evaded by the device of declaring, in a municipal ordinance or statute, a simple breach of contract to be a crime.[35]

The Hawaii Supreme Court to date has not been confronted with the issue of the scope of the state constitutional guarantee of the bar on imprisonment for debt. It did declare, however, in the 1895 In re Ruttmann[36] case that imprisonment for debt under a statute authorizing imprisonment for debt contracted in a fraudulent manner[37] is unconstitutional under constitutional guarantees of the Republic of Hawaii where no fraud or crime is shown. The Court stated:[38]

> In this Republic there is no provision for a poor man, utterly unable to pay a judgment, obtaining his release so long as his creditor pays for his support in jail. This is imprisonment for debt, which though not expressly prohibited by our constitution is contrary to the spirit of its Article 6, which secures a person from being subject to punishment for any offense except upon due and legal conviction upon a charge describing the offense. It is also repugnant to Article 8, where life, liberty and property cannot be taken without due process of law; and to Article 9, where involuntary servitude except for crime is prohibited. The strongest argument in my mind for holding the detention in prison of a debtor upon the sole allegation that he was about to quit the Republic to be unconstitutional, is, that the intent to quit the Republic is not a fraud nor a crime.

Article I, section 17, of the Washington Constitution forbids imprisonment for debt except in cases of absconding debtors.[39] The Washington Supreme Court has interpreted this provision as making fraud a ground for imprisonment.[40] In 17 state constitutions the exception for cases of fraud as a ground of imprisonment is express.[41] Yet, in Georgia, where the constitutional prohibition against imprisonment for debt is absolute,[42] at least one state supreme court opinion has held that the constitutional provision is not violated by an act making it punishable for any person to use the proceeds of payment on account of real property for fraudulent purposes.[43] Five state constitutions prohibit imprisonment for debt unless there is a strong presumption of fraud.[44]

In some cases it has been held that "debt" under constitutional provisions barring imprisonment for debt limits debts to those founded upon or arising out of contract, excluding nonpayment of taxes.[45] Considering nonpayment of taxes or license fees to be a violation of a duty imposed upon the taxpayer by law, the courts in some cases have held that statutes, ordinances, and other regulations imposing such taxes or license fees lawfully may authorize the imprisonment of those who fail to pay.[46] At least one court, however, has held that imprisonment is prohibited for nonpayment of income taxes.[47]

The 1950 Hawaii delegates resolved in floor debate that contempt proceedings to enforce alimony payments were not intended to be covered by Article I, section 17, of the Hawaii Constitution,[48] and thus followed the lead of every state court except Missouri's in the view that contempt imprisonment for failure to pay maintenance or child support is not imprisonment for debt in violation of the constitutional prohibition.[49] Missouri fell into national step in 1976, overturning 110 years of precedent.[50]

Possible Approaches to Imprisonment for Debt Issues

The Constitutional Convention may wish to review various constructions of the scope and application of the freedom from imprisonment for debt guaranty. Through delegate interpretation, Article I, section 17, of the Hawaii Constitution prohibiting imprisonment for debt appears to apply only to contract obligations

and not to nonpayment of fines and penalties imposed for the violation of law. The Constitutional Convention may wish to make this restriction express, as Missouri and Oklahoma have done.

The Constitutional Convention also may wish to explore the question of contempt proceedings to enforce alimony payments as a possible express exception to Article I, section 17. Delegate interpretation of this question is in line with the national view that such proceedings do not fall within the protection of the rule on prohibiting imprisonment for debt.

Constitutional revision in addition may focus on the question of broadening Article I, section 17, to include tortious conduct and peacetime militia fines within the proscription on imprisonment for debt. Article I, section 10, of the California Constitution explicitly includes these 2 areas within its bar on imprisonment for debt.

Constitutional revision may center too on the issue of excluding fraudulent conduct from the protections of the bar on imprisonment for debt. Seventeen states already have written that exception into their constitutions and 5 other state constitutions have made exception for a "strong presumption" of fraud. Notwithstanding these express provisions, the constitutions of Georgia and Tennessee, which, like Hawaii's Constitution, contain within their terms no exceptions, have been construed by their respective state supreme courts to provide against imprisonment for debt only where the obligation out of which the claim arises is free from fraud. An 1895 Hawaii Supreme Court decision, decided under constitutional guarantees of the Republic of Hawaii, appears to pave the way for an exception for fraud from the state constitutional guaranty on the bar on imprisonment for debt.

Finally, the Constitutional Convention may wish to debate the question of whether the protection of Article I, section 17, excludes imprisonment for nonpayment of taxes. The generally held view appears to be that "debt" under constitutional provisions barring imprisonment for debt limits to those founded upon or arising out of contract, excluding taxes.[51]

PART III. EMINENT DOMAIN

Comparative State Provisions

The Fifth Amendment of the U.S. Constitution provides in part:

> ...nor shall private property be taken for public use without just compensation.

Private parties cannot, by contract, impair the power of eminent domain. Contracts attempting to do so are void as against the public policy.[52] The United States Supreme Court held in 1887 that the Fifth Amendment restraint on the power of eminent domain is deemed incorporated by the Fourteenth Amendment due process clause, and hence is a limitation on state action as well.[53] The concept of "taking" of the condemnation clause exists in all but one state constitution, North Carolina's. The typical provision provides that private property cannot be taken for public use without making just compensation.[54]

In the usual case of the exercise of the power of eminent domain, the government institutes proceedings against the landowner for the purpose of paying the landowner just compensation for the taking of property. This procedure is known as condemnation. Typically, the only issue to be decided by the court in a condemnation proceeding is the amount of compensation required.[55] Generally, just compensation is measured by the fair market value of the land taken as enhanced by the improvements and fixtures attached to the particular parcel.[56]

Eminent Domain and the Police Power. The police power of the government to regulate the public health, safety, morals, and general welfare is an inherent element of sovereignty without which no government could exist.[57] The boundary line which divides the police power of the state from the exercise of eminent domain often is difficult to discern, since a regulation may have all of the economic consequences of a taking. Although the exercise of the police power and the exercise of the power of eminent domain have common

characteristics, they also are essentially distinct. Thus, under the police power, many restrictions may be imposed without compensation being given, whereas under the power of eminent domain compensation is required.[58] A more important distinction is that in eminent domain, property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own. Under the police power, although it may, and often does, take property in the constitutional sense, this is not accomplished by a transfer of ownership, but by impairing its value or by restricting the use of the property.[59] Private property is taken by eminent domain for a public use, while the police power regulates its use and enjoyment; or, if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public.[60]

"Damage" Clause in State Constitutions. In the mid-1800's it was recognized that exercise of the eminent domain power resulted in indirect or consequential losses not contemplated by the market value formula. A taking for a public use frequently produced noncompensable losses of goodwill, interruption of business, removal expenses, and injuries to adjoining property no part of which was sought to be acquired.[61] It was in the rapidly growing city of Chicago that the most serious injuries to property by the construction of public improvements occurred.[62] In 1870, a constitutional amendment was adopted in Illinois providing that private property should be neither taken nor damaged for public use without compensation.[63] Today, 26 state constitutions require just compensation when property is taken or damaged for a public use.[64] This clause may be used to extend the existing right to recover for damage to remaining land when part of a tract is taken to similar cases when no property is taken.

As soon as the constitutional provision requiring compensation when property was damaged for the public use had been adopted, the question of what the provision meant arose. It was conceded that it did not apply to the personal inconvenience or annoyance of the occupant of property or to injury to business, but only to injury to property.[65] However, the question of injury to property caused a swirl of debate. It was at first contended that the provision applied only to direct physical injury.[66] The change in the constitution was,

however, interpreted as being remedial and required a broad construction.[67] By 1888, the direct physical injury concept was rejected in most jurisdictions.[68]

It recently has been held that the constitutional provision for compensation for "damage" indicates an intent to expand the area of compensability, requiring the courts to fix its limits by balancing the public interest against the sacrifices imposed upon the landowner or occupier of land.[69] The 26 states which have the damage clause in their constitutions vary on the standards employed to determine what specific types of injuries require compensation.[70] Essentially, there are 3 standards.

A few courts have defined "damaged" to include those injuries which would have been actionable at common law had the damaging act been done by an individual.[71] The Texas Supreme Court declared in 1968 that the constitutional prohibition against damaging a person's property for public use without adequate compensation:[72]

> ...does not give a cause of action against those constructing public works for acts which, if done by an individual in pursuit of a private enterprise, would not be actionable at common law.

This definition involves compensation for damage resulting from those negligent acts or nuisances attributable to a sovereign.[73] This standard, however, appears to have 2 major problems. First, few public improvements which damage adjoining land have been the subject of litigation. These cases have not come up frequently enough to have settled the question whether such public acts would constitute an actionable injury at common law, so that the proposed test in most cases appears to be useless.[74] Second, some of the injuries from public improvements which cause the greatest hardship to individuals would not be actionable at common law. Thus, the right of a private owner to pile up a mound of earth on the owner's land close to a neighbor's line, or to excavate on the land so long as a neighbor's soil was not deprived of support, was unquestioned at common law.[75] Yet, the right of a city to do the same thing in the course of grading a street without liability to the adjoining owner placed a prohibitive qualification upon the "damage" clause and caused considerable dissatisfaction with the rule.[76]

Common law liability appears to be an indication of damage. Lack of liability at common law, however, "should not conclusively prove that there is no damage under the constitutional provision".[77] Thus, a California appeals court in 1975 permitted compensation for actual physical injury to land despite the fact it was not actionable at common law.[78]

The broadest application of the constitutional "damage" clause has been under the depreciation in value standard. This standard provides that any public use of land which causes an actual ascertainable depreciation of the present market value of neighboring land is a damage under the constitution's damage clause.[79] Although this rule has received approval in a few cases,[80] in most jurisdictions such a definition of damage has been rejected as too broad, and compensation has been denied for injuries which had a depreciating effect upon the present market value.[81]

Most jurisdictions which have adopted the damage clause have supported the rule that one is entitled to just compensation when one's land is damaged for a public use if there has been a physical injury to the property or the property rights of the owner.[82] This rule does not allow compensation where the mere presence of the public use devalues the adjacent land.[83] Compensation is required:[84]

> ...not only when there is an injury that would be actionable at common law, but also in all cases in which it appears that there has been some physical disturbance of a right, either public or private, which the owner of a parcel of land enjoys in connection with his property and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. (Emphasis added)

Although the majority rule does not create an unwarranted distinction between those injured by private and by public improvements as the actionable injury at common law standard appears to do, the question arises whether it does not arbitrarily distinguish between an owner whose land in part is taken and one whose land is not taken at all:[85]

> If two men own adjoining similar tracts and a railroad is constructed in such a way as to take a few inches off one tract and to pass just outside the other, the owner of the first tract by an accidental circumstance not affecting the merits of his case recovers full compensation for the depreciation in value of his land by the noise, smoke and dust from the railroad; the owner of the second tract which receives almost precisely the same injury receives nothing.

The depreciation in value rule, which does not require physical injury to property or to a property right, controls application of the damage clause in such a way as to avoid such inequity.[86] This standard, however, has been subjected to severe criticism on 2 grounds:[87]

(1) Adherence to the depreciation in value rule would give rise to a multiplicity of claims whenever a public improvement is constructed and would result in such a high cost as to retard the rate of progress;

(2) It would burden the public developer with costs not normally paid by a private developer.

One commentator finds it difficult to accept these arguments and states:[88]

> With respect to multiplicity of claims, our legal system is well equipped to handle any frivilous [sic] claim. With respect to the second argument, there is already a significant difference between public and private development; the state can command title to property from the individual, while a private developer must negotiate any transfer of ownership. The fundamental basis of the power of eminent domain is that it may be freely exercised for a public use as long as the condemnor pays just compensation. To require the state to indemnify the individual for the losses sustained in an involuntary conveyance would not strip the state of its power to develop.

Hawaii Application

Article I, section 18, of the Hawaii Constitution reads:

> Private property shall not be taken or damaged for public use without just compensation. (Emphasis added)

The 1950 Constitutional Convention adopted the eminent domain provision of the Fifth Amendment. Such language was adopted by the Convention:[89]

> ...because of the certainty which has been given to the interpretation of that section by the Federal decisions.

The Constitutional Convention discussed the inclusion of 2 additional provisions in this section. The first proposal expressly would have given the legislature the power to provide for "excess condemnation" or condemnation of property in excess of that absolutely necessary for a particular public project.[90] This provision, however, was rejected as unnecessary since the delegates felt that that power was implied within the general legislative power of eminent domain and that the courts could be relied upon to restrain any excessive use of that power.[91]

The second proposal would have required that just compensation be paid whenever any property is taken or damaged. This proposal was rejected by the Convention "...because of the uncertainty of the term relating to 'damage'".[92] The Constitutional Convention felt that:[93]

> ...if the provision of the Federal Constitution adopted by this section should ever be considered by the legislature as too restrictive, the legislature by statute could always extend the right to secure compensation, by appropriate statutes narrowly worded to cover only such types of damages as the legislature in its discretion might consider desirable.

To date only 2 types of statutory provisions provide compensation for "damages". The first type is the "blight of summons damage" provisions,[94] which means, in general, indemnification due a condemnee for damages resulting from the government's delay in paying the full cash equivalent of the property taken on the date of summons. These provisions do not address the question of damages for one whose land is not taken at all. Rather, they amount to a penalty interest charged against the government for delay in compensating the landowner.

The second type is the "compensation assessment" provision, which calculates compensation to be paid for the condemnation of any property, whether taken in whole or in part.[95] A partial taking involves the concept of severance damages. The term "severance damages" means that if only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract.[96] This provision does not address the question of damages for one whose land is not taken at all.

The 1968 Constitutional Convention adopted the "or damaged" clause first adopted by Illinois in 1870 and subsequently adopted by 24 other states.

The final determination of applicability of the law from other states was reached by Report No. 15:[97]

> The established body of law will be helpful and will provide guidance to our courts; however, it is not your Committee's intent that our courts be bound by each precedent in every case. It should also be noted that it is not the intent of your Committee that our courts be guided or controlled in any way by the several specific examples mentioned on page 8 of Standing Committee Report No. 55 and in the debates of your Committee of the Whole.

Report No. 15 states that the Committee of the Whole considered the 1882 Rigney v. City of Chicago[98] case, which promulgated the majority rule of special and peculiar damages, and which is the only decision specifically cited therein.

Standing Committee Report No. 55,[99] however, which preceded Report No. 15, reflected a significantly broader application of the law which was developed with respect to damages. Standing Committee Report No. 55 sought to expand the scope and measure of damages not only in specific instances where damage and no taking has occurred, but also in those situations where a taking has occurred.[100] Among those situations were damage as the result of a change of grade in a road,[101] as well as damage to plans and drawings made for future use of the property taken or damaged,[102] and damage to a tenant's interest when the tenant is forced to move as a result of a taking or

damaging.[103] In those situations where damage but no taking has occurred, the specific examples cited in Standing Committee Report No. 55 appear to indicate approval of the depreciation in value standard.[104]

The Hawaii Supreme Court to date has not been confronted with an Article I, section 18, damage claim when no total or partial taking has occurred. In 4 cases,[105] however, involving commercial lots where improvement and development expenditures and anticipated profits were sought as separate items of damage in condemnation proceedings involving taking of whole real properties, the court limited damages that could be received. In all 4 cases it provided that the loss of business profits and expenses incurred could be considered only as evidence in the process of determining the fair market value of the taken property.[106]

In the most recent of the 4 cases, City and County of Honolulu v. Market Place, Ltd.,[107] the Court in dicta explained that by the 1968 constitutional change liability for damages has emerged where no liability previously existed:[108]

> Prior to the [constitutional] amendment, only the owner of physically "taken" property was entitled to compensation in Hawaii, and those whose property was merely consequentially "damaged" by the primary taking were without recourse. The chief purpose in adding the "or damaged" clause to the Constitution was to remedy this situation. Accordingly, courts would continue to compensate individuals for condemnatory "takings" of their property under traditional measures thereof, but would add to the class of those entitled to indemnification individuals whose property, although not technically "taken," is nonetheless injured by a government use elsewhere in a way that society as a whole, and not the individual property owner, ought to bear the costs.

In a footnote to the passage above, the Court made reference to the recommendation of Standing Committee Report No. 55 that the cost of architectural designs be computed as a separate damage item in situations where a taking has occurred.[109] The Court appeared to reject this proposal, stating that such expenditures:[110]

> ...are indirectly recoverable since they are considered as evidence in the process of determining the fair market value of the taken property.

Possible Approaches to Eminent Domain Issues

Although it is clear that a class of damages, which formerly was noncompensable, now requires compensation, the vast majority of jurisdictions require some sort of physical injury to property or property right, thus limiting the measure of damages that may be awarded. The physical limitation to application of the damage clause, however, is a product of the courts and not the language contained within the constitutional provision.[111]

While the eventual significance of Hawaii's damage clause must await a future judicial determination, the Constitutional Convention, in anticipation of the legal effect of the new clause, may focus on the various standards by which to gauge the effect of the amended version of Article I, section 18, of the Hawaii Constitution. The Convention may wish to discuss what kinds of injuries are compensable under these standards.

Constitutional revision also may focus on making express the view that Article I, section 18, is neither intended to affect governmental bodies in their lawful and proper exercise of police powers to protect public health, safety, and welfare, nor apply to instances of zoning or planning, which fall within the proper exercise of such police powers.

PART IV. CONSTRUCTION

Article I, section 20, of the Hawaii Constitution provides a "saving" clause:

> The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.

This section was promulgated by the 1950 Constitutional Convention but was not discussed at the 1968 Convention. Standing Committee Report No. 20 of the 1950 Convention explained that section 20:[112]

> [R]epresents a general statement reserving to the people those rights and privileges not specifically enumerated in the Bill of Rights and to prevent any interpretation by the courts that because certain rights and privileges were not specifically enumerated, it was intended to deny them to the people.

Thirty state constitutions[113] have provisions very similar to Article I, section 20, of the Hawaii Constitution and the interpretations of those provisions uniformly appear to represent the view set forth by Standing Committee Report No. 20:[114]

> It [saving clause] gives explicit recognition to the principle that the Bill of Rights is not an all-encompassing enumeration of a citizen's rights and immunities with respect to government action.

The Ninth Amendment and the Saving Clause

The Ninth Amendment of the U.S. Constitution reads:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Although Hawaii's constitutional framers did not state that Article I, section 20, of the Hawaii Constitution substantially was adopted from the Ninth Amendment, Justice Levinson of the Hawaii Supreme Court has observed that Article I, section 20 "...contains a similar rule of construction".[115]

The 30 state constitutions which have provisions similar to the saving clause of the Hawaii Constitution uniformly appear to recognize the applicability of the Ninth Amendment to those provisions. For example, the Commentary to Article I, section 23, of the Michigan Constitution (1967) provides:

> This is a new section taken from the 9th amendment to the U.S. Constitution. It recognizes that no Declaration of Rights can enumerate or guarantee all the rights of the people - that it is presently difficult to specify all such rights which may encompass the future in a changing society. (Emphasis added)

Although authorities seem to disagree on the significance of the Ninth Amendment,[116] there is little disagreement as to the purpose of including it in the U.S. Constitution:[117]

> Historically, it [the ninth amendment] was included to nullify the argument that the enumerated rights were intended to be the only rights protected.

As for its applicability to the states:[118]

> ...by definition, the rights protected by the Ninth Amendment are those fundamental to a free society and therefore are included in the Fourteenth Amendment. The Ninth Amendment is a reservoir of personal rights necessary to preserve the dignity and existence of man in a free society. (Emphasis added)

This recognition of unenumerated rights, however, has not gone without criticism:[119]

> [J]udges [are] to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary.

The Ninth Amendment has been applied to cases involving the right to marital privacy. In the 1965 case, Griswold v. Connecticut,[120] the United States Supreme Court, with only one justice dissenting, recognized a constitutional right to marital privacy which a state could not invade by a law prohibiting the use of contraceptives. The majority and concurring opinions differed over the source of that right. Justice Douglas' opinion for the Court stated that the right to marital privacy was within the "penumbras", or shades, of the Bill of Rights.[121]

Justice Goldberg's concurring opinion relied in part on the Ninth Amendment in securing the right to marital privacy.[122] He found that such a

right is implicit in the concept of "liberty" within the protection of the Fourteenth Amendment Due Process Clause. The Ninth Amendment:[123]

> ...lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

Justices Harlan and White, in separate concurring opinions, applied the flexible due process approach of the Fourteenth Amendment and found the right to marital privacy fundamental.[124]

More recently, in the 1973 case, Roe v. Wade,[125] the Court simply held that the right of personal privacy is implicit in the concept of "liberty" within the protection of the Fourteenth Amendment Due Process Clause. The Court did not rely on the Ninth Amendment as did Justice Goldberg in Griswold. Thus, the status of the Ninth Amendment as a safeguard of the right to personal privacy appears to have diminished since the Roe v. Wade decision.

Hawaii Application. The Hawaii Supreme Court has been faced with the Ninth Amendment and the saving clause in 3 cases. In the 1968 case, State v. Abellano,[126] defendants were charged with violating an ordinance which made it unlawful for any person to engage or participate in, or to be present at, any cockfighting exhibition. Justice Abe's opinion for the Court held that the ordinance proscribing presence at a cockfight exhibition was overly vague and violated the requirements of due process.

Justice Levinson's concurring opinion relied in part on the Ninth Amendment's guarantee of personal privacy and Article I, section 2, of the Hawaii Constitution protecting the freedom of movement:[127]

> Freedom of movement is a vital aspect of the right of privacy which must be recognized if we are to preserve individual freedom. Although the Federal Constitution does not refer to a general right of privacy or freedom of movement, both have been long and consistently recognized as adjuncts of specific constitutional provisions. Griswold v. Connecticut, 381 U.S. 479 (1965);...

In the 1972 case, State v. Kantner,[128] the sole issue presented was the constitutionality of the statutory scheme for the control of the possession of marihuana. Justice Richardson's opinion for the Court held that the dissimilarities between the drugs marihuana and alcohol:[129]

> ...justify dissimilar legislative treatment. Alcohol is a drug about which much is known concerning the long-term effect on the human body; of marihuana, much less is known. On that basis alone, treatment dissimilar to that given alcohol is justified, at least until scientific research conclusively establishes the long-term effects of the drug marihuana.

Justice Levinson dissented, citing his concurring opinion in State v. Abellano. He explained that the statutory scheme for the control for the possession of marihuana violated defendants' constitutional rights to personal autonomy and privacy, guaranteed by Article I, sections 2 and 5, of the Hawaii Constitution as well as the Ninth Amendment incorporated by the states through the Fourteenth Amendment. Justice Levinson concluded that the:[130]

> ...framers of the United States Constitution recognized that individual freedom is not susceptible to full definition by verbal enunciation and thus warned in the Ninth Amendment:
>
> > The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The 1975 case, State v. Baker,[131] was decided after Justice Levinson had left the Court. The issue presented was whether the state's interest in proscribing marihuana patently was de minimis and did not warrant the application of a penal sanction to the mere possession of marihuana for personal use. Justice Lewis' opinion for the Court held that the statute proscribing the commercial distribution of harmful substances (of which marihuana was one):[132]

> ...may sweep within its ambit, as an enforcement measure, the possession of the substance for personal use.

Although the defendants alleged violation of their right of personal privacy based upon Article I, sections 2, 4, 5, and 20, of the Hawaii

Constitution, and the first, fourth, fifth, ninth, and fourteenth amendments of the U.S. Constitution, the Court addressed itself only to Article I, section 5, which gives the right of privacy substantive expression in the Constitution.[133] The Court held that:[134]

> While our State Constitution has a right of privacy provision [Article I, section 5], we do not find in that provision any intent to elevate the right of privacy to the equivalent of a first amendment right.... By the plain wording of the constitution the right of privacy is protected only against unreasonable invasion.

Application of the Saving Clause in Other States. Most litigation involving state saving clauses have centered around the extent of the legislative power. Where a state constitution provides that the legislative power shall be vested in a general assembly, by the force of these general words, if there is nothing else to qualify them, it is held that an unlimited power is given to the legislature to make all such laws as it may think proper.[135]

The broad powers inherent in the legislative body of a state may be subjected to express limitations by the provisions of a state constitution, as, for example, where a saving clause is provided. Thus, in 1967, the Nevada Supreme Court held that although in part through the saving clause in the Constitution the people themselves may propose or enact laws in connection with the legislature that power in no manner prohibits the legislature from also enacting the same law that might be desired by the people:[136]

> It follows that the voters approval in 1956 of a sales and use tax for the general fund cannot be a perpetual limitation upon legislative power to impose the same kind of tax solely for the support of public education.

The tension between the authority of the legislature and the power of the saving clause appeared to be very evident in a 1917 case in which the Indiana Supreme Court held that the General Assembly of that state did not have the authority to call a Constitutional Convention without submitting the matter to the voters of that state.[137] That opinion noted that the 1917 Convention call had been preceded by a convention call which was submitted to the electorate in 1914

and by them soundly defeated. The Indiana court also noted that its legislature "...has no inherent rights. Its powers are derived from the Constitution."[138] When the legislative powers are not found in the constitution, then "...a warrant for the same must be found somewhere".[139] Therefore, the Court found that the constitutional call should have been submitted to the people. Because Indiana's Constitution did not have a saving clause, the Court found the source of authority in the natural rights declaration of the state's Bill of Rights giving the people the right to alter or reform the government.

In 1957, the Idaho Supreme Court held that under the Idaho Constitution's saving clause parents have an inherent right to participate in the supervision and control of the education of their children.[140] Before the Court was a petition by residents and qualified electors for separation of their residential area from one school district and joinder to another district. The Court's opinion in part read:[141]

> True, the constitution vests the legislature with plenary power as well as a specific mandate to provide for the education of the children of the state,...but it cannot seriously be urged that in clothing the legislature and the board with such powers the people transferred to them the rights accorded to parenthood before the constitution was adopted.

FOOTNOTES

Chapter 1

1. Grad, "The State Constitution: Its Function and Form for Our Time," 54 *Va. L. Rev.* 928, 948 (1968). In general, the state constitution is a document of limitation; the state government is a government of plenary powers except as limited by the state and U.S. constitutions. *Ibid.*, p. 966.

2. *Ibid.*, p. 932. This subject is discussed further in chapter 9 on the indigent and the right to government services.

3. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

4. The Due Process Clause also protects against state action certain rights deemed fundamental which are not enumerated in the first 8 amendments, such as the right of privacy discussed in chapter 8. The imposition of federal guarantees on the states is also discussed in chapter 4 on due process, equal protection, and freedom from discrimination.

5. *Adamson v. California*, 332 U.S. 46, 53 (1947).

6. The summary which follows has been taken in large part from *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

7. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

8. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925). See also, chapter 3 on First Amendment Freedoms.

9. *Mapp v. Ohio*, 367 U.S. 643 (1961).

10. *Malloy v. Hogan*, 378 U.S. 1 (1964).

11. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

12. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

13. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

14. *In re Oliver*, 333 U.S. 257 (1948).

15. *Pointer v. Texas*, 380 U.S. 400 (1965).

16. *Washington v. Texas*, 388 U.S. 14 (1967).

17. *Robinson v. California*, 370 U.S. 660 (1962).

18. Note, "State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism," 13 *Am. Crim. L. Rev.* 737-738 (1976); hereinafter cited as "State Constitutional Guarantees."

19. *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971) (statements obtained without *Miranda* warnings cannot be used to impeach defendant's direct testimony); *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974) (warrantless search incident to lawful arrest limited to search for weapons or fruits and instrumentalities of particular crime for which arrest was made).

20. "State Constitutional Guarantees," pp. 739-740; Zimmerman, "The Shield of State Courts," *Honolulu Star-Bulletin*, July 21, 1977, p. A-14.

21. "State Constitutional Guarantees," p. 738 n. 10.

22. See *Ex parte Edwards*, 13 Haw. 32 (1900); *Territory v. Yoshimura*, 35 Haw. 324 (1940); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

23. Norman Meller, *With an Understanding Heart: Constitution Making in Hawaii* (New York: National Municipal League, 1971), pp. 4-5. The Constitution went into effect on August 21, 1959 when Hawaii was admitted to the Union.

24. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, pp. 299-305; Vol. II, pp. 7, 28-29. This intent has been taken into consideration by the Hawaii Supreme Court in its interpretation of the state constitution; see, e.g., *State v. Pokini*, 45 Haw. 295, 367 P.2d 499 (1961).

Chapter 2

1. *Modernizing State Constitutions 1966-1972* (Lexington, Ky.: Council of State Governments, 1973), p. 18. In *State v. Shigematsu*, 52 Haw. 604, 483 P.2d 997 (1971), the Court relied upon Article I, section 2, to declare unconstitutional a statute directed at the suppression of gambling. It emphasized that "[the inalienable rights mentioned in section 2] are just as important and vital to our way of life as the rights or freedoms more specifically enumerated in sections 3 to 19...." *Ibid.*, p. 610.

2. Thirty-nine states have such a right to change the form of government, the exceptions being Alaska, Arizona, Hawaii, Illinois, Kansas, Louisiana, Michigan, Nebraska, New York, Washington, and Wisconsin.

3. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 4.

4. Corwin, "The Basic Doctrine of American Constitutional Law," 42 *Harv. L. Rev.* 149, 247-248 (1928-1929), as quoted in Paul Brest, *Processes of Constitutional Decision Making* (Boston: Little, Brown and Company, 1975), p. 706. The Ninth Amendment was ignored by the U.S. Supreme Court until Justice Goldberg invoked it in *Griswold v. Connecticut*, 381 U.S. 479 (1965), to support a right of personal privacy. Brest, p. 708. The Hawaii Supreme Court apparently has never relied upon section 20 to support a decision.

5. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 300.

6. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, pp. 3-5.

7. These provisions are discussed in chapter 4 on due process, equal protection, and freedom from discrimination, and in chapter 10 on miscellaneous provisions (eminent domain).

8. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 5.

9. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 304.

10. The war-making powers of the state are severely restricted by Article I, section 10, of the U.S. Constitution, which prohibits the state from keeping troops or a navy in time of peace without the consent of Congress or from engaging in war unless actually invaded or in imminent danger.

11. The writ of habeas corpus is a remedy for any unlawful detention or imprisonment, whether pre- or post-conviction. It is further discussed in chapter 6 on the administration of criminal justice.

12. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). This issue should be distinguished from the well-established power of the military to exercise jurisdiction over (1) members of the armed forces who commit offenses in an area under military control, such as a military post; (2) enemy belligerents, prisoners of war, or others charged with violating the laws of war; (3) civilians in an area of military occupation. 327 U.S. 304, 313-314.

13. See Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment," 2 *Hastings Const. L. Q.* 961 (1975); *Commonwealth v. Davis*, 343 N.E. 2d 847 (1976) (right to keep and bear arms for common defense not directed to guaranteeing individual ownership or possession of weapons other than in state militia).

14. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 303.

15. Weatherup, pp. 995-1000.

16. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, pp. 10-15.

17. *Ibid.*

18. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 24.

Chapter 3

1. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religion); *Gitlow v. New York*, 268 U.S. 652 (1925) (speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (press); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (assembly); *Bridges v. California*, 314 U.S. 252 (1941) (petition).

2. The summary which follows is taken from Emerson, "Colonial Intentions and Current Realities of the First Amendment," 125 *U. Pa. L. Rev.* 737 (1977).

3. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

4. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

5. Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 *Harv. L. Rev.* 1, 2 (1965).

6. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

7. *Engel v. Vitale*, 370 U.S. 421 (1962).

8. *Wolman v. Walter*, 45 U.S.L.W. 4861, 4862, 4864-4865, 4867 (U.S. June 24, 1977).

9. 51 Haw. 1, 12, 449 P.2d 130 (1968).

10. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Compare, *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970) (sex education films shown with excusal system do not involve compulsion or coercion, and therefore do not violate free exercise clause).

11. *Torasco v. Watkins*, 367 U.S. 488 (1961).

12. *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970). See also, Greenawalt, "All or Nothing at All: The Defeat of Selective Conscientious Objection," 1971 *Sup. Ct. Rev.* 31, 41.

13. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

14. Bayus, "The Constitutional Status of Commercial Expression," 3 *Hastings Const. L. Q.* 761 (1976). In setting the dividing line between militant expression (protected by the First Amendment) and violent or otherwise illegal action (which is not protected), the Supreme Court is presently relying on the following rule: speech may be curtailed when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

15. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

16. This section is not intended to exhaust all of the possible ramifications of the First Amendment. One particularized application of the First Amendment has been in the area of "academic freedom," "that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community." Wayne K. Minami and Judy E. Stalling, *Article I: Bill of Rights*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), p. 51; see also, Emerson, p. 746. Since unpopular or controversial opinions can be stifled by summary dismissal of teachers or expulsion of students, the effective protection of academic freedom depends in large measure on procedural due process, i.e. procedural fairness with respect to the hiring, promotion, tenure, and termination of faculty, and disciplinary measures against students. See chapter 4 on due process and equal protection; also, Minami, p. 52. The U.S. Supreme Court and the Hawaii Supreme Court are both of the view that only teachers with tenure or the equivalent are entitled to the protection of due process, that is, to a hearing when a contract of employment is not renewed. *Perry v. Sinderman*, 408 U.S. 593 (1972); contrast, *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Abrameon v. Board of Regents*, 56 Haw. 680, 548 P.2d 253 (1976).

    Another ramification of the First Amendment is that of freedom of association: the right to undertake collective activity for the purpose of exercising First Amendment rights. Although first expressly recognized in the context of political and social reform, freedom of association has at times been extended by the U.S. Supreme Court to encompass situations where

purely economic interests are at stake. See Richard F. Kahle, Jr., *Prepaid Legal Services and Hawaii*, Legislative Reference Bureau, Report No. 4 (Honolulu: 1975), pp. 5-7; Minami, pp. 63-64; Raggi, "An Independent Right to Freedom of Association," 12 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 1 (1977).

17. William L. Prosser, *The Law of Torts* (4th ed.; St. Paul: West Publishing Co., 1971), p. 737; James A. Henderson, Jr. and Richard N. Pearson, *The Torts Process* (Boston: Little, Brown and Company, 1975), p. 834.

18. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

19. Eaton, "The American Law of Defamation through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer," 61 *Va. L. Rev.* 1349, 1360-1361 (1975).

20. *Abercrombie v. McClung*, 55 Haw. 595, 525 P.2d 594 (1974), extended legislative immunity to cover a newspaper interview that commented upon legislative proceedings.

21. For an application of the *New York Times* rule, see *Togawa v. Maui Publishing Co.*, 50 Haw. 648, 448 P.2d 337 (1969).

22. Lehmann, "Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege," 3 *Hastings Const. L. Q.* 543, 564 (1976).

23. Eaton, pp. 1378-1379. But see, *Aku v. Lewis*, 52 Haw. 366, 477 P.2d 162 (1970) (plaintiff-policeman defamed in private capacity as coach of a youth football team).

24. Derived from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For an application of the *Gertz* rule, see *Cahill v. Hawaii Paradise Park Corp.*, 56 Haw. 522, 545 P.2d 692 (1975). The Supreme Court has never directly addressed the question of whether either rule applies to private parties as well as media defendants. Lehmann, p. 581; Phillips, "Defamation, Invasion of Privacy, and the Constitutional Standard of Care," 16 *Santa Clara L. Rev.* 77, 93 (1975).

25. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 359 (1974).

26. 424 U.S. 448 (1976).

27. Lehmann, p. 580.

28. Phillips, p. 98.

29. Prosser, pp. 804-814.

30. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

31. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

32. *Zacchini v. Scripps-Howard Broadcasting Co.*, 45 U.S.L.W. 4954 (U.S. June 28, 1977); *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 441 P.2d 141 (1968).

33. See cases cited in notes 30-31. In the *Cohn* case, the plaintiff sued for invasion of privacy when a broadcast disclosed the name of his daughter who had been raped and murdered. The Court held that the First Amendment precluded liability where the information, although humiliating, was accurate and had been obtained from judicial records open to public inspection. Yet, it appears that the only essential difference between *Cohn* and *Firestone*, where the Court upheld the interest of the individual, was that the information in *Cohn* was true.

34. See cases cited in note 32.

35. Phillips, p. 99.

36. See *Goldman v. Time, Inc.*, 336 F.Supp. 133, 138 (N.D. Cal. 1971).

37. Project, Government Information and the Rights of Citizens, 73 *Mich. L. Rev.* 971, 1164 (1975); hereinafter cited as Government Information; *Hawaii Rev. Stat.*, sec. 92-1.

38. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. sec. 552 (1970)).

39. The federal sunshine law is Pub. L. No. 409, 94th Cong., 2nd Sess., 90 Stat. 1241 (Sept. 13, 1976). In Hawaii, the open-records law and sunshine law have been combined into one statute, *Hawaii Rev. Stat.*, ch. 92.

40. *Mont. Const.* art. II, sec. 8.

41. See 5 U.S.C. sec. 552(b)(6) (1970); *Hawaii Rev. Stat.*, sec. 92-50; Government Information, pp. 1179-1180, 1172. At the present time, in Hawaii, the following types of records are shielded from disclosure: the records of the attorney general and the district attorneys pertaining to the prosecution or defense of any action (*Hawaii Rev. Stat.*, sec. 92-51); adoption records (*Hawaii Rev. Stat.*, sec. 578-15); arrest and criminal identification records (*Hawaii Rev. Stat.*, sec. 831-3.2(d)); tax returns (*Hawaii Rev. Stat.*, sec. 235-116); and welfare records (*Hawaii Rev. Stat.*, secs. 346-10, 11); among others. It does not appear that, e.g., motor vehicle records and school records, are so protected. Government Information, pp. 1173 n.1221, 1269-1277.

42. *Mont. Const.* art. II, sec. 10.

43. *Mont. Const.* art. II, sec. 9.

44. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

45. Rendleman, "Free Press--Fair Trial: Review of Silence Orders," 52 *N.C. L. Rev.* 127 (1973).

46. 384 U.S. 333 (1966).

47. Ranney, "Remedies for Prejudicial Publicity: A Brief Review," 21 *Vill L. Rev.* 819, 820 (1976).

48. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

49. *Ibid.*, at 568.

50. *Sheppard v. Maxwell*, 384 U.S. 333, 355-361 (1966); Ranney, p. 828.

51. *Sheppard v. Maxwell*, 384 U.S. 333, 355, 358 (1966). *Hawaii Rules of Penal Procedure*, Rule No. 53 (Regulation of Conduct in the Courtroom)

provides that during judicial proceedings, there may be no taking of photographs or radio broadcasting. On rare occasions, the public and the press may be excluded altogether from a preliminary hearing. There does not appear to be any law or rule of criminal procedure specifically authorizing or forbidding a closed preliminary hearing. Ranney, p. 829; "Courtroom Closed in Murder Hearing," *Honolulu Star-Bulletin*, July 23, 1977, p. A-2.

52. The kind of contempt referred to here is both *criminal* and *constructive*. Criminal contempt is conduct which brings the court into disrespect or which interferes with the administration of justice. Constructive contempt is that which is committed at a distance from the court but which tends to obstruct or defeat the administration of justice. Violation of a silence order would be an offense under *Hawaii Rev. Stat.*, sec. 710-1077(1)(g), and would be punishable as either a misdemeanor or petty misdemeanor.

53. See, e.g., *Wood v. Georgia*, 370 U.S. 375 (1962); also, *Coli v. Deeha*, 27 Haw. 855 (1924); Ranney, p. 828; Dobbs, "Contempt of Court: A Survey," 56 *Cornell L. Rev.* 183, 208-211 (1971). The power of the federal courts to punish for contempt apparently does not reach out-of-court comments on a trial; see 18 U.S.C. sec. 401 (1970).

54. ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press* (Approved Draft 1968), sec. 4.1(a)(1); [hereinafter, ABA Project], quoted in Ranney, p. 828.

55. ABA Project, sec. 4.1(b), quoted in Ranney, p. 828.

56. *Branzburg v. Hayes*, 408 U.S. 665 (1973).

57. *Ibid.*, at 690-691.

58. "Legislature May Weigh Shield Bill for Newsmen," *Honolulu Star-Bulletin*, July 15, 1977, p. A-8.

59. See Samuel B. K. Chang and others, *Privileged Communication and Counseling in Hawaii*, Legislative Reference Bureau, Report No. 1 (Honolulu: 1976), esp. chapter II. Hawaii recognizes 4 privileges: spousal, attorney-client, physician-patient, clerical-penitent.

60. *In re Goodfader*, 45 Haw. 317, 367 P.2d 472 (1961). A Honolulu news reporter was recently found in contempt of court for refusing to reveal the source of a grand jury transcript; the case is now on appeal to the Hawaii Supreme Court. "Jail Ordered for Newsman," *Honolulu Star-Bulletin*, July 12, 1977, p. A-1.

61. Bollinger, "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media," 75 *Mich. L. Rev.* 1 (1975); Emerson, p. 751.

62. Bollinger, p. 1 n.3.

63. Emerson, p. 753.

64. Bollinger, p. 2. Compare Hawaii Att'y Gen. Ops. No. 74-11 (April 2, 1974) (statute which would include newspapers within definition of public utility and subject them to PUC jurisdiction would violate freedom of the press).

65. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

66. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The "personal attack" rule should be distinguished from the "political editorializing" rule; under the latter rule, when a broadcaster endorses a political candidate, other candidates must be given an opportunity to respond. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 111, 112 n.10 (1973).

67. It has been questioned whether the scarcity doctrine will have much validity after the expansion of cable television; Bollinger, p. 37.

68. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

69. Emerson, p. 753.

70. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

71. Bayus, pp. 761-762.

72. *Ibid.*, p. 761.

73. 341 U.S. 622 (1951).

74. *Martin v. Struthers*, 319 U.S. 141 (1943).

75. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *aff'g* 373 F.Supp. 683 (E.D. Va. 1974). See also, *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertising for abortion information, counseling, and referral available in another state); *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 27, 1977) (lawyers' advertising).

76. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976), *aff'g* 373 F.Supp. 683 (E.D. Va. 1974).

77. *Ibid.*, at 771-772.

78. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); compare *Cohen v. California*, 403 U.S. 15 (1971) (wearing of a jacket with the words "Fuck the Draft" constitutes protected speech).

79. *United States v. O'Brien*, 391 U.S. 367 (1968); see also, *State v. Jordan*, 53 Haw. 634, 500 P.2d 560 (1974).

80. Emerson, p. 754; compare, *Kleinjans v. Lombardi*, 52 Haw. 427, 478 P.2d 320 (1970) (protest which took form of occupation of private office of university official outside the First Amendment); *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 (1973) (criminal trespass statute not unconstitutionally applied to those who occupied office of private corporation).

81. Note, "Community Standards, Class Actions, and Obscenity under *Miller v. California*," 88 *Harv. L. Rev.* 1838, 1839-1840 (1975); hereinafter cited as "Community Standards." The critical question in obscenity cases is not the speaker's right to communicate--perhaps to an unwilling listener--but the "interested individual's right of access to materials he desires." *Smith v. United States*, 45 U.S.L.W. 4495, 4502 n.18 (U.S. May 23, 1977) (Stevens, J., dissenting).

82. Hunsaker, "The 1973 Obscenity--Pornography Decisions: Analysis, Impact, and Legislative Alternatives," 11 *San Diego L. Rev.* 906, 910. See also, the discussion of *Brandenburg v. Ohio*, note 14. It is worthwhile to contrast the Court's treatment of obscenity and its attitude towards "commercial speech," discussed elsewhere in this chapter.

83. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-63 (1973).

84. *Ibid.*, at 64.

85. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

86. *Roth v. United States*, 354 U.S. 476 (1957).

87. 413 U.S. 15 (1973).

88. 383 U.S. 413, 418 (1966).

89. Interpreted in *Miller* to require a national standard of obscenity; 413 U.S. 15, 30 (1973).

90. *Hawaii Rev. Stat.*, sec. 712-1210(5), reads:

> *"Pornographic." Any material or performance is "pornographic" if all of the following coalesce:*
>
> *(a) Considered as a whole, its predominant appeal is to prurient interest in sexual matters. In determining predominant appeal, the material or performance shall be judged with reference to ordinary adults, unless it appears from the character of the material or performance and the circumstances of its dissemination that it is designed for a particular, clearly defined audience. In that case, it shall be judged with reference to the specific audience for which it was designed.*
>
> *(b) It goes substantially beyond customary limits of candor in describing or representing sexual matters. In determining whether material or a performance goes substantially beyond the customary limits of candor in describing or representing sexual matters, it shall be judged with reference to the contemporary standards of candor of ordinary adults relating to the description or representation of such matters.*
>
> *(c) It is utterly without redeeming social value.*

In addition to U.S. Supreme Court cases, the Hawaii definition draws upon other proposed and enacted codifications as well as the Model Penal Code. Commentary to sec. 712-1214.

91. "Community Standards," p. 1853.

92. 413 U.S. 15, 24 (1973). Also relevant to the Supreme Court's toughened attitude towards commercialized obscenity is *California v. LaRue*, 409 U.S. 109 (1972), *reh. denied*, 410 U.S. 948 (1973) (under the Twenty-First Amendment, the state may prohibit explicitly sexual live entertainment and films in licensed establishments); *Rowan v. Post Office Department*, 397 U.S. 728 (1970) (federal statute upheld allowing postmaster-general, at request of individual receiving pandering advertisements in the mail, to strike individual's name from mailing list and to refrain from sending further mailings to that address).

93. *Hawaii Rev. Stat.*, secs. 712-1210 to 1216, were cited with approval in *Miller* as an example of the required specificity. 413 U.S. 15, 24, n.6. The applicable state law can be either a statute or judicial interpretation thereof.

94. "Community Standards," pp. 1843-1844.

95. *Ibid.*, p. 1838.

96. *Ibid.*, p. 1854.

97. *Ibid.*, pp. 1849-1850.

98. *Ibid.*, p. 1847.

99. *Ibid.*, p. 1858; Hunsaker, pp. 925-930. National distributors would have to adjust their patterns of distribution to accommodate individual jurisdictions, or more likely, use the lowest common denominator.

100. See the summary in Hunsaker, p. 908.

101. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-59 (1973).

102. *Stanley v. Georgia*, 394 U.S. 557 (1969). This case is further discussed in chapter 8 on the right of privacy.

103. *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 127-128 (1973).

104. *United States v. Orito*, 413 U.S. 139, 141-143 (1973).

105. *Kaplan v. California*, 413 U.S. 115 (1973).

106. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Smith v. United States*, 45 U.S.L.W. 4495, 4498 (U.S. May 23, 1977).

107. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973); *Kaplan v. California*, 413 U.S. 115, 121 (1973).

108. *Hamling v. United States*, 418 U.S. 87, 105-106 (1974).

109. *Smith v. United States*, 45 U.S.L.W. 4495, 4499 (U.S. May 23, 1977).

110. *Ibid.*, at 4497; *Jenkins v. Georgia*, 418 U.S. 153, 160-161 (1974).

111. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

112. *Manzo v. State*, Hawaii Supreme Court No. 5795, is presently under consideration on interlocutory appeal. The defendant was charged with the offense of promoting pornography.

Chapter 4

1. Civil rights have been variously defined as those rights which belong to every citizen or inhabitant of a state or country; as those rights not connected with the organization or administration of

government; as those rights including rights of property, marriage, freedom of contract, trial by jury; as those rights capable of being enforced or redressed in a civil action; as those rights secured by the Thirteenth and Fourteenth Amendments to the U.S. Constitution and various acts of Congress made in pursuance thereof. *Black's Law Dictionary* (4th ed.; St. Paul: West Publishing Company, 1968), p. 1487. Civil rights are distinguished from natural rights and political rights; *ibid.*, pp. 1487-1488. Natural rights are those which appertain originally to man and which would exist even without statutory law. These are guaranteed by Article I, section 2: enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. Political rights are those which may be exercised in the formation or administration of government, such as the right to vote or the right to run for political office.

At the 1968 Constitutional Convention, which considered and rejected the excision of "civil" from Article I, section 4, there was some disagreement as to the scope of "civil" rights and whether they encompassed political rights. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, pp. 2-5 (remarks of Delegates Aduja, Larson, and O'Connor).

2. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Standing Committee Report No. 20, p. 164.

3. There are 4 other anti-discriminatory provisions in the Hawaii Constitution: Article I, section 7 ("No citizen shall be denied enlistment in any military organization of this State nor be segregated therein because of race, religious principles or ancestry"); Article I, section 12 ("No person shall be disqualified to serve as a juror because of sex"); Article I, section 21 ("Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section"); Article IX, section 1 ("... There shall be no segregation in public educational institutions because of race, religion, or ancestry").

The purpose of Article I, section 7, was primarily to afford conscientious objectors an opportunity to serve in a noncombatant capacity. The failure to include sex in the list of suspect classifications was not discussed. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 300; Vol. II, pp. 33-34.

Article I, section 12, was originally adopted because women were not allowed to serve on juries under the Organic Act. Statement of Delegate Kellerman, Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 44. The provision is now largely of historical interest because of subsequent legislation and judicial decision. In Hawaii, as in all the states, women are eligible to serve on state and federal juries; discrimination on the basis of sex is prohibited by *Hawaii Rev. Stat.*, sec. 612-2, and the Federal Jury Selection Act, 28 U.S.C. sec. 1862. In *Taylor v. Louisiana*, 419 U.S. 477 (1975), the U.S. Supreme Court held that a criminal defendant was deprived of the Sixth Amendment right to a jury composed of a cross section of the community by a law that automatically exempted women from jury duty unless they had filed a declaration of their desire to serve.

Article I, section 21, is the state Equal Rights Amendment and is discussed in further detail below.

> *Sex was intentionally omitted from Article IX, section 1 because of the classes maintained by the public school system at the Kawailoa School and the Boy's Industrial School at Waialae.* Statement of Delegate Dowson, Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 587.

In 1968 the Committee on the Bill of Rights considered but did not recommend amendment of Article I, section 4, to include "economic status or political belief" as suspect classifications. It was felt that these criteria had not been sufficiently defined. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, p. 234.

It is important to note that Article I, section 4, was not intended to apply to the benefits accruing to the Hawaiians under the Hawaiian Homes Commission Act. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, pp. 300-301; Vol. II, p. 35.

4. *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

5. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare recipient has a "property interest" in continued receipt of benefits and must be allowed an opportunity for an evidentiary hearing before benefits are terminated). Compare, *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 522 P.2d 1255 (1974) (public housing tenants entitled to hearing before rent increases can be imposed based on their alleged overincome status).

6. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendant has right to assistance of court-appointed counsel). Kadish, "Methodology and Criteria in Due Process Adjudication," 66 *Yale L. J.* 319, 346 (1958), has this to say about procedural due process:

> *...["Fairness"] gives meaning to the great bulk of procedures that have become part of the due process of law: that the accused be put on fair notice of the nature of the prohibited acts; that he be given an adequate opportunity to present his side through counsel before a fair and impartial tribunal free from prejudicial influences; that he be entitled to be continuously present at the trial, and to confront and cross-examine his accusers; that he have the right to be free of the damaging and untrustworthy influence of coerced confessions and testimony knowingly perjured.*

7. See, e.g., *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969) (prior notice and hearing required before garnishment of wages). See generally, Richard F. Kahle, Jr., *Creditor's Remedies*, Legislative Reference Bureau (Honolulu: 1974).

8. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894-895 (1961).

9. Paul Brest, *Processes of Constitutional Decision-Making* (Boston: Little, Brown and Company, 1975), p. 805.

10. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); see also, chapter 1.

11. Brest, p. 701 n.17.

12. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 681 (1966) (Harlan, J., dissenting).

13. Barbara Allen Babcock and others, *Sex Discrimination and the Law* (Boston: Little, Brown and Company, 1975), p. 74.

14. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *New Orleans v. Dukes*, 427 U.S. 297 (1976). The Hawaii Supreme Court is not necessarily as deferential to the legislature. Contrast the approach of the Hawaii Supreme Court in *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 475 P.2d 679 (1970) (Hawaii statute requiring every employer with more than 25 employees to continue salary of employee serving on jury or public board violates equal protection and taking clauses of both Hawaii and U.S. Constitutions) with the approach of the U.S. Supreme Court in *Dean v. Gadsden Times Publishing Co.*, 412 U.S. 543 (1973) (statute requiring employer to continue salary of employee on jury duty not a deprivation of due process). Since the *Hasegawa* decision rested on state as well as U.S. constitutional grounds, the U.S. Supreme Court could not review the decision.

15. "Suspect class" was defined as follows in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973): "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process".

16. "Fundamental rights" under the Equal Protection Clause should be distinguished from substantive due process rights under the Due Process Clause. Brest, p. 809.

17. Babcock, p. 74.

18. The U.S. Supreme Court has struck down discriminatory laws using the reasonableness test; see *Reed v. Reed*, 404 U.S. 71 (1971) (unconstitutionality of statute providing that, when 2 individuals are otherwise equally entitled to appointment as administrator of estate, male applicant must be preferred to female) and *Stanton v. Stanton*, 421 U.S. 7 (1975) (unconstitutionality of statute specifying for males greater age of majority than for females, in context of parent's obligation for support payments).

    It has also relied on the so-called "irrebuttable presumption" theory in invalidating mandatory maternity leave and return-to-work rules; see *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). The "irrebuttable presumption" theory is more exacting than the reasonableness test but less exacting than the strict scrutiny test; for further discussion of this middle-level of scrutiny, see Babcock, p. 128.

    In *Frontiero v. Richardson*, 411 U.S. 677 (1973), only 4 justices held that sex was a suspect classification; 4 others concurred in the judgment that differential treatment for servicewomen with respect to fringe benefits was unconstitutional.

19. Brown and others, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871, 885 (1971).

20. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

21. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). Out of deference to state economic regulation, the Court upheld California's temporary disability insurance program which denied benefits for pregnancy-related disabilities. Compare *General Electric Co. v. Gilbert*, 97 S. Ct. 401 (1976) (exclusion of pregnancy-related disabilities does not constitute sex discrimination in violation of Title VII of the Civil Rights Act of 1964). In Hawaii, pregnancy-related disabilities are covered by temporary disability insurance; see *Hawaii Rev. Stat.*, sec. 392-21.

22. Compare *Kahn v. Shevin*, 416 U.S. 351 (1974) (property tax exemption for widows, but not widowers, upheld), with *Craig v. Boren*, 45 U.S.L.W. 4057 (U.S. Dec. 21, 1976) (statute prohibited sale of 3.2 beer to males under 21 but females under 18 struck down).

23. Brown, pp. 922-923.

24. *Ibid.*, p. 885.

25. Three of the 35 have voted to rescind, but the legal effect of such rescission is in doubt. Thirty-eight states must ratify by March 22, 1979 for the amendment to take effect. "The Unmaking of an Amendment", *Time*, April 25, 1977, p. 89. Hawaii was the first state to ratify the federal ERA; the ratifying resolution was adopted unanimously by both houses of the state legislature within 20 minutes after the proposed amendment had been voted out of the U.S. Senate. See Patricia K. Putman, "ERA in Hawaii" (memorandum, Honolulu, Hawaii), p. 5.

26. Alaska (art. I, sec. 3); Colorado (art. II, sec. 29); Connecticut (art. I, sec. 20); Hawaii (art. I, sec. 21); Illinois (art. I, sec. 18); Maryland (Declaration of Rights, art. 46); Massachusetts (art. I); Montana (art. II, sec. 4); New Hampshire (Natural Rights, art. II); New Mexico (art. II, sec. 18); Pennsylvania (art. I, sec. 28); Texas (art. I, sec. 3a); Utah (art. IV, sec. 1); Virginia (art. II, sec. 11); Washington (art. XXXI, sec. 1); Wyoming (art. I, sec. 3).

    The Hawaii ERA follows the language of the federal ERA, which is strictest in its prohibition against discrimination. The Hawaii ERA took effect upon ratification at the general election on November 7, 1972; 87 per cent of the voters voted aye. Putman, p. 6.

    The Wyoming and Utah provisions were adopted before 1900 and have not been interpreted as modern ERAs. The Virginia provision includes a section permitting separation of the sexes and has been interpreted to allow women to decline jury duty without reason. The Illinois provision uses "equal protection" language but has been interpreted as strictly as an ERA. National Commission on the Observance of International

Women's Year, "...To Form A More Perfect Union..." (Washington: 1976), p. 27 n.46; hereinafter cited as "More Perfect Union."

27. Brown, pp. 884-885, 893, 922-928; "More Perfect Union," pp. 373-377. Most of these arguments of course are applicable to a state ERA.

28. Since the outlook for ratification of the federal ERA by the necessary number of states is currently rather gloomy, this rationale is of questionable validity. "The Unmaking of an Amendment," *Time*, April 25, 1977, p. 89.

29. Brown, pp. 944-946. Hawaii already has adopted the "ability to pay" principle with regard to alimony and child support; see *Hawaii Rev. Stat.*, secs. 580-9, 580-47, 580-74. However, the husband is still liable for support during marriage; *Hawaii Rev. Stat.*, sec. 573-7.

30. Brown, p. 893.

31. *Ibid.*, pp. 897-898.

32. *Ibid.*, pp. 900-902.

33. Statement of Senator Sam Ervin, *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970), quoted in Babcock, p. 136. Some of the existing federal laws which seek to eliminate sex discrimination include Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000(e) *et seq.* and the Equal Pay Act, 29 U.S.C. 206(d).

34. Freund, "The Equal Rights Amendment is Not the Way," 6 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 234, 236 (1971).

35. *Ibid.*, p. 234.

36. Linker & Miller, "The Equal Rights Amendment: An Analysis of the Campaigns for Ratification in California and Utah" (Student paper, Stanford Law School, May 1973), quoted in Babcock, pp. 181-183.

37. *Ibid.*, pp. 183-184.

38. The Hawaii ERA provided the basis for the circuit court's decision in *Cragun and Spiller v. State*, Civil No. 43175, First Circuit Hawaii, January 27, 1975. The Court ruled that *Hawaii Rev. Stat.*, sec. 574-1, which required a woman to assume her husband's name upon marriage was unconstitutional. The statute was amended in 1975 to permit both parties to a marriage the option of choosing their married surname, whether that of the wife, the husband, or a combination of those names. Putman, p. 8.

39. The summary which follows is taken from Babcock, p. 186, and Putman, pp. 5-9. Putman covers Hawaii legislation from 1972 through 1976. See also, Galvin & Mendelsohn, "Legal Status of Women," *Book of the States 1976-77* (Lexington, Ky.: Council of State Governments, 1976), pp. 231-237.

40. *Hawaii Rev. Stat.*, sec. 383-29.

41. *Hawaii Rev. Stat.*, sec. 383-30.

42. *Hawaii Rev. Stat.*, sec. 392-3(5).

43. *Hawaii Rev. Stat.*, sec. 87-1(6).

44. *Hawaii Rev. Stat.*, sec. 88-189.

45. *Hawaii Rev. Stat.*, sec. 477E-3.

46. *Hawaii Rev. Stat.*, sec. 378-2.

47. *Hawaii Rev. Stat.*, secs. 515-3, 5 to 8.

48. Proposals for further reform may be found in a study undertaken jointly by the Hawaii Legislative Reference Bureau and the Hawaii State Commission on the Status of Women (unpublished).

49. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 659 (1974) (Rehnquist, J., dissenting).

50. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

51. *Nelson v. Miwa*, 56 Haw. 601, 546 P.2d 1005 (1976).

52. *Ibid.*, at p. 612. The rules relating to mandatory retirement of university faculty have been amended to prohibit employment of post-65 persons except when "no one else is available [i.e. advertising has failed to produce a qualified applicant under 65]." See Appendix B attached to University of Hawaii, Office of the Director of Administration, Business Manual Memorandum No. 76-38, October 22, 1976. The issue of whether compulsory retirement *per se* is a denial of equal protection is presently under consideration by the Hawaii Supreme Court; see *Levi v. Board of Regents*, Hawaii Sup. Ct. No. 6631.

53. Note, "Too Old to Work: The Constitutionality of Mandatory Retirement Plans," 44 *S. Cal. L. Rev.* 150, 158-159 (1971); hereinafter cited as "Too Old to Work"; Shabecoff, "A Right to Work for the Aging Class," *New York Times*, July 17, 1977, sec. 4, p. 10; Waldman & Levine, "...Serves a Valid and Legal Social Purpose," 1 *Civ. Lib. Rev.* 98 (1974).

54. Waldman, p. 99; "Increase in Early Retirement Traced," *Honolulu Star-Bulletin*, August 4, 1977, p. C-1; "Poll Shows Executives Favor Retirement at 65," *Honolulu Star-Bulletin*, August 4, 1977, p. C-1.

55. "Too Old to Work," esp. pp. 152-158, 159-162; Eglit, "Is Compulsory Retirement Constitutional?", 1 *Civ. Lib. Rev.* 87 (1974).

56. *Hawaii Rev. Stat.*, sec. 349-6(a)(5).

57. *Hawaii Rev. Stat.*, sec. 378-2. The prohibition on discriminatory employment practices does not extend to *bona fide* retirement plans. *Hawaii Rev. Stat.*, sec. 378-9(4).

58. *Louisiana Const.* art. I, sec. 3, has a heavily qualified Equal Protection Clause prohibiting arbitrary, capricious or unreasonable discrimination on the basis of age.

59. Maine has recently enacted a new retirement law, banning compulsory retirement of public employees. "Maine Wipes Out Forced Retirement," *Honolulu Star-Bulletin*, July 26, 1977, p. A-16. A bill has been introduced in Congress that would amend the Age Discrimination Act of 1967 so as to eliminate immediately the mandatory retirement

age of 70 now applicable to federal employees. This legislation is aimed at ultimately eliminating mandatory retirement altogether. Shabecoff, p. 10.

60. Wayne K. Minami and Judy E. Stalling, *Article I: Bill of Rights*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), pp. 116-117; see also, note 1.

61. See, e.g., *Hawaii Rev. Stat.*, chapter 378, which prohibits discrimination in employment on the basis of marital status as well as sex. From one point-of-view, it would appear that discrimination on the basis of sex differentiates between men and women, whereas discrimination on the basis of sexual preference differentiates between the homosexual (whether male or female) and the heterosexual, and discrimination on the basis of marital status between the married (whether male or female) and the unmarried. For arguments as to whether discrimination on the basis of sexual preference should be seen as sex discrimination, see Babcock, pp. 179-180.

62. See note 58.

63. See *Florida Const.* art. I, sec. 2: "No person shall be deprived of any right because of race, religion or physical handicap"; *Illinois Const.* art. I, sec. 19: "All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer."

Chapter 5

1. *Hawaii Const.* art. I, sec. 5.

2. See *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

3. *Katz v. United States*, 389 U.S. 347, 357 (1967).

4. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

5. *United States v. Ventresca*, 380 U.S. 102, 106 (1965).

6. For the procedures for issuing search warrants, see Rule 41, *Hawaii Rules of Penal Procedure*, the Supreme Court of Hawaii, 1977.

7. *Marron v. United States*, 275 U.S. 192 (1927).

8. *Brinegar v. United States*, 338 U.S. 160 (1949).

9. *State v. Chong*, 52 Haw. 226, 473 P.2d 567 (1970).

10. See Israel & LaFave, *Criminal Procedure in a Nutshell* (St. Paul: West, 1975), p. 100.

11. *Brinegar v. United States*, 338 U.S. 160 (1949); *State v. Chong*, 52 Haw. 226 (1970).

12. *Angular v. Texas*, 378 U.S. 108 (1964).

13. *Draper v. United States*, 358 U.S. 307 (1959).

14. *Elkins v. United States*, 364 U.S. 206, 222 (1960).

15. As a general rule, only the items specifically named in the warrant may be properly seized. *Stanford v. Texas*, 379 U.S. 476 (1964). But see, *U.S. v. Jones*, 543 F.2d 627, 629 (9th Cir. 1976) ("reasonably related to the crimes for which the warrant issued"); *U.S. v. Honore*, 450 F.2d 31 (9th Cir. 1971) ("means and instrumentalities of a separate crime").

16. *Louis v. United States*, 426 F.2d 1398 (9th Cir. 1970) ("reasonably related" to the search); *Woo Lai Chyn v. United States*, 274 F.2d 708 (9th Cir. 1960) ("closely related to that which is sought").

17. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Walling*, 486 F.2d 229 (9th Cir. 1973).

18. *Quigg v. Estelle*, 492 F.2d 343 (9th Cir. 1974).

19. *United States v. Fisch*, 474 F.2d 1071, 1078 (9th Cir. 1973); *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969); *cert. den.*, 397 U.S. 1012 (1970).

20. *United States v. Kim*, 415 F.Supp. 1252 (D. Haw. 1976). But see, *United States v. Walling*, 486 F.2d 229 (9th Cir. 1973) (use of flashlight is permissible).

21. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-249 (1973); *United States v. Rothman*, 492 F.2d 1260, 1264 (9th Cir. 1973).

22. *U.S. v. Rothman*, 492 F.2d 1260, 1264 (9th Cir. 1973); *Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973); *Miranda v. Arizona*, 384 U.S. 436 (1966).

23. *United States v. Irion*, 482 F.2d 1240 (9th Cir. 1973).

24. *Bumper v. North Carolina*, 381 U.S. 543 (1968).

25. *United States v. Botelho*, 390 F. Supp. 620, 625 (D. Haw. 1973); see also, *State v. Evans*, 45 Haw. 622, 372 P.2d 365 (1962) (wife cannot permit search of her husband's personal effects); *Chapman v. United States*, 365 U.S. 610 (1961) (landlord cannot consent to search of premises rented by tenants, even though landlord may enter for the purpose of cleaning and maintenance).

26. *Stoner v. California*, 376 U.S. 483 (1964).

27. *Chimel v. California*, 395 U.S. 752 (1969).

28. *Gustafson v. Florida*, 414 U.S. 260 (1973).

29. *State v. Kaluna*, 55 Haw. 361, 370-371, 520 P.2d 51, 59 (1974).

30. *Ibid.*, at 60.

31. See *Schmerber v. California*, 384 U.S. 757 (1966) (police allowed to extract blood from the arrestee to preserve evidence of intoxication, since the alcohol in the arrestee's blood would have dissipated in the time necessary to obtain a warrant).

32. *Warden v. Hayden*, 387 U.S. 294 (1967).

33. *United States v. Scott*, 520 F.2d 687 (9th Cir. 1975).

34. *State v. Onishi*, 53 Haw. 593, 499 P.2d 657 (1972).

35. 392 U.S. 1 (1968).

36. *Adams v. Williams*, 407 U.S. 143 (1972).

37. *United States v. Gonzales-Rodrigues*, 513 F.2d 928 (9th Cir. 1975).

38. *United States v. Patterson*, 492 F.2d 995 (9th Cir. 1974).

39. *United States v. Chadwick*, 45 U.S.L.W. 4797 (1977).

40. See *Wyman v. James*, 400 U.S. 309, 317 (1971).

41. *Vale v. Louisiana*, 399 U.S. 30, 35 (1970).

42. There is a lesser expectation of privacy for one's automobile than for one's home or office, due to the public nature of automobile travel and the fact that automobiles, unlike homes, are subjected to "pervasive and continuing governmental regulation and controls". *South Dakota v. Opperman*, 96 S. Ct. 3092, 3096 (1976).

43. *Ibid.*

44. If the car is not on the street and there are no exigent circumstances, the court may require that a warrant be obtained. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

45. *Carroll v. United States*, 267 U.S. 132 (1925).

46. *Chambers v. Maroney*, 399 U.S. 42 (1970).

47. See *United States v. Mehoiz*, 437 F.2d 145 (9th Cir. 1971).

48. *United States v. Chadwick*, 45 U.S.L.W. 4797, 4800 (1977).

49. *United States v. Edwards*, 415 U.S. 800, 806 (1974); *State v. Kaluna*, 55 Haw. 361, 373, 520 P.2d 51, 61 (1974).

50. *United States v. Edwards*, 415 U.S. 800; *South Dakota v. Opperman*, 96 S. Ct. 3092 (1976).

51. Border searches were never intended to be included within the prohibition of the Fourth Amendment. See Note, "The Constitutionality of Airport Searches," 72 *Mich. L. Rev.* 128, 138 (1973).

52. Persons and objects *leaving* the country are not subject to search under the border search rationale. Thus, probable cause would be required to search a vehicle leaving the country. *United States v. Castillas-Munoz*, 542 F.2d 508 (9th Cir. 1976).

53. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

54. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1972); *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976).

55. *United States v. Schafer*, 461 F.2d 856 (9th Cir. 1972).

56. *United States v. Biswell*, 406 U.S. 311 (1971).

57. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).

58. See *Boyd v. United States*, 116 U.S. 616 (1886).

59. 232 U.S. 383 (1914).

60. 367 U.S. 643 (1961).

61. See *State v. Pokini*, 45 Haw. 295, 367 P.2d 499 (1961).

62. *Wong Sun v. United States*, 371 U.S. 471 (1963) (statements made in response to an illegal entry and arrest); *Massiah v. United States*, 377 U.S. 201 (1964) (violation of right to counsel); *United States v. Wade*, 388 U.S. 218 (1967) (lineup identification).

63. *Terry v. Ohio*, 392 U.S. 1 (1968).

64. *Linkletter v. Walker*, 381 U.S. 618, 636-637 (1965).

65. *One 1968 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965).

66. *Silverthorn Lumber Co. v. United States*, 251 U.S. 385 (1920).

67. See generally, Note, "Seizures by Private Parties: Exclusion in Criminal Cases," 19 *Stan. L. Rev.* 608 (1967).

68. *Silverthorn Lumber Co. v. United States*, 251 U.S. 385 (1920).

69. *United States v. Bacall*, 443 F.2d 1050 (9th Cir. 1971).

70. *Warren v. Hawaii*, 119 F.2d 936 (9th Cir. 1941); see generally, Maguire, "How to Unpoison the Fruit: The Fourth Amendment and the Exclusionary Rule," 55 *J. Crim. L.C. & P.S.* 307 (1964).

71. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). But see, *Brown v. Illinois*, 422 U.S. 590 (1975) (such evidence will be inadmissible when the police engage in *intentional* unconstitutional activity for the very purpose of acquiring evidence).

72. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963).

73. *United States v. Williams*, 436 F.2d 1166 (9th Cir. 1970).

74. *United States v. Winsett*, 518 F.2d 51, 54 (9th Cir. 1975).

75. *Ibid.*, at 55.

76. *Walder v. United States*, 347 U.S. 62 (1954); *Oregon v. Hass*, 420 U.S. 714 (1975).

77. See chapter 7 (Fifth Amendment Rights).

78. Note that illegally obtained evidence may be used for impeachment purposes only when that evidence contradicts or impeaches statements made by the defendant on direct examination, and cannot be smuggled in by the prosecution on cross examination. *United States v. Trejo*, 501 F.2d 138 (9th Cir. 1974). See also, *Walder v. United States*, 347 U.S. 62 (1954).

79. *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971).

80. *United States v. Calandra*, 414 U.S. 355 (1974).

81. *Alderman v. United States*, 394 U.S. 165, 174 (1969).

82. *Jones v. United States*, 362 U.S. 257, 267 (1960). See also, *State v. Matias* (overnight guest has standing to challenge search of the host's premises).

83. Whether standing will be granted to one who is more than a temporary trespasser is not clear. See *Cotton v. United States*, 371 F.2d 385, 391 (9th Cir. 1967) ("Even a trespasser, if he has taken actual possession of the premises, acquires possessory rights against all the world except the true owner"). But see, *State v. Pokini*, 45 Haw. 295, 367 P.2d 499 (1961) (defendants had no standing where they stole a car and were occupying it unlawfully). The validity of the *Pokini* decision, however, is open to question in light of the later decision of *Cotton*.

84. *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967).

85. See *Chapman v. United States*, 365 U.S. 610 (1965); *Alderman v. United States*, 394 U.S. 165, 177 (1969) (electronic surveillance).

86. *Jones v. United States*, 362 U.S. 257, 261 (1960). See also, *United States v. Jeffers*, 342 U.S. 48 (1951) (defendant has standing even if the property seized is contraband to which, under law, no property rights attach); *Alderman v. United States*, 394 U.S. 165 (1969) (defendant whose conversations were overheard by an illegal electronic surveillance has standing).

87. *Jones v. United States*, 362 U.S. 257 (1960).

88. *Ibid.*, at 263. See also, *State v. Dias*, 52 Haw. 100 (1970), *reh. den.*, 52 Haw. 128 (1970). It is not clear whether the doctrine of automatic standing has any continued usefulness in light of the decision in *Simmons v. United States*, 390 U.S. 377 (1967), where it was held that pre-trial testimony to establish standing may not be used against the defendant at the trial on the issue of guilt. See also, *Brown v. United States*, 411 U.S. 223 (1973).

89. See generally, Voorsanger, "*United States v. Robinson, Gustafson v. Florida, United States v. Calandra*: Death Knell of the Exclusionary Rule?", 1 *Hastings Const. L. Q.* 179 (1974).

90. Note, "Fruit of the Poisonous Tree--A Plea for Relevant Criteria," 115 *U. Pa. L. Rev.* 1136, 1141 (1967).

91. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

92. See Cannon, "Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion," 62 *Ky. L. J.* 631 (1974).

93. *Ibid.*

94. *State v. Kaluna*, 55 Haw. 361, 367 P.2d 499, and *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971).

95. See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970) (Burger, C.J., dissenting); Cannon, 62 *Ky . L. J.* 631 (1974).

96. *Louisiana Const.* art. I, sec. 5.

97. *Florida Const.* art. I, sec. 1.03(c).

98. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), art. I, sec. 12.

Chapter 6

1. Sinclair, "A Proposal for an 'Own Recognizance Release' Bail Program, With Focus on the DWI Arrest," 13 *Idaho L. Rev.* 81, 82 (1976).

2. 75 *A.L.R.*3d 956, 960, *Pretrial Preventive Detention*, sec. 2 (1977). For an historical account of bail in Anglo-American law, see Meyer, "Constitutionality of Pretrial Detention," 60 *Georgetown L. J.* 1139, 1145-1164 (1972).

3. Wayne Thomas, Jr., *Bail Reform in America* (Berkeley: University of California Press, 1976), p. 234.

4. *Ibid.*

5. *Ibid.*, pp. 237-238.

6. *Ibid.*, pp. 239-240.

7. *Ibid.*, p. 240.

8. See Foote, "The Coming Constitutional Crisis in Bail," 113 *U. Pa. L. Rev.* 959, 1164-1188 (1965). It is stated in the Commentary of section 5.5 of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release (1968), that it is clear that preventive detention would violate present constitutional and statutory provisions in the great majority of states which grant an absolute right to bail.

9. 9 Cal.3d. 345, 107 *Cal. Rptr.* 401, 508 P.2d 721 (1973).

10. *Hawaii Const.* art I, sec. 9.

11. *Hawaii Rev. Stat.*, secs. 804-3 and 804-4.

12. *Hawaii Rev. Stat.*, sec. 804-8. This provision may be open to constitutional attack on due process grounds, as for example where a person charged with assault may be detained pending ascertainment of the consequences of the injury. Presumably, it denies defendant freedom prior to an adjudication of guilt.

13. *Hawaii Rev. Stat.*, sec. 804-4.

14. 18 U.S.C.A. sec. 3146 *et seq.*

15. 18 U.S.C.A. sec. 3148.

16. Thomas, p. 244.

17. *Ibid.*

18. 18 U.S.C.A. secs. 3161-3174. Rule 48(b) of the *Hawaii Rules of Penal Procedure* (1977) provides that all criminal cases, except for traffic offenses, must be brought to trial within 6 months of the filing of the charge or the arrest, whichever is sooner.

19. Thomas, p. 259.

20. *Ibid.*, p. 253.

21. 18 U.S.C.A. sec. 3146.

22. By 1971, at least 36 states had enacted statutes authorizing the release of defendants on their own recognizance. See Thomas, p. 27. Hawaii law long has provided for personal recognizance. See *Hawaii Rev. Stat.*, sec. 804-15; formerly, *Rev. Laws of Hawaii*, sec. 256-15 (1955) (renumbered in the interim).

23. Thomas, p. 258.

24. *Ibid.*

25. Thomas, p. 259.

26. See *Schilb v. Kuebel*, 404 U.S. 357 (1971).

27. "Recent Developments," 14 *J. Family L.* 492, 495 (1976); Meyer, p. 1179. *Contra*, Foote, p. 968.

28. *Carlson v. Landon*, 342 U.S. 524, 569 (1952) (Burton, J., dissenting).

29. The statute referred to is 1 Stat. 91, sec. 33 (1789), which now is substantially contained in Rule 46 of the *Federal Rules of Criminal Procedure* and the Bail Reform Act of 1966, 18 U.S.C.A. sec. 3146 *et seq.* Both Rule 46 and the Bail Reform Act of 1966 provide that under certain circumstances the accused may be released on personal recognizance or upon the execution of an unsecured appearance bond.

30. However, 18 U.S.C.A. sec. 3148, unlike Rule 46, does not permit the court to consider the evidence and the nature and circumstances of the offense in determining whether the defendant should be released at all, although the court is authorized to take these matters into account in determining what conditions reasonably will assure the appearance of the defendant. 18 U.S.C.A. sec. 3146(b).

31. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

32. *Ibid.*, p. 10 (Jackson, J., concurring). One commentary has attacked the abuse of this doctrine. See Note, "Bail and Its Discrimination Against the Poor: A Civil Rights Action for Reform," 9 *Valparaiso L. Rev.* 167 (1974). Its thesis is that courts detain defendants on judicial hunches of dangerousness through the practice of setting bail bond beyond defendants' financial capacity.

33. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

34. *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). See also, Meyer, p. 1173.

35. See Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 302; *Hawaii Const.* art. I, sec. 9.

36. Egeland, "Bail as a Matter of Right - *In Re Underwood*," 26 *Hastings L. J.* 559 (1974).

37. Illinois is the only state which does not have an Excessive Bail Clause in its constitution. See U.S., Congress, Senate, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *Hearings on Preventive Detention*, 91st Cong., 2d Sess., 1970, p. 1193, updated to 1977; hereinafter cited as 1977 Update.

38. 1977 Update, *ibid.* Illinois has bail as a matter of right. *Illinois Const.* art. I, sec. 9 (1971). By judicial decision the excessive bail principle is established in Illinois. *Ibid.*, Commentary.

39. *Colorado Const.* art. I, sec. 19 (1973).

40. The other states are Alaska, Maryland, New Hampshire, and Vermont. *Alaska Stat.*, sec. 12.30.010 (1972); *Hawaii Rev. Stat.*, secs. 804-3 and 804-4; *Md. Ann. Code Rules of Proc.*, 777 sec. a (1977); *N.H. Rev. Stat. Ann.*, ch. 597:1 (1974); *Vt. Stat. Ann.*, Title 13, sec. 7554 (1974).

41. These states are Georgia, Massachusetts, New York, Virginia, and West Virginia. *Georgia Const.* sec. 2-114; *Massachusetts Const.* art. XXVI; *New York Const.* art. I, sec. 5; *Virginia Const.* art. I, sec. 9; *West Virginia Const.* art. III, sec. 5.

42. See Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 302.

43. See Hawaii Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, p. 234.

44. *Ibid.*

45. See text accompaniment to note 40.

46. *Hawaii Rev. Stat.*, secs. 804-3 and 804-4.

47. Only California's Constitution goes this far. *California Const.* art. I, sec. 12 (1977). However, California's Constitution, unlike Hawaii's, explicitly provides for the right to bail in noncapital cases. Article I, section 12, of the California Constitution provides:

> *A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required.*
>
> *A person may be released on his or her own recognizance in the court's discretion.*

48. See text accompaniments to notes 38 and 39.

49. The other 4 states are Alaska, Maryland, New Hampshire, and Vermont. See note 40.

50. *Hawaii Rev. Stat.*, sec. 804-9. See also, *Hawaii Rev. Stat.*, sec. 804-8, which bars bail where wounding or other injury may terminate in death. However, this provision may be of doubtful constitutional validity. See note 12 and text accompaniment.

51. See text accompaniments to notes 31 and 32.

52. *Sakamoto v. Chang*, 56 Haw. 447, 451, 539 P.2d 1197 (1975). The Hawaii Supreme Court stated this in the context of interpreting *Hawaii Rev. Stat.*, sec. 709-9 (1968), later redesignated as *Hawaii Rev. Stat.*, sec. 724-9 (Supp. 1974), and most recently redesignated as *Hawaii Rev. Stat.*, sec. 804-9. The language of the statute has remained the same throughout.

53. Quoting in part the concurring opinion of Justice Jackson, note 32, 56 Haw. at 451.

54. This exception long has been viewed as reasonable and constitutional. See Meyer, p. 1180.

55. See Note, "*Roll v. Larson*: The Right to Bail in Capital Cases After *Furman v. Georgia*, 1974 ed., *Utah L. Rev.* 421, 422; hereinafter cited as *Furman*.

56. *Furman*, p. 422.

57. 408 U.S. 238 (1972).

58. See *Furman*, p. 421.

59. *Ibid.*, p. 422.

60. 428 U.S. 153 (1976).

61. See 75 *A.L.R.*3d 956, 962, *Pretrial Preventive Detention*, sec. 2 (1977).

62. *Colorado Const.* art. I, sec. 19.

63. Thomas, p. 248.

64. *Hawaii Const.* art. I, sec. 8.

65. The earliest origins of the grand jury, however, lie not in an effort to protect the people from prosecutorial misconduct, but as an instrument to augment the royal power. See Tiger & Levy, "The Grand Jury as the New Inquisition," 50 *Mich. S. B. J.* 693 (1971).

66. See Zwerling, "Federal Grand Jury v. Attorney Independence and the Attorney-Client Privilege," 27 *Hastings L. J.* 1263 (1976).

67. See Comment, "Federal Grand Jury Investigation of Political Dissidents," 7 *Harv. Civ. Rights-Civil Lib. L. Rev.* 432 (1972); hereinafter cited as "Federal Grand Jury."

68. *Ibid.*; National Center for State Courts, Hawaii's Jury System, Vol. I, *Grand Juries* (San Francisco: 1976), p. 18; hereinafter cited as *Grand Juries*.

69. See Zwerling, p. 1263.

70. See *Blair v. United States*, 250 U.S. 273 (1919).

71. See *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the discussion of "news reporter's privilege" in chapter 3 on the First Amendment.

72. See *Hawaii Rules of Penal Procedure*, Rule 6(d).

73. See Comment, "Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence," 39 *U. of Chicago L. Rev.* 761, 762 (1972); hereinafter cited as "Grand Jury Proceedings."

74. *Grand Juries*, p. 32.

75. *Ibid.*, pp. 29-31.

76. *State. v. Joao*, 53 Haw. 226, 491 P.2d 1089 (1971).

77. *Hawaii Rev. Stat.*, sec. 621-20.5.

78. See *Wery v. Pacific Trust Co.*, 33 Haw. 701 (1935). Other privileges include the husband-wife privilege (*Hawaii Rev. Stat.*, sec. 621-18) and the clergyman-counselee (*Hawaii Rev. Stat.*, sec. 621-20).

79. See *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951).

80. *Hawaii Rev. Stat.*, ch. 612C.

81. *Hawaii Rules of Penal Procedure*, Rule 6(e).

82. *Ibid.*, Rule 6(e)(1).

83. See Zwerling; *Grand Juries*.

84. See Tiger & Levy.

85. See *Grand Juries*, p. 16.

86. *Ibid.*, p. 29.

87. Tiger & Levy, p. 698.

88. See Zwerling, pp. 1263 and 1270. In Hawaii, the potential for abuse is somewhat limited because witnesses are granted "transactional" immunity--immunity from prosecution for matters to which the witness' testimony relate. On the federal level, "use" immunity is deemed sufficient and the witness may be prosecuted for a crime about which the witness testifies but the information furnished by the witness may not be used against that witness unless it had an independent source (see chapter 5, searches and seizures).

89. See "Federal Grand Jury."

90. See Tiger & Levy.

91. See Kuh, "The Grand Jury 'Presentment': Foul Blow or Fair Play?", 55 *Columbia L. Rev.* 1103, 1120 (1955).

92. *Ibid.*, p. 1118.

93. *Grand Juries*, p. 35.

94. *Ibid.*

95. See "Grand Jury Proceedings."

96. See, e.g., *Montana Const.* art. II, sec. 20; *Nevada Const.* art. I, sec. 8; *New Mexico Const.* art. I, sec. 14.

97. See, e.g., *Oklahoma Const.* art. II, sec. 17; *Montana Const.* art. II, sec. 20. A preliminary hearing is held before the district court judge to determine whether there is a basis for holding the accused until the grand jury has reviewed the facts. It is an inquiry into whether there is probable cause to believe a crime was committed, and that the accused committed it. *Grand Juries*, p. 20; *Martinez v. State*, 423 P.2d 700, 711 (Alaska, 1967); *Beaird v. Ramey*, 456 P.2d 587, 589 (Oklahoma, 1969).

98. See, e.g., *North Dakota Const.* art. I, sec. 8; *Indiana Const.* art. VII, sec. 17.

99. *Grand Juries*, p. 27.

100. *Ibid.*, p. 35.

101. *Ibid.*, pp. 36-38.

102. *Ibid.*, p. 31.

103. *Ibid.*, pp. 36-38; see also, "Federal Grand Jury."

104. See "Federal Grand Jury."

105. But see, *Grand Juries*, p. 40, "low grand jury independence and high prosecution influence appear to be inherent in the system."

106. Jon M. Van Dyke, *Jury Selection Procedures* (Cambridge, Mass.: Ballinger Publishing Co., 1977), p. 4.

107. Van Dyke, pp. 13-14.

108. 391 U.S. 145, 155-156 (1968), quoted in Van Dyke, p. 8.

109. 391 U.S. 145, 149 (1968).

110. *Ibid.*, at 159-162. See also, *Cheff v.Schnackenberg*, 384 U.S. 373 (1966); *Baldwin v. New York*, 399 U.S. 66 (1970); *State v. Shak*, 51 Haw. 612, 466 P.2d 422, *cert. denied*, 400 U.S. 930 (1970).

111. Rule 23(a) is as follows: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial with the approval of the court. The waiver shall be either by written consent filed in court or by oral consent in open court entered on the record." See also, *State v. Oliveira*, 53 Haw. 551, 497 P.2d 1360 (1972) (demand in open court of jury-waived trial by accused's counsel in accused's presence constitutes voluntary and knowing waiver).

112. 386 U.S. 213 (1967).

113. *U.S. v. Marion*, 404 U.S. 307, 320 (1971); Note, "Speedy Trial Schemes and Criminal Justice Delay," 57 *Cornell L. Rev.* 794, 795 (1972).

114. 404 U.S. 307, 321 (1971); see also, *State v. Bryson*, 53 Haw. 652, 500 P.2d 1171 (1972).

115. *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). See also, *U.S. v. Lovasco*, 45 U.S.L.W. 4627 (U.S. June 7, 1977) (lapse of more than 18 months between alleged commission of offenses and indictment not violation of Speedy Trial Clause; good-faith investigative delay); *U.S. v. Baillie*, 316 F.Supp. 892 (D. Hawaii 1970) (lapse of 6 months between alleged commission of offenses and indictment, and 12 months between indictment and hearing on motion to dismiss not violation of Speedy Trial Clause; no showing that delay was improperly motivated, oppressive, or prejudicial to defense). Contrast, *State v. Almeida*, 54 Haw. 443, 509 P.2d 549 (1973) (where 7 months elapsed between indictment and service of arrest warrant on defendant, and there was substantial prejudice to adequate preparation of the defense, right to speedy trial violated).

116. 18 U.S.C. sec. 3161.

117. 333 U.S. 257 (1948).

118. *Ex parte Higashi*, 17 Haw. 428 (1906); *Territory v. Scharsch*, 25 Haw. 429 (1920); *State v. Hashimoto*, 47 Haw. 185, 389 P.2d 146 (1963).

119. *Territory v. Scharsch*, 25 Haw. 429, 436 (1920).

120. *State v. Hashimoto*, 47 Haw. 185, 200, 389 P.2d 146 (1963).

121. *Swain v. Alabama*, 380 U.S. 202, 208 (1965), quoted in Van Dyke, p. 57.

122. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (daily wage-earners); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-born citizens); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women). Both the Federal Jury Selection and Service Act, 28 U.S.C. sec. 1862, and *Hawaii Rev. Stat.*, sec. 612-2, prohibit discrimination on the basis of race, color, religion, sex, national origin, or economic status.

123. Van Dyke, p. 49.

124. *Ibid.*, p. 50.

125. *Ibid.*, Appendix A, p. 259; *Hawaii Rev. Stat.*, sec. 612-11.

126. Van Dyke, p. 25.

127. *Hawaii Rev. Stat.*, secs. 612-4 and 614-5.

128. *Hawaii Rev. Stat.*, sec. 612-6. The 1968 Constitutional Convention rejected the idea of eliminating occupational exemptions. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, p. 234.

129. *Hawaii Rev. Stat.*, sec. 612-7.

130. Van Dyke, p. 112. In Honolulu, 10.7 per cent of all persons who received a jury questionnaire in 1974 were granted a discretionary excuse because of some job-related hardship. *Ibid.*, p. 119. It is suggested that the representativeness of juries would be increased if jury duty were less burdensome financially and time-wise, and if excuses were more strictly granted. *Ibid.*, p. 134.

131. *Ibid.*, Appendix D, p. 282. *Hawaii Rules of Penal Procedure*, Rule 24(a).

132. *Swain v. Alabama*, 380 U.S. 202, 208 (1965), quoted in Van Dyke, p. 139. See also, *Hawaii Rev. Stat.*, secs. 635-27 and 635-28.

133. Van Dyke, p. 140.

134. *Swain v. Alabama*, 380 U.S. 202, 220 (1965), quoted in Van Dyke, pp. 139-140. See also, *Hawaii Rev. Stat.*, secs. 635-29 and 635-30; *Hawaii Rules of Penal Procedure*, Rule 24(b).

135. Van Dyke, p. 154.

136. *State v. Altergott*, 57 Haw. 492, 559 P.2d 728, 733 (1977).

137. Ranney, "Remedies for Prejudicial Publicity: A Brief Review," 21 *Vill. L. Rev.* 819, 834 (1976). See also, *State v. Pokini*, 55 Haw. 640, 641, 526 P.2d 94 (1974); the requirement of a trial by an "impartial jury" means among other things "trial by a jury substantially free from the biasing effects of inflammatory pre-trial publicity."

138. Ranney, p. 821; *State v. Pokini*, 55 Haw. 640, 642, 526 P.2d 94 (1972); the "required examination of prospective jurors must be sufficiently detailed"--here it was not--"to discover whether they hold any prejudice as a result of exposure to pre-trial publicity."

139. Ranney, p. 833.

140. Van Dyke, pp. 179-181.

141. The historical reason for requiring the jury to be from the vicinage or district was that the accused should benefit from good standing with neighbors and also knowledge they might have of witnesses. This is no longer of consequence since the modern jury is expected *not* to be familiar with, and partial to, the defendant. The requirement, however, also prevents the accused from being transported to a distant place where the defendant could not have the benefit of the presence of friendly witnesses. *State v. Johnston*, 51 Haw. 195, 456 P.2d 805, appeal dismissed, 397 U.S. 336 (1969).

142. Ranney, pp. 835-836.

143. Van Dyke, pp. 181-182.

144. *Ibid.*, pp. 182-183.

145. *Sheppard v. Maxwell*, 384 U.S. 333, 359, 361 (1966).

146. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

147. Van Dyke, p. 193.

148. *Williams v. Florida*, 399 U.S. 78 (1970).

149. *Colgrove v. Battin*, 413 U.S. 149 (1973).

150. *Johnston v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).

151. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

152. Van Dyke, pp. 196-200.

153. *Ibid.*, pp. 211-214.

154. *Ibid.*, pp. 200-203.

155. *Ibid.*, p. 195; Appendix E, pp. 285-288.

156. National Center for State Courts, Hawaii's Jury System, Vol. II, *Trial Juries* (San Francisco: 1976), p. 40 note; hereinafter cited as *Trial Juries*.

157. Van Dyke, p. 195.

158. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 301; Vol. II, p. 45.

159. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 301; Vol. II, p. 40.

160. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, pp. 301-302. See also, *Hawaii Rules of Penal Procedure*, Rule 23(b) (jury of less than 12); Rule 31(a) (less than unanimous verdict).

161. It was the understanding of the 1950 Convention that any *exception* to the jury of 12 and unanimous verdict had to be explicitly provided for; Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 301. See also, Att'y Gen. Ops. No. 68-10 at pp. 1-4 (June 13, 1968). A study of the Hawaii trial jury system recommends no change in the size of the jury in criminal cases; *Trial Juries*, p. 39.

162. Waelder, "Psychiatry and the Problem of Criminal Responsibility," 101 *U. Pa. L. Rev.* 378 (1952), as quoted in Joseph Goldstein and others, *Criminal Law: Theory and Process* (New York: Free Press, 1974), pp. 716-718. These considerations are reflected in *Hawaii Rev. Stat.*, sec. 706-620 (sentence of imprisonment withheld unless imprisonment is necessary) and sec. 706-641 (criteria for imposing fines).

163. See the Index of Bill of Rights Provisions in the Appendix.

164. *State v. Tackett*, 52 Haw. 601, 483 P.2d 191 (1971); *State v. Huggett*, 55 Haw. 632, 525 P.2d 1119 (1974).

165. *Hawaii Rev. Stat.*, sec. 706-641(3)(a). In practice, fines are almost never imposed in criminal cases. Commentary on sec. 706-640.

166. *Hawaii Const.* art. I, sec. 9.

167. *U.S. Const.* amend. VIII.

168. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 302.

169. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

170. See Granucci, "'Nor Cruel and Unusual Punishment Inflicted': The Original Meaning," 57 *Cal. L. Rev.* 839, 842 (1969).

171. See discussion of the Eighth Amendment in *Weems v. United States*, 217 U.S. 349, 389-407 (1910).

172. *Ibid.*, at 378.

173. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

174. In *Weems*, where the punishment was 12 years in chains, hard labor, and the lost of basic civil rights for the crime of falsifying an official document, the Court's decision focused on the lack of proportion between the criminal sanction and the offense:

> *Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practices of the American commonwealth, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense.* 217 U.S. 366-367.

Although in *Trop*, the concept of proportionality was not the basis for the holding, the majority opinion stated that "[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime." 356 U.S. 100.

175. 370 U.S. 660 (1962).

176. 56 Haw. 343, 537 P.2d 724 (1975).

177. *Ibid.*

178. *State v. Renfro*, 56 Haw. 501, 506, 542 P.2d 366 (1975). Here, the controlling factor in the Court's decision was the rejection of the appellant's argument that marijuana had been scientifically proven to be harmless. In the absence of conclusive studies, the Court felt

that it was within the legislature's power to provide criminal sanctions for possession of marijuana.

179. 428 U.S. 153, 169 (1976).

180. *Ibid.*, at 178.

181. *Furman v. Georgia*, 408 U.S. 238 (1972).

182. *Gregg v. Georgia*, 428 U.S. 153, 180 (1976).

183. *Ibid.*, at 183.

184. *Ibid.*, at 187.

185. 45 U.S.L.W. 4961, 4965 (June 29, 1977).

186. *Ibid.*, at 4965.

187. *Ibid.*

188. *Ibid.*

189. *Ibid.*

190. 408 U.S. 238 (1972).

191. *Ibid.*, at 309-310.

192. Accord, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

193. *Ibid.*, at 195.

194. 428 U.S. 280 (1976).

195. 428 U.S. 280, 304 (1976).

196. *Ibid.*, at 199-207.

197. 45 U.S.L.W. 4584 (June 6, 1977). Also see, *Gardner v. Florida*, 45 U.S.L.W. 4275 (March 22, 1977) where the Court reversed and remanded the death sentence imposed because the trial judge withheld from the petitioner part of a sentencing report thereby denying the right to due process.

198. *Ibid.*, at 4585.

199. *Gregg v. Georgia*, 428 U.S. 153 (1976).

200. Senate Bill No. 2403, Eighth Legislature, 1976, State of Hawaii; Senate Bill No. 184, Ninth Legislature, 1977, State of Hawaii.

201. 6 Cal. 3d 628, 493 P.2d 880 (1972). The California court found the death penalty to be both cruel and also unusual. They concluded that the penalty was cruel because of the execution itself and the "psychological torture" accompanying it. It was unusual because of its infrequent use and the general trend of many states and countries that have abolished the penalty. Furthermore, the California court found that the objectives of punishment were not served by the death penalty and could not be justified as necessary to meet any state interest. Unlike the U.S. Supreme Court 4 years later in *Gregg*, the state court was not persuaded that acceptable indices of contemporary decency could be found in public acceptance of capital punishment, legislative creation of more capital crimes, or legislative acquiescence in the continuation of capital punishment.

202. *Ibid.*

203. *California Const.* art. I, sec. 27, reads:

> *All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.*
>
> *The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any provision of this constitution.*

204. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, pp. 14-18.

205. *Ibid.*

206. *Montana Const.* art. III, sec. 24, reads:

> *Laws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death.*

207. *North Carolina Const.* art. XI, sec. 2, reads:

> *The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.*

208. *New Hampshire Const.* pt. 1, art. 16, reads in part:

> *...Nor shall the legislature make any law that shall subject any person to a capital punishment (excepting for the government of the army and navy, and the militia in actual service), without a trial by jury.*

209. *Arizona Const.* art. II, sec. 23, reads in part:

> *...Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons.*

210. *Louisiana Const.* art. I, sec. 17, reads in part:

> *A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict....*

211. *Hawaii Const.* art. I, sec. 8, reads in part:

> *No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,...*

Other states with similar provisions include: *Alaska Const.* art. I, sec. 8; *Florida Const.* art. I, sec. 15; *Illinois Const.* art. I, sec. 7; *Connecticut Const.* art. I, sec. 8; *Louisiana Const.* art. I, sec. 15; *Maine Const.* art. I, sec. 7; *Mississippi Const.* art. III, sec. 27; *Nevada Const.* art. I, sec. 8; *New York Const.* art. I,

sec. 6; *Ohio Const.* art. I, sec. 10; and *Rhode Island Const.* art. XI.

212. *Benton v. Maryland*, 395 U.S. 784 (1969).

213. The Hawaii Supreme Court requires a more rigorous standard for determining what constitutes the "same" offense than that required by the U.S. Supreme Court under the U.S. Constitution. See *State v. Pia*, 55 Haw. 14, 18, 514 P.2d 568 (1973).

214. See *Serfass v. United States*, 420 U.S. 377, 388 (1974).

215. Jeopardy attaches when the jury is empaneled and sworn, or in the case of a bench trial, when the judge begins to hear the evidence. *Serfass v. United States*, 420 U.S. 377, 388 (1974).

216. A defendant who appeals a conviction is deemed to have waived the claim against double jeopardy. See *United States v. Ewell*, 383 U.S. 116 (1966). Upon retrial, a defendant cannot be given a higher penalty (if convicted) than that given at the first trial for the purpose of discouraging an exercise of the defendant's right to appeal or to collaterally attack (see part III, habeas corpus) a conviction. *State v. Shak*, 51 Haw. 626, 466 P.2d 422 (1970). But see, *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (rendition of a higher sentence by a jury upon retrial generally not prohibited by the Double Jeopardy Clause, since a jury, unlike a judge, is less likely to impose a harsher sentence to discourage appeals or to vindicate a prior decision that has been reversed).

217. This is termed the "manifest necessity" doctrine. Briefly, the doctrine declares that where a mistrial is necessary so as not to defeat the "public's interest in fair trials designed to end in just judgment"; and, at least where there was no motive of prosecutorial manipulation, a mistrial may be declared and the defendant subject to a second trial. See *Illinois v. Somervill*, 410 U.S. 458 (1973).

218. See *Green v. United States*, 355 U.S. 184 (1957).

219. *Ashe v. Swenson*, 397 U.S. 436 (1970).

220. *Breed v. Jones*, 421 U.S. 519, 528 (1975).

221. *Ibid.*, at 529.

222. See *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 189 (1959).

223. See Note, "Double Jeopardy and Dual Sovereignty: A Critical Analysis," 11 *William and Mary L. Rev.* 946 (1970). For a more extensive critique of the doctrine, see Note, "Double Prosecution by State and Federal Governments: Another Exercise in Federalism," 80 *Harv. L. Rev.* 1538 (1967); Fisher, "Double Jeopardy and Federalism," 50 *Minn. L. Rev.* 607 (1966).

224. See *Petite v. United States*, 361 U.S. 529, 531 (1960).

225. *Hawaii Rev. Stat.*, secs. 701-112, 712-1254.

226. See Note, "Double Prosecution by State and Federal Governments: Another Exercise in Federalism," 80 *Harv. L. Rev.* 1538 (1967).

227. *Gasquet v. Lapeyre*, 242 U.S. 367, 369 (1917). The right to petition for habeas corpus is one of the few personal rights specifically enumerated in the Constitution.

228. Collings, "Habeas Corpus for Convicts - Constitutional Right or Legislative Grace?", 40 *Calif. L. Rev.* 335, 339 (1952).

229. Ronald P. Sokol, *Federal Habeas Corpus* (2d ed.; Charlottesville, Va.: Michie Company, 1969), p. 198. *In 1807, President Jefferson tried to* suspend the writ by a bill, which succeeded in passing the Senate but was rejected in the House. *Ibid.* In 1905, under President Theodore Roosevelt, it was suspended in certain parts of the Philippines, and in the 1940's in Hawaii while Franklin Roosevelt was President. *Ibid.*, p. 201.

230. James Randall, *Constitutional Problems under Lincoln* (rev. ed. 1951), p. 119, cited in Sharer, "Power, Idealism, and Compromise: The Coordinate Branches and the Writ of Habeas Corpus," 26 *Emory L. J.* 149 n.1 (1977).

231. *Ibid.*

232. Sharer, pp. 149-150.

233. *Ibid.*

234. Sokol, p. 204.

235. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 38.

236. *Ibid.*, p. 10.

237. See text accompaniment to note 231.

238. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 10.

239. *Ibid.*

240. See Kelman, "Federal Habeas Corpus as a Source of New Constitutional Requirements for State Criminal Procedure," 28 *Ohio State L. J.* 46, 47 (1967).

241. See Collings, p. 345.

242. *Ex parte Watkins*, 28 U.S. 193 (1830).

243. Act of February 5, 1867, ch. 28, sec. 14, 1 Stat. 385 (codified in 28 U.S.C.A. sec. 2241(c)(3)).

244. *Pettibone v. Nichols*, 203 U.S. 192 (1906).

245. 344 U.S. 443.

246. *Ibid.*, at 508.

247. 372 U.S. 391.

248. Note, "Exclusionary Rule Need Not be Applied in Federal Habeas Reviews of State Convictions," 28 *Mercer L. Rev.* 567, 569 (1977).

249. 372 U.S. 293.

250. *Ibid.*, at 313.

251. 116 U.S. 616.

252. 255 U.S. 298.

253. 367 U.S. 643.

254. *Ibid.*, at 660.

255. 414 U.S. 338, 348 (1974).

256. *Fay v. Noia*, 372 U.S. 391, 401 (1963).

257. *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

258. *Ibid.*

259. 28 U.S.C.A. sec. 2241 *et seq.*

260. 428 U.S. 465 (1976).

261. *Ibid.*, at 486.

262. See *Lefkowitz v. Newsome*, 420 U.S. 283, 294 (1975) (White, J., dissenting).

263. 394 U.S. 217, 226 (1969).

264. Comment, "Habeas Corpus: Still as Great as When It was Writ?", 43 *Brooklyn L. Rev.* 773, 797 (1977).

265. Note, "Federal Habeas Corpus: A Major Step Toward Phasing Out the Exclusionary Rule," 29 *U. of Fla. L. Rev.* 364, 371 (1977).

266. *Stone* easily can be utilized for restricting the use of the exclusionary rule as a habeas corpus remedy with respect to other constitutional claims. These other areas may include claims of double jeopardy, entrapment, and self-incrimination violations. See Friedman, pp. 796-797.

267. See *Kaufman v. United States*, 394 U.S. 217, 225 (1969).

268. See Gallagher, p. 375.

269. *Ibid.*

270. *Ibid.*

271. See Christensen, "Suppression of Evidence Without the Aid of the Fourth, Fifth and Sixth Amendments," 8 *Hawaii Bar J.* 109, 116 (1972).

272. *Stone v. Powell*, 428 U.S. 465, 536 (1976) (White, J., dissenting).

273. "The notice of appeal by a defendant shall be filed within 10 days after the entry of the judgment or order appealed from." *Hawaii Rules of Penal Procedure*, Rule 37(c) (1977).

274. See *Annual Report of the Director of Administrative Offices of the United States Courts, 1975* (Washington: U.S. Government Printing Office, 1976), p. 207.

275. See Gallagher, p. 375 n.85. Although Hawaii has a State Tort Liability Act, *Hawaii Rev. Stat.*, ch. 662, which waives governmental immunity in certain cases, the scope of the Act is restricted by 2 noteworthy exceptions:

(1) "Operational level" acts are those which concern routine, everyday matters, not requiring evaluation of broad policy factors, and therefore are actionable. However, "planning level" acts call for evaluation of broad policy factors and therefore fall under the "discretionary function" exception to the rule. *Hawaii Rev. Stat.*, sec. 662-15(1). This exception is the most far-reaching limitation upon the scope of the Act, in spite of the Hawaii Supreme Court's pronouncement that the Act is to be "liberally construed to effectuate its purpose." *Rogers v. State*, 51 Haw. 293, 296, 459 P.2d 378 (1969). In all likelihood, tortious search and seizure claims concern negligence in the performance of a planning function involving policy factors and therefore fall within the ambit of the "discretionary function" exception. However, in spite of the Act's restrictive nature, the *Rogers* case indicates that the increasing complexity of the state's governmental activity would not prevent a concurrent widening of its tort liability. See Engleman, "*Rogers v. State*: The Limits of State Tort Liability," 8 *Hawaii Bar J.* 89 (1971). The Hawaii Supreme Court has not yet been confronted with a tortious search and seizure claim under the Act.

(2) The Act does not apply to any claim arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process...." *Hawaii Rev. Stat.*, sec. 662-15(4). Although the Act attempts to accommodate the conflicting policies of compensating private injuries while allowing for the discretionary policy-making necessary for state administration, presumably, the Act, like the federal counterpart which it is modeled after, the Federal Tort Claims Act, 28 U.S.C.A. sec. 2671 *et seq.*, excludes tortious search and seizure claims. See 28 U.S.C.A. sec. 2680(h) (substantially identical wording as the parallel state provision); 35 Am Jur. 2d *Federal Tort Claims Act*, secs. 43 and 44 (1967, Supp. 1977). However, because the *Rogers* case indicates a concurrent widening of the state's tort liability, perhaps future application of the Act may include waiver of governmental immunity as to tort damages caused by its employees for an illegal search and seizure.

In *Orso v. City and County of Honolulu*, 56 Haw. 241 (1975), the Hawaii Supreme Court held that only *Hawaii Rev. Stat.*, sec. 662-4, relating to the statute of limitations, is applicable to the City and County of Honolulu. In effect, this decision paves the way for tort relief against city and county agencies, unencumbered by the State Tort Liability Act. The injured party, however, in suing a nonjudicial governmental officer, is to be held to a higher standard of proof than in a normal tort case, that of showing malice, which, in effect, will limit tort liability. 56 Haw. at 247-248.

276. See Christensen, p. 110. These limitations apply only in situations where the deterrent effect on the police community outweighs the exclusion of probative evidence. See Gallagher, p. 375. Louisiana through the contours of a privacy guarantee has bypassed the "standing" limitation upon the exclusionary rule. See *Louisiana Const.* art. I, sec. 5.

277. See Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, pp. 4-9.

278. See Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, pp. 233-234.

279. 1972 Haw. Sess. Laws, Act 9, part of sec. 1, codified in *Hawaii Rev. Stat.*, secs. 711-1100(3) and 711-1111.

280. Previous Hawaii law in this area was limited to violations of privacy resulting from interception or recordation of telephone and wire communications. *Hawaii Rev. Stat.*, secs. 275-3 and 275-5.

281. See Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, pp. 233-234.

282. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), art. I, sec. 1.03(c). This provision reads:

> *Evidence obtained in violation of this section [right to be free from unreasonable searches and seizures] shall not be admissible in any court against any person.*

283. See Gallagher, p. 375.

284. *Louisiana Const.* art. I, sec. 5.

Chapter 7

1. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 301.

2. See *Iowa Code Ann.*, sec. 782.9 (Supp. 1977); *New Jersey Stat. Ann. Rules of Evidence*, 2A: 84A-19 (1976).

3. See generally, *Hawaii Rev. Stat.*, secs. 621-18 (witnesses in criminal cases) and 621-21 (court to decide whether testimony would incriminate in civil or criminal proceedings).

4. See 8 J. Wigmore, *Evidence* sec. 2250 (J. McNaughton rev. ed. 1961).

5. See Ritchie, "Compulsion that Violates the Fifth Amendment: The Burger Court's Definition," 61 *Minn. L. Rev.* 383, 385 (1977); Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 *U. Cincinnati L. Rev.* 671, 679 (1968).

6. 21 Am Jur. 2d *Criminal Law*, sec. 350 (1965); hereinafter referred to as *Criminal Law*.

7. See *Andresen v. Maryland*, 427 U.S. 463, 470-471 (1976).

8. *Criminal Law*, sec. 350.

9. *Ibid.*

10. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

11. 378 U.S. 1 (1964).

12. 52 Haw. 527, 480 P.2d 148 (1971).

13. *Malloy v. Hogan*, 378 U.S. 1 (1964).

14. See *State v. Santiago*, 53 Haw. 254, 265, 492 P.2d 657 (1971).

15. See *United States. v. Abe*, 95 F.Supp. 991 (D. Hawaii 1951); *Suzuki v. Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976).

16. *Michigan v. Tucker*, 417 U.S. 433 (1974).

17. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

18. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

19. See *McCarthy v. Arndstein*, 266 U.S. 34 (1924). The privilege, however, must be claimed in the civil proceedings. If the individual responds to the inquiries instead of claiming the privilege, the individual cannot later bar that evidence from a criminal prosecution on self-incrimination grounds. See *United States v. Kordel*, 397 U.S. 1 (1970).

20. National Municipal League, *Model State Constitution* (6th ed.; New York: 1968), sec. 1.04; hereinafter cited as *Model State Constitution*.

21. 378 U.S. 52 (1964).

22. *Ibid.*, at 79.

23. To date no other state constitution appears to incorporate the *Murphy* rule.

24. 142 U.S. 547 (1892).

25. *Ibid.*, at 586.

26. *Ibid.*

27. Ch. 13, 15 Stat. 37. The modern counterpart is 18 U.S.C.A. sec. 6002, which was enacted in 1970 as Title II, sec. 201 of the Organized Crime Control Act of that year. Section 6002 provides that where a witness refuses to testify before a federal court or grand jury, a federal agency, or a committee of either or both Houses of Congress on the basis of the Fifth Amendment privilege, the person presiding over the proceeding can order the witness to testify.

    No testimony or information given by the witness, however, or any information directly or indirectly derived from such testimony or information may be used against the witness in any criminal case. The exceptions to this rule involve prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

28. 142 U.S. 547, 585.

29. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, 444.

30. 378 U.S. 52 (1964).

31. *Ibid.*, at 79.

32. 406 U.S. 441 (1972).

33. Pub. L. 91-452, sec. 201(a), 84 Stat. 927, codified in 18 U.S.C.A. secs. 6002 and 6003 (1970).

34. 406 U.S. 441, 453.

35. 406 U.S. at 460. An earlier case provided an additional safeguard: the effectiveness of immunity must be made clear. *Stevens v. Marks*, 383 U.S. 234 (1966). That case held that an individual may not be compelled to give incriminating information under a grant of immunity unless it affirmatively has been demonstrated that the individual adequately is protected by immunity.

36. For legislative history, see 1971 Haw. Sess. Laws, Act 211, part of sec. 1, Hawaii, *Journal of the House of Representatives, 1971 Regular Session*, H.B. No. 56, House Judiciary Committee, Standing Committee Report No. 483, p. 898.

37. 1971 Haw. Sess. Laws, Act 211, part of sec. 1.

38. *Hawaii Rev. Stat.*, sec. 621C-1(a).

39. *Hawaii Rev. Stat.*, sec. 621C-1(c).

40. 384 U.S. 757 (1966).

41. See *ibid.*, and *United States v. Wade*, 388 U.S. 263 (1967).

42. 8 J. Wigmore, *Evidence*, sec. 2265 (W. Reiser, Jr. Suppl. 1977).

43. Friendly, pp. 671, 679.

44. *United States v. White*, 322 U.S. 694, 701 (1944).

45. 116 U.S. 616, 634-635 (1886).

46. *Couch v. United States*, 409 U.S. 322 (1973).

47. 425 U.S. 391 (1976).

48. 427 U.S. 463 (1976).

49. *Ibid.*, at 473-474.

50. *Ibid.*, at 486.

51. Friendly, p. 722.

52. 424 U.S. 648 (1976).

53. 425 U.S. 564 (1976).

54. 45 U.S.L.W. 4465 (U.S. May 23, 1977).

55. *Ibid.*, at 4468.

56. 45 U.S.L.W. 4464 (U.S. May 23, 1977).

57. *Spevack v. Klein*, 385 U.S. 511, 514 (1967).

58. 414 U.S. 70 (1973).

59. 392 U.S. 273 (1968).

60. 425 U.S. 308 (1976).

61. 380 U.S. 609 (1965).

62. 385 U.S. 511 (1967).

63. *Ibid.*, at 514.

64. Friendly, p. 722.

65. 297 U.S. 278 (1936).

66. 367 U.S. 568 (1961).

67. 384 U.S. 436 (1966). There are 4 "rights" which *Miranda* affords one who is subjected to custodial interrogation. See 384 U.S. at 444, 467-479. *First*, the right to be warned. The defendant must be given a warning which contains the following elements:

    (1) Defendant has a right to remain silent;

    (2) Anything defendant says may be used to prove defendant's guilt;

    (3) Defendant has a right to be an attorney, not only for purposes of consultation before interrogation but to remain present for consultation during the interrogation itself;

    (4) If defendant financially is unable to obtain representation by an attorney, representation will be provided at government expense.

    Second, the right to counsel. The defendant has the right to have an attorney present during interrogation. Defendant also must have adequate opportunity to consult privately with the attorney.

    Third, the right to halt all interrogation until representation is provided. If, following the warning, the defendant indicates "in any way" that defendant desires representation by counsel, no interrogation may be carried on until such representation is provided.

    Fourth, the right to have a voluntary waiver of rights established. No statement is admissible unless the prosecution affirmatively demonstrates that the defendant has waived the *Miranda* rights.

68. 378 U.S. 1, 7 (1964).

69. See *Bram v. United States*, 168 U.S. 532, 542-543 (1897). *Cf.*, *United States v. McShane*, 462 F.2d 5, 7 (9th Cir. Haw. 1972). The American Law Institute's *Model Code of Pre-Arraignment Procedure*, sec. 150.2(8) (Approved Draft 1975), follows this rule.

70. 371 U.S. 341, 347 (1963).

71. *Ibid.*, at 347-348.

72. *Frazier v. Cupp*, 394 U.S. 731 (1969).

73. *Leyra v. Denno*, 347 U.S. 556 (1954).

74. *Miranda v. Arizona*, 384 U.S. 436, 476.

75. 1975 Approved Draft, sec. 140.4(b); hereinafter referred to as ALI.

76. 384 U.S. 436, 414.

77. *Orozco v. Texas*, 394 U.S. 324 (1969).

78. *Oregon v. Mathiason*, 429 U.S. 492 (1977).

79. *Beckwith v. United States*, 425 U.S. 341 (1976).

80. ALI at sections 110.2 and 110.3.

81. *Beckwith v. United States*, 425 U.S. 341, 351 (1976) (Brennan, J., dissenting).

82. 384 U.S. 436, 473-474.

83. 423 U.S. 96 (1975).

84. *Ibid.*, at 116.

85. *Miranda v. Arizona*, 384 U.S. 436, 477.

86. 401 U.S. 222 (1971).

87. 53 Haw. 254, 492 P.2d 657 (1971).

88. Protection under state constitutions: *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975); *People v. Disbrow*, 16 Cal.3d 101, 127 *Cal. Rptr.* 360, 545 P.2d 272 (1976). State statutory guarantee: *State v. Butler*, 493 S.W.2d 190 (Tex. Crim. App. 1973).

89. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

90. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. sec. 3501(c). Thus, mere delay in presentment before a magistrate no longer requires exclusion of a confession which is determined to be voluntary, given the totality of the circumstances. See *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970).

    In attempting to return to the "totality of the circumstances" test for voluntariness, section 3501(c) appears to attempt an overturning of *Mallory* and *Miranda*. Insofar as sec. 3501(c) attempts to contravene *Miranda* it may be found unconstitutional. See ALI at 323. With regard to *Mallory*, the general view is that Congress permissibly may alter it in that the rule merely was one of federal judicial interpretation, and not of constitutional statute.

91. *Hawaii Rev. Stat.*, sec. 803-9(5).

92. 48 Haw. 204, 397 P.2d 558 (1964).

93. *Ibid.*, at 215.

94. See *State v. Kahalewai*, 54 Haw. 28, 501 P.2d 977 (1972).

95. See Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, pp. 21-22.

96. The Sixth Amendment counsel guarantee was derived from colonial constitutional provisions and statutes which were designed to reject the English common law rules which severely limited the right of a defendant accused of a felony to consult with a lawyer at trial. See *United States v. Ash*, 413 U.S. 300, 306 (1973).

97. *Chandler v. Fretag*, 348 U.S. 3, 9 (1954). But see, *Kelly v. Springett*, 527 F.2d 1090 (9th Cir. 1975) (where defendant was represented by appointed counsel, being prevented from retaining private counsel not a ground for relief).

98. *Ibid.*, at 10 (1954). This right may be limited, however, in the face of dilatory or obstructionist conduct by the defendant who attempts to abuse this right. See *Nunn v. Wilson*, 371 F.2d 113 (9th Cir. 1967); *Lofton v. Procunier*, 487 F.2d 434 (9th Cir. 1973).

99. For determining eligibility for court-appointed counsel based on indigency, see *State v. Mickel*, 56 Haw. 23, 525 P.2d 1108 (1974). See also, *Hawaii Rev. Stat.*, sec. 802-4.

100. 287 U.S. 45 (1932).

101. 372 U.S. 335 (1963).

102. See *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

103. 407 U.S. 25 (1972).

104. *Ibid.*, at 40. Section 802-1 of the *Hawaii Rev. Stat.* goes even further and provides that indigents who face imprisonment for an offense or confinement in a mental institution are entitled to appointed counsel.

105. See Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 21.

106. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

107. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

108. See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

109. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

110. See *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Mara v. Naauao*, 51 Haw. 322, 459 P.2d 382 (1969). See also, *White v. Maryland*, 373 U.S. 59 (1963) (certain initial appearances before the judge); *Coleman v. Alabama*, 339 U.S. 1 (1970) (preliminary hearings); *Mempa v. Rhay*, 389 U.S. 128 (1968) (sentencing); *Olney v. United States*, 433 F.2d 161 (9th Cir. 1976) (pretrial motion to suppress evidence); *Schatz v. Eyman*, 418 F.2d 11 (9th Cir. 1969) (post indictment questioning by state psychiatrist).

111. See *United States v. Ash*, 413 U.S. 300, 309 (1973).

112. *Ibid.* See also, *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

113. *United States v. Wade*, 388 U.S. 218, 244 (1967).

114. *United States v. Ash*, 413 U.S. 300, 321 (1973).

115. *Ibid.*

116. *Ibid.*, at 315.

117. *United States v. Wade*, 388 U.S. 218, 227-228 (1967).

118. *Gilbert v. California*, 388 U.S. 263, 267 (1967).

119. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to counsel necessary to protect Fifth Amendment self-incrimination right).

120. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (certain parole or probation revocation proceedings).

121. See *Douglas v. California*, 372 U.S. 353 (1963) (Equal Protection Clause requires appointment of counsel for the first appeal where the appeal is granted by the state as a matter of right). But see, *Ross v. Moffitt*, 417 U.S. 600 (1974) (appointed counsel not required for a second, discretionary appeal).

122. *State v. Dicks*, 57 Haw. 46, 549 P.2d 727 (1976); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

123. *Miranda v. Arizona*, 384 U.S. 436, 476 (1965); *Cf., United States v. Stage*, 464 F.2d 1054 (9th Cir. 1972).

124. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

125. See *Brewer v. Williams*, 45 U.S.L.W. 4287 (1977).

126. *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *State v. Dicks*, 57 Haw. 46, 549 P.2d 727 (1976). Waiver must also be reasonably contemporaneous with the advice. *Schram v. Cupp*, 436 F.2d 692 (9th Cir. 1970).

127. *Carvalho v. Olim*, 55 Haw. 336, 519 P.2d 892 (1972). In a habeas corpus proceeding, however, the burden rests on the convicted defendant to show that counsel was not validly waived. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1937).

128. *Carvalho v. Olim*, 55 Haw. 336, 342, 519 P.2d 892, 897 (1972).

129. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

130. Where the defendant is known to be of subnormal intelligence, "an additional effort must be made by the court" to explain the ramifications of the defendant's decision. *Carvalho v. Olim*, 55 Haw. 336, 343, 519 P.2d 892, 897 n.2 (1974).

131. See *State v. Dicks*, 57 Haw. 46, 549 P.2d 727 (1976).

132. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1965).

133. See Comment, "Self Representation in Criminal Trials: The Dilemma of the Pro Se Defendant," 59 *Calif. L. Rev.* 1479 (1971); hereinafter cited as "Self Representation." A defendant may have many legitimate reasons for wanting self-representation. See *ibid.*; Note, "The Jailed Pro Se Defendant and the Right to Prepare a Defense," 86 *Yale L. J.* 292, 293-294 n.7 (1976); hereinafter cited as "Jailed Pro Se Defendant."

134. See, e.g., *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958).

135. "Self Representation," pp. 1479, 1480 n.47.

136. 422 U.S. 806 (1975).

137. *Ibid.*, at 820.

138. *Ibid.*

139. *Ibid.*, at 821.

140. e.g., *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

141. *Faretta v. California*, 422 U.S. 806, 834 (1975).

142. *Ibid.*

143. *Ibid.*, at 835. Whether the defendant is required to have notice of the right to proceed pro se is not clear. See Note, "*Faretta v. California*: The Law Helps Those Who Help Themselves," 28 *Hastings L. J.* 283 (1976); hereinafter cited as "Faretta".

144. *Cooley v. United States*, 501 F.2d 1249 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975).

145. *Arnold v. United States*, 414 F.2d 1056 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970).

146. *Faretta v. California*, 422 U.S. 806, 835 (1975).

147. *United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973).

148. *Meeks v. Craven*, 482 F.2d 465 (9th Cir. 1973).

149. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

150. *Powell v. Alabama*, 387 U.S. 45, 71 (1932); *State v. Kahalewai*, 54 Haw. 28, 501 P.2d 977 (1972).

151. *State v. Kane*, 52 Haw. 484, 486, 479 P.2d 207, 208 n.2 (1971).

152. See Stone, "Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences," 7 *Colum. Human Rights Rev.* 427 (1975).

153. e.g., *United States v. Martin*, 489 F.2d 674 (9th Cir. 1973). How much it follows or will continue to follow this standard is open to question. Compare, *Kreiling v. Field*, 431 F.2d 502, 504 (9th Cir. 1970) and *Liechko v. Galli*, No. 75-2525 (April 14, 1976) (slip opinion), *cert. denied*, 45 U.S.L.W. 3253 (1976), with *United States v. Stern*, 519 F.2d 521 (9th Cir. 1975), *cert. denied*, 423 U.S. 1033 (1975). See also, *Leano v. United States*, 457 F.2d 1208, 1209 (9th Cir. 1972) (both standards used).

154. See *United States v. DeCoster*, No. 72-1283 (D.C. Cir. 1976) (slip opinion).

155. See Bazelon, "The Realities of Gideon and Argersinger," 64 *Georgetown L. Rev.* 811, 820 n.48 (1976).

156. *State v. Kahalewai*, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972). Whether this standard is in practice much different than the older "mockery" standard has been questioned. Bazelon, pp. 820-821.

157. *State v. Kahalewai*, 54 Haw. 28, 32, 501 P.2d 977, 980 (1972).

158. *Ibid.* But see, *Andrews v. United States*, 403 F.2d 341 (9th Cir. 1968) (per se ineffective assistance found solely because counsel failed to pursue certain "critical" defenses); *Riser v. Craven*, 501 F.2d 381 (9th Cir. 1974) (per se denial of effective assistance where counsel failed to protect the defendant's right of appeal).

159. *State v. Kahalewai*, 54 Haw. 28, 30, 501 P.2d 977, 979-980 (1972).

160. *Cf., State v. Torres*, 54 Haw. 502, 510 P.2d 494 (1973).

161. *Ibid.*, at 506, 510 P.2d at 497.

162. *Chambers v. Maroney*, 399 U.S. 42 (1969). For a review of some of the factors to be considered in

determining prejudice, see *State v. Torres*, 54 Haw. 502, 506-508, 510 P.2d 494, 497-498 (1973).

163. *State v. Kane*, 52 Haw. 484, 479 P.2d 207 (1971).

164. e.g., *State v. Torres*, 54 Haw. 502, 510 P.2d 494 (1973); *United States v. Main*, 443 F.2d 900 (9th Cir. 1971).

165. *State v. Torres*, 54 Haw. 502, 505, 510 P.2d 494, 496 (1973).

166. *Glasser v. United States*, 315 U.S. 60 (1942).

167. *Sanchez v. Nelson*. 446 F.2d 849, 850 (9th Cir. 1971) (per curiam).

168. See *United States v. Choate*, 527 F.2d 748 (9th Cir. 1975). But see, *Weatherford v. Bursey*, 45 U.S.L.W. 4154 (1977) (no denial of right to effective assistance of counsel where government agent did not reveal the contents of the trial sessions of the defendant to the government).

169. See *Herring v. New York*, 422 U.S. 853 (1975).

170. See *State v. Pokini*, 55 Haw. 640, 526 P.2d 94 (1974).

171. See *Griffin v. Illinois*, 351 U.S. 12 (1956) (trial); *Lane v. Brown*, 372 U.S. 477 (1963) (Coram nobis hearing); *Long v. Dist. Ct.*, 385 U.S. 192 (1966) (habeas corpus proceeding); *Mayer v. Chicago*, 404 U.S. 189 (1971) (misdemeanor trial).

172. *Draper v. Washington*, 372 U.S. 487 (1963).

173. *Roberts v. LaVallee*, 389 U.S. 40 (1967). But see, *Britt v. North Carolina*, 404 U.S. 226 (1971) (transcripts may be refused where there were alternatives available).

174. *Mason v. State of Arizona*, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 1145 (1975).

175. *Faretta v. California*, 422 U.S. 806, 835 n.46 (1974).

176. "Jailed Pro Se Defendant," p. 301.

177. "Faretta," p. 283.

178. See "Jailed Pro Se Defendant."

179. *Ibid.*; see also, "Self Representation."

180. ABA Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, section 6.7 (approved draft, 1972).

181. "Faretta," pp. 293-295.

182. e.g., *United States v. Price*, 474 F.2d 1223 (9th Cir. 1970); *Hodge v. United States*, 414 F.2d 1040 (9th Cir. 1969).

183. See "Jailed Pro Se Defendant;" "Self Representation."

184. "Jailed Pro Se Defendant," pp. 295-301.

185. *See generally*, Duke, "The Right to Appointed Counsel: Argersinger and Beyond," 12 *Am. Crim. L. Rev.* 601 (1975); Rossman, "The Scope of the Sixth Amendment: Who is a Criminal Defendant?", 12 *Am. Crim. L. Rev.* 633 (1975); Comment, "The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings," 9 *J. Law. Ref.* 554 (1976).

186. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 302. See also, *State v. Wong*, 47 Haw. 361, 385, 389 P.2d 439 (1964). The *Model State Constitution* has a provision modeled after the federal constitutional provision. *Model State Constitution*, sec. 1.06.

187. See *Territory of Hawaii v. Henriques*, 21 Haw. 50, 51 (1912).

188. *Ibid.*, at 52.

189. See *Territory of Hawaii v. Tamashiro*, 37 Haw. 552 (1947). The Fifth Amendment prohibition against double jeopardy was held binding on the states in *Benton v. Maryland*, 395 U.S. 784 (1969). Jeopardy attaches in a jury trial when the jury has been impaneled and sworn. In a nonjury trial it attaches when the court begins to take evidence. See *Downum v. United States*, 372 U.S. 734 (1965).

190. 49 Haw. 624, 425 P.2d 1014 (1967).

191. 342 U.S. 337 (1952).

192. 49 Haw. 624, 636-637. Followed in *State v. Marley*, 54 Haw. 450, 460, 509 P.2d 1095 (1973); *State v. Kahalewai*, 56 Haw. 481, 490-491, 541 P.2d 1020 (1975).

193. 49 Haw. at 638, quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1946). This doctrine has been incorporated in Hawaii statutory law. *Hawaii Rev. Stat.*, sec. 806-26, provides:

> *The words and phrases used in an indictment shall be construed according to their usual acceptation, except words and phrases which have been defined by law or which have acquired a legal signification, which words and phrases shall be construed according to their legal signification and shall be sufficient to convey that meaning.*

Rule 7(c) and (f), *Hawaii Rules of Penal Procedure* (1977).

194. 49 Haw. 624, 638.

195. *Ibid.*

196. 380 U.S. 400 (1965).

197. *Model State Constitution*, sec. 1.06.

198. See Baker, "The Right to Confrontation, The Hearsay Rule, and Due Process - A Proposal for Determining When Hearsay May Be Used in Criminal Trials," 6 *Conn. L. Rev.* 529 (1974).

199. *Ibid.*, at p. 532.

200. *Ibid.*, at pp. 533-534.

201. See *McCray v. Illinois*, 386 U.S. 300 (1967).

202. See *Smith v. Illinois*, 390 U.S. 129 (1968).

203. 397 U.S. 337 (1970).

204. *Ibid.*, at 343-344.

205. See *Bruton v. United States*, 391 U.S. 123 (1968).

206. *Ibid.*, at 127-128.

207. See *Nelson v. O'Neill*, 402 U.S. 622 (1971).

208. See *Barber v. Page*, 390 U.S. 719 (1968).

209. See *California v. Green*, 399 U.S. 149 (1970).

210. See *Boykin v. Alabama*, 395 U.S. 238 (1968).

211. See *Henderson v. Morgan*, 426 U.S. 637 (1976).

212. See *Brady v. United States*, 397 U.S. 742 (1970).

213. See *Santobello v. New York*, 404 U.S. 257 (1971).

214. See *Menna v. New York*, 423 U.S. 61 (1975).

215. See *United States v. Nobles*, 422 U.S. 225 (1975).

216. See *Bailey v. Richardson*, 341 U.S. 918 (1951).

217. See *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

218. See *Hannah v. Larche*, 363 U.S. 420 (1960).

219. See *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

220. *In the Matter of John W. McCarthy*, 5 Haw. 573 (1886).

221. See *Hawaii Rev. Stat.*, sec. 801-2.

222. 51 Haw. 125, 453 P.2d 221 (1969).

223. 54 Haw. 637, 513 P.2d 697 (1973).

224. 55 Haw. 336, 519 P.2d 892 (1974).

225. *Model State Constitution*, sec. 1.06.

226. See *Hawaii Rev. Stat.*, sec. 801-2.

227. See Rule 17 of the *Hawaii Rules of Penal Procedure* (1977). Rule 17 substantially is derived from Rule 17 of the *Federal Rules of Criminal Procedure*.

228. 51 Haw. 581, 465 P.2d 560 (1970).

229. *Ibid.*, at 585-586.

230. See Westen, "The Compulsory Process Clause," 73 *Mich. L. Rev.* 73, 74 (1974).

231. *Pate v. Robinson*, 383 U.S. 375 378 n.1 (1966); *Blackmer v. United States*, 284 U.S. 421, 422 (1932); *United States v. Van Dusee*, 140 U.S. 169, 173 (1891) (dictum that compulsory process does not require defense subpoenas to issue at government expense); *Ex parte Harding*, 120 U.S. 782 (1887); *United States v. Reid*, 53 U.S. (12 How.) 361, 363-365 (1851) (dictum), *overruled* in *Rosen v. United States*, 245 U.S. 467 (1918).

232. See cases cited in Westen, p. 132 n.295.

233. 388 U.S. 14 (1967).

Chapter 8

1. 381 U.S. 479 (1965).

2. *Whalen v. Roe*, 45 U.S.L.W. 4166, 4168 (U.S. Feb. 22, 1977).

3. *Olmstead v. United States*, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).

4. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

5. Note, "On Privacy: Constitutional Protection from Personal Liberty," 48 *N.Y.U. L. Rev.* 671 (1973); hereinafter cited as "On Privacy."

6. *Ibid.*, pp. 675-676.

7. *Ibid.*, p. 678.

8. *Ibid.*, pp. 680-681.

9. See *Roe v. Wade*, 410 U.S. 113, 153 (1973):

> *This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.*

10. "Roe and Paris: Does Privacy Have a Principle?," 26 *Stan. L. Rev.* 1161, 1173 (1974).

11. *Whalen v. Roe*, 45 U.S.L.W. 4166, 4168 (U.S. Feb. 22, 1977); Wilkinson & White, "Constitutional Protection for Personal Lifestyles," 62 *Cornell L. Rev.* 563, 588 (1977).

12. Note, "Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments," 90 *Harv. L. Rev.* 945, 978 (1977).

13. *Andreason v. Maryland*, 96 S. Ct. 2737 (1976).

14. 381 U.S. 484-486 (1965).

15. 394 U.S. 557 (1969).

16. 413 U.S. 49 (1973). See also, *United States v. Reidel*, 402 U.S. 351 (1971) (no right to distribute obscenity to consenting adult purchaser); *United States v. 12 200-ft. Reels of 8mm. Film*, 413 U.S. 123 (1973) (no right to import obscenity for personal use); *United States v. Orito*, 413 U.S. 139 (1973) (no right to transport obscenity across statelines for personal use). Under Hawaii law, it is an offense to sell pornographic materials, exhibit pornographic films or pornographic performances for a charge, or participate in commercial sex acts. *Hawaii Rev. Stat.*, sec. 712-1210 *et seq.* Private possession and non-commercial private performances are not offenses. Commentary to sec. 712-1214.

17. "On Privacy," p. 691.

18. 389 U.S. 347 (1967).

19. *Ibid.*, at 520. See also, *State v. Matias*, 51 Haw. 62, 451 P.2d 257 (1969) (overnight guest of tenant had right to privacy in host's apartment,

even though host consented to search); *State v. Dias*, 52 Haw. 100, 470 P.2d 510 (1970) (passageway on private property located between 2 apartment houses gives rise to reasonable expectation of privacy). But see, *State v. Rocker*, 52 Haw. 336, 475 P.2d 684 (1970) (arrest of defendants sunbathing nude on public beach did not violate their right of privacy).

20. Charles Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890).

21. Project, Government Information and the Rights of Citizens, 73 *Mich. L. Rev.* 971, 1225 (1975); hereinafter cited as Government Information.

22. *Ibid.*, pp. 1222-1223.

23. *Ibid.*, pp. 1227-1230; Leigh, "Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies," 3 *Hastings Const. L. Q.* 229, 249 (1976).

24. Government Information, p. 1222.

25. Leigh, p. 248 n.119.

26. "On Privacy," p. 770.

27. Leigh, p. 243.

28. 45 U.S.L.W. 4166 (U.S. Feb. 22, 1977).

29. *Ibid.*, at 4170.

30. 424 U.S. 693 (1976).

31. *Ibid.*, at 713.

32. 13 Cal.3d 757, 533 P.2d 222, 120 *Cal. Rptr.* 94 (1975).

33. 405 U.S. 438 (1972).

34. 410 U.S. 113 (1973).

35. *Ibid.*, at 164-165. Although the woman's freedom of choice diminishes as the fetus approaches the point of viability (the capacity for independent existence outside the womb), the U.S. Supreme Court emphasized that at no time prior to live birth was a fetus a "person" entitled to constitutional protection under the Fourteenth Amendment. *Ibid.*, at 156-158. Therefore, even after the point of viability, the interest of the state in protecting "the potentiality of human life" would not suffice to prevent an abortion to save the life or health of the mother. The Court's decision is consistent with earlier property, criminal, and tort law in not recognizing the rights of the born and unborn as equivalent. Note, "Live Birth: A Condition Precedent to Recognition of Rights," 4 *Hofstra L. Rev.* 805 (1976); hereinafter cited as "Live Birth."

    Given the U.S. Supreme Court's decision in *Roe v. Wade*, any attempt to extend protection of "life" to fetuses from the moment of conception must come through an amendment to the U.S. Constitution. The addition of a "right to life" to a state constitution would be superseded and rendered ineffective by the *Roe* decision. With the liberalization of abortion laws, there have been efforts to amend the Fifth and Fourteenth Amendments of the U.S. Constitution to extend protection of "life" from the moment of conception. See, e.g., S.J. Res. 140 and S.J. Res. 141, 94th Cong., 1st Sess. (1975), quoted in "Live Birth," p. 835 n.178. Even these would permit abortion to save the life of the mother. Another approach is a U.S. constitutional amendment which would permit the states to formulate their own abortion policy. See, e.g., H.R.J. Res. 261, 94th Cong., 1st Sess., sec. 1 (1975), quoted in Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 *Cal. L. Rev.* 1250, 1320 n.344 (1975).

36. See, e.g., *Carey v. Population Services International*, 45 U.S.L.W. 4601 (U.S. June 7, 1977) (sale of contraceptives); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (rules governing mandatory termination of pregnant teachers and eligibility to return to work after giving birth).

37. See, e.g., *Maher v. Roe*, 45 U.S.L.W. 4787 (U.S. June 21, 1977) (state medicaid benefits limited to "medically necessary" first-trimester abortions); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (exclusion of disabilities relating to pregnancy from state insurance scheme).

38. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, pp. 4-9. Compare, *Hawaii Rev. Stat.*, sec. 711-1111.

39. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, p. 234.

40. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, pp. 4-5.

41. *Robinson v. California*, 370 U.S. 660 (1962), in holding that the *status* of drug addiction may not suffer criminal sanction, did not affect the state's power to regulate drug possession or use. The Court did not review a conviction under Hawaii law for possession of marijuana; see *State v. Kantner*, 53 Haw. 327, 493 P.2d 306, *cert. denied*, 409 U.S. 948 (1972).

42. *State v. Rocker*, 52 Haw. 336, 475 P.2d 684 (1970).

43. *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970).

44. *State v. Roy*, 54 Haw. 513, 510 P.2d 1066 (1973).

45. *State v. Kantner*, 53 Haw. 327, 333, 493 P.2d 306, *cert. denied*, 409 U.S. 948 (1972).

46. *State v. Baker*, 56 Haw. 271, 280, 535 P.2d 1394 (1975).

47. *Ibid.*, at 280-281. The importance of this separate privacy provision became all the more clear in *Ravin v. State*, 537 P.2d 494 (Alaska 1975), where it formed the basis of the Court's decision to protect possession of marijuana for personal home use.

    It should be noted that Justice Levinson consistently and emphatically urged that the right of privacy articulated in Article I, section 5, included more than just freedom from electronic surveillance and the like. "It guarantees to the individual the full measure of control over his personality consistent with the security of himself and others," including the right to smoke marijuana. *State v. Kantner*, 53 Haw. 327, 342, 493 P.2d 306, *cert. denied*, 409 U.S. 948 (Levinson, J., dissenting); see also, *State v. Roy*, 54 Haw. 513, 518, 510 P.2d 1066 (Levinson, J., concurring).

48. Wilkinson and White, p. 564.

49. 45 U.S.L.W. 4550 (U.S. May 31, 1977).

50. 416 U.S. 1 (1974).

51. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

52. *Hawaii Penal Code*, ch. 707, pt. V, Introduction.

53. *Kelley v. Johnson*, 425 U.S. 238 (1976) (hair grooming regulations for police officers); *Quinn v. Muscare*, 425 U.S. 560 (1976) (hair grooming regulations for fire fighters).

54. See note 41; see also, *Stanley v. Georgia*, 394 U.S. 557, 558 n.11 (1969).

55. See note 47.

56. See generally, Christine Mukai, Hilary K. Josephs, and Linda Luli Nakasone, *Towards a Definition of Death*, Legislative Reference Bureau, Report No. 1 (Honolulu: 1977).

57. 137 N.J. Super. 227, 348 A.2d 801 (1975), *modified and remanded*, 70 N.J. 10, 355 A.2d 647 (1975), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

58. *Alaska Const.* art. I, sec. 22; *Arizona Const.* art. II, sec. 8; *California Const.* art. I, sec. 1; *Illinois Const.* art. I, sec. 6; *Louisiana Const.* art I, sec. 5; *Montana Const.* art. II, sec. 10; *South Carolina Const.* art. I, sec. 10; *Washington Const.* art. I, sec. 7.

59. Illinois, Louisiana, and South Carolina.

60. California.

61. Alaska, Arizona, Montana, and Washington.

62. Government Information, p. 1243.

63. *Ibid.*

64. *Ibid.*, p. 1244.

65. *Ibid.*

66. *Ibid.*

Chapter 9

1. See Michelman, "The Supreme Court, 1968 Term, FORWARD: ON PROTECTING THE POOR THROUGH THE FOURTEENTH AMENDMENT," 83 *Harv. L. Rev.* 7 (1969).

2. C. F. Snider, *American State and Local Government* (2nd ed.; New York: Meredith Publishing Co., 1965), pp. 492-493; see also, Cantor, "The Law and Poor People's Access to Health Care," 35 *Law and Contemp. Prob.* 901 (1970).

3. Michelman, p. 7.

4. For a discussion on the concept of positive rights, see Wayne Minami and Judy E. Stalling, *Article I: Bill of Rights*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), pp. 125-130.

5. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 37.

6. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, p. 236. The Committee on Bill of Rights, Suffrage and Elections reported to the Convention that it considered the additions of new sections to the Bill of Rights including a provision for economic security. In recommending against inclusion, the report stated:

> *Serious consideration was given to these proposals not only in terms of substance but also as to whether they were proper subjects of legislation or the Constitution.... However, meritorious the interest and subject matter may have been, your Committee believes that the legislature with its powers extending to all rightful subjects of legislation not inconsistent with the Hawaii Constitution or the Constitution of the United States might better deliberate and act upon them.*

7. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, p. 42.

8. *Ibid.*, p. 38. Delegate Mizuha who proposed the amendment, quoted a newspaper story reporing that in 1968, the State of Hawaii was paying 90 per cent of the minimum standard of living. "The figure should be 100 per cent, not 90 per cent and that is what my amendment proposes to do,..."

9. *Ibid.*, p. 40.

10. Note, "Municipal Self-Determination: Must Local Control Yield to Travel Rights?", 17 *Ariz. L. Rev.* 145 (1975). The author examines a number of strategies used to control the growth of municipalities.

11. *Ibid.*, at 146-147.

12. The Governor of the State of Hawaii in his 1977 State of the State Address said:

> *The problems of excessive population seems to be central to nearly every problem in our State. Too many people means too few jobs and too much competition for them; too many people means too little land for agriculture, and parks, and scenic vistas; too many people means too much crime and too much erosion of possibly our most important commodity, the Aloha Spirit; too many people means too much pressure on all our governmental and private institutions.*
>
> *In short, too many people can spell disaster for this State.*

13. Hawaii, Department of Planning and Economic Development, *State of Hawaii Growth Policies Plan: 1974-84* (Honolulu: 1974), pp. 57-84.

13. Hawaii, Department of Planning and Economic Development, *Report to the Eighth Legislature of the State of Hawaii as Mandated by Act 189, Regular Session of 1975, Eighth Legislature of the State of Hawaii, on the Hawaii State Plan* (Honolulu: 1976), p. 38.

15. 1977 Haw. Sess. Law, Act 211.

16. J. Van Dyke, "Residency Requirements and the Burger Court," *Honolulu Star-Bulletin*, May 2, 1977, p. A-19. Also, the American Civil Liberties Union has filed suit against the one-year residency requirement for public employment, *Honolulu Star-Bulletin*, August 1, 1977, p. A-1.

17. *Hicklin v. Orbeck*, 45 U.S.L.W. 2593 (June 21, 1977).

18. See chapter 4 of this study on due process and equal protection.

19. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

20. 383 U.S. 663 (1966).

21. *Ibid.*, see also, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *Shapiro v. Thompson*, 394 U.S. 618 (1969).

22. *Graham v. Richardson*, 403 U.S. 365 (1971).

23. *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

24. *U.S. v. Guest*, 383 U.S. 745, 758 (1966).

25. 73 U.S. (6 Wall.) 35 (1868).

26. *Edwards v. California*, 314 U.S. 160 (1941).

27. 383 U.S. 745, 758-759 (1966).

28. 394 U.S. 618 (1969).

29. *Ibid.*, at 634-638.

30. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

31. 415 U.S. 250 (1974).

32. 394 U.S. 618, 638 (1969).

33. *Soena v. Iowa*, 419 U.S. 393 (1975).

34. *Valdis v. Kline*, 412 U.S. 441 (1973).

35. 424 U.S. 645 (1975).

36. *Whitehead v. Whitehead*, 53 Haw. 302, 492 P.2d 939 (1972).

37. *Ibid.*, at p. 311.

38. *York v. State*, 53 Haw. 557, 498 P.2d 644 (1972).

39. Att'y Gen. Ops. No. 74-17 (October 10, 1974).

40. 415 U.S. 250, 259. The Court stated:

> *...it is at least clear that medical care is as much "a basic necessity of life" to the indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of government entitlements.*

41. Comment, "The Right to Travel: In Search of a Constitutional Source," 55 *Neb. L. Rev.* 117, 125 (1975).

42. Michelman, pp. 13-16.

43. 405 U.S. 56 (1972).

44. 397 U.S. 471 (1970).

45. *Ibid.*, at 486.

46. 411 U.S. 1 (1973).

47. *Ibid.*, at 33.

48. 45 U.S.L.W. 4787 (June 20, 1977).

49. *Ibid.*, at 4789.

50. Wilkinson, "The Supreme Court: The Equal Protection Clause, and the Three Faces of Constitutional Equality," 61 *Vir. L. Rev.* 945, 1012 (1975).

Chapter 10

1. See chapter 4 on due process and equal protection.

2. *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376 (1968).

3. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, pp. 40-41.

4. *Ibid.*

5. According to National Center for State Courts, Hawaii's Jury System, Vol. II, *Trial Juries* (San Francisco: 1976), p. 38; hereinafter cited as *Trial Juries*, only 3 out of 34 jury trials in the last quarter of 1974 involved claims of damage of $5,000 or less. In 1968, the Constitutional Convention discussed but rejected the possibility of changing the minimum amount to a sum prescribed by the legislature. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, p. 234.

6. For further discussion of the nature of equitable proceedings, see 30 C.J.S. *Equity*, sec. 39 *et seq.*; 27 Am. Jur. 2d *Equity*, sec. 52 *et seq.*

7. *Harada v. Burns*, 50 Haw. 528, 445 P.2d 376 (1968).

8. *Hawaii Rules of Penal Procedure*, Rule 23(a).

9. *Ibid.*, Rule 38(b); *Lii v. Sida of Hawaii, Inc.*, 53 Haw. 353, 493 P.2d 1032, *cert. denied*, 408 U.S. 930, *reh. denied*, 409 U.S. 903 (1972).

10. An express mandate to the legislature was seen as essential before a departure from the tradition of the unanimous verdict could take place. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 301.

11. *Hawaii Rev. Stat.*, sec. 635-20.

12. Jon M. Van Dyke, *Jury Selection Procedures* (Cambridge, Mass.: Ballinger Publishing Co., 1977), Appendix E, pp. 285-289.

13. Rule 48.

14. *Trial Juries*, p. 40 note. The 6-person jury in federal civil cases was expressly approved by the U.S. Supreme Court in *Colgrove v. Battin*, 413 U.S. 149 (1973); compare, *Dashiell v. Keauhou-Kona Co.*, 487 F.2d 957 (9th Cir. 1973).

15. *Trial Juries*, p. 9; *Hawaii Rules of Penal Procedure*, Rule 23(b); *Hawaii Rules of Civil Procedure*, Rule 48. The fact that most juries are full juries of 12 suggests that criminal defendants and civil litigants perceive definite advantages in the larger number.

16. *Trial Juries*, pp. 37-39.

17. *Ibid.*, pp. 47-48.

18. Perhaps the most celebrated opinion involving the equal protection issue with regard to failure of indigents to pay fines is *Williams v. Illinois*, 399 U.S. 235 (1970), in which the Court said that where an indigent's incarceration for failure to pay a fine extends for a longer period than the Court had authority to incarcerate the person by imposing a straight sentence of imprisonment, equal protection is denied unless some alternative method of paying the fine (such as installment payment) is provided. Two state constitutions expressly exclude from protection the nonpayment of fines and penalties imposed for the violation of law and make that a ground of imprisonment. See *Missouri Const.* art. I, sec. 11 (1970); *Oklahoma Const.* art. 2, sec. 13 (1952).

19. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 5, p. 302.

20. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 8. Three state constitutions have similar provisions. See *Minnesota Const.* art. I, sec. 12 (1976); *Nevada Const.* art. I, sec. 14 (1973); *Wisconsin Const.* art. I, sec. 16 (1957).

21. Delegate Mizuha, Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 9.

22. See Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 302.

23. Delegate Anthony, Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 9. *Hawaii Rev. Stat.*, sec. 651-65, exempts certain real property from attachment. The crucial question with regard to attachment and garnishment relates to the validity of summary procedures authorizing the prejudgment seizure of property. See *North Georgia Furnishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975); see generally, Richard F. Kahle, Jr., *Creditor's Remedies*, Legislative Reference Bureau (Honolulu: 1974).

24. The 13 states which do not prohibit imprisonment for debt as a constitutional guarantee are: Connecticut, Delaware, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New York, Rhode Island, Vermont, Virginia, and West Virginia. Neither does the *Model State Constitution* provide for a bar to imprisonment for debt. See National Municipal League, *Model State Constitution* (6th ed.; New York: 1968).

25. 12 Wheat (U.S.) 370. The Court pronounced that art. I, sec. 10, clause 1, of the U.S. Constitution forbidding state impairment of contracts has no application to state abolishment of imprisonment for debt. 12 Wheat (U.S.) at 378. Laws abolishing arrest for debt do not impair the obligation of existing contracts because the right to imprison does not constitute a part of the contract. Such laws merely act upon the remedy and therefore must be regulated by views of policy and expediency entertained by the state legislature. *Ibid.*

26. See text accompanying note 19; *Speidel v. State*, 460 P.2d 77, 83 (Alaska, 1969). *Cf.*, *Frank F. Fasi Supply Co. v. Wigwam Investment Co.*, 308 F.Supp. 59 (D. Hawaii 1969).

27. See 48 *A.L.R.3d*, *Constitutional Provision Against Imprisonment for Debt as Applicable to Nonpayment of Tax*, sec. 2 (1973); hereinafter cited as *Nonpayment of Tax*.

28. See *People v. Bishopp*, 128 *Cal. Rptr.* 923, 925-926 (1976).

29. See *Garrett v. Garrett*, 65 *Cal. Rptr.* 580, 585 (1968).

30. See *Alabama Const.* art. I, sec. 20 (1973); *California Const.* art. I, sec. 10 (1977); *Georgia Const.* sec. 2-120 (1977); *Mississippi Const.* art. 3, sec. 30 (1972); *New Mexico Const.* art. II, sec. 21 (1970); *South Dakota Const.* art. VI, sec. 15 (1967); *Tennessee Const.* art. I, sec. 18 (1976); *Texas Const.* art. I, sec. 18 (1955).

31. *California Const.* art. I, sec. 10 (1977). Four other states have similar provisions. See Tort: *Colorado Const.* art. II, sec. 12 (1974); *Montana Const.* art. II, sec. 27 (1975 Supp.); *Nevada Const.* art. I, sec. 14 (1973); *North Dakota Const.* art. I, sec. 15 (1960). Militia fine: *Nevada Const.* art. I, sec. 14 (1973).

32. See Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 302. *Cf.*, *Frank F. Fasi Supply Co. v. Wigwam Investment Co.*, 308 F.Supp. 59 (D. Hawaii 1969).

33. *California Const.* art. I, sec 10 (1977).

34. See *People v. Bishopp*, 128 *Cal. Rptr.* 923, 925-926 (1976).

35. See *State v. Davis*, 462 S.W.2d 178, 181 (Mo. 1970), citing *Kansas City v. Pengilley*, 269 Mo. 59, 189 S.W. 380 (1916).

36. 11 Haw. 794 (1895).

37. This statute, *Civil Code of Hawaii*, secs. 953-955 (1859) (arrest of debtors), was redesignated as *Civil Laws of Hawaii*, chapter 108 (1897), and repealed in 1905.

38. 11 Haw. at 795-796.

39. Three state constitutions have similar provisions. See *Alaska Const.* art. I, sec. 17 (1973); *Oregon Const.* art. I, sec. 19 (1975); *Utah Const.* art. I, sec. 16 (1971).

40. See *State v. MaDonald*, 1 Wash. App. 592, 463 P.2d 174 (1969), cited in *Washington Const.* art. I, sec. 17 (1976 Supp.), *Notes of Decisions*.

41. These states are: Arizona, Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Ohio, Oregon, South Carolina, and Wyoming.

42. *Georgia Const.* sec. 2-120 (1977).

43. *Collins v. State*, 55 S.E.2d 599 (1949), cited in *Georgia Const.* sec. 2-120 (1977), *Annotation*. In Tennessee, which also has an absolute provision, at least one state supreme court opinion has excepted cases of fraud. See *Tennessee Const.* art. I, sec. 18 (1976); *State v. Murray*, 480 S.W.2d 355 (1972).

44. See *Illinois Const.* art. I, sec. 14 (1971); *Kentucky Const.*, Bill of Rights sec. 18 (1973); *Montana Const.* art. II, sec. 27 (1975 Supp.); *North Dakota Const.* art. I, sec. 15 (1960); *Pennsylvania Const.* art. I, sec. 16 (1969).

45. See *Nonpayment of Tax*, at sec. 4 for a list of cases; *State v. Locklear*, 21 N.C. App. 48, 203 S.E. 2d 63 (1974) (citing *Nonpayment of Tax* annotation).

46. *Nonpayment of Tax*, at sec. 6(a).

47. See *Carollo v. United States*, 141 F.2d 997 (8th Cir. 1944), cited in *Nonpayment of Tax*, at sec. 6(c).

48. See Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 9.

49. See *State ex rel. Stanhope v. Pratt*, 533 S.W.2d 567, 571-572 (Mo. 1976).

50. *Ibid.*; followed in *Re Vanet*, 544 S.W.2d 236 (Mo. 1976).

51. See *Nonpayment of Tax*, at sec. 2.

52. See 2 Nichols, *Eminent Domain*, sec. 6.1 (3d ed. 1976); hereinafter cited as *Nichols*. Never in history has the United States Supreme Court held a use to be nonpublic when the legislature and the highest state court have declared the use to be public. See Conahan, "Hawaii's Land Reform Act: Is it Constitutional?", 6 *Hawaii Bar J.* 31, 35 (1969).

53. See *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897).

54. e.g., see *Maine Const.* art. I, sec. 21 (1965).

55. See Baumgardner, "'Takings' Under the Police Power - The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances," 30 *Southwestern L. J.* 723, 724 (1976).

56. See *Gill v. State*, 531 S.W.2d 322, 324 (Tex. 1975).

57. See 6 McQuillin, *Municipal Corporations*, sec. 24.02 (3d ed. 1969).

58. *United States v. Carmack*, 329 U.S. 230, 241-242 (1946).

59. Baumgardner, p. 725.

60. *Ibid.*

61. Mattoch, "The Amended Just Compensation Provision of the Hawaii Constitution: A New Basis for Indemnification of the Condemnee," 6 *Hawaii Bar J.* 55, 56 (1969).

62. Nichols, vol. 2A, sec. 6.44.

63. *Ibid.*

64. States which have this constitutional provision are: Alabama, Arizona, Arkansas, California, Colorado, Georgia, *Hawaii*, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

65. Nichols, vol. 2A, sec. 6.441.

66. *Ibid.* Direct physical injury does not include mere physical disturbance. Rather, it requires:

> *...that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate.*

Chicago v. Taylor, 125 U.S. 161, 168 (1888). This distinction becomes important when the majority rule of special and peculiar damages is discussed.

67. *Ibid.*

68. See *Chicago v. Taylor*, 125 U.S. 161 (1888).

69. See Nichols, vol. 2A, sec. 6.441.

70. See Mattoch, p. 58.

71. See *Archer v. Los Angeles*, 19 Cal.2d 19, 119 P.2d 1 (1946); *Albers v. County of Los Angeles*, 62 Cal.2d 259, 398 P.2d 129 (1965).

72. *City of Houston v. Renault, Inc.*, 431 S.W.2d 322, 324 (Texas 1968).

73. See Mattoch, p. 58.

74. See Nichols, vol. 2A, sec. 6.441(2).

75. *Ibid.*

76. *Ibid.*

77. *Ibid.*

78. See *Ingram v. City of Redondo Beach*, 119 *Cal. Rptr.* 688, 690 (1975).

79. See Nichols, vol. 2A, sec. 6.441(1).

80. See Nichols, vol. 2A, sec. 6.441(1), n.7, for list of cases.

81. See *O'Brien v. City of Syracuse*, 388 N.Y.S.2d 868, 870-871 (1976); *Sheridan Drive-In Theatre, Inc. v. State*, 384 P.2d 597, 599-600 (Wy. 1963). It is conceded, however, that the depreciation in value standard must involve ascertainable depreciation and does not apply to mere personal inconvenience of the occupier of the land. See *State v. Stefaniak*, 238 N.E.2d 451 (Ind. 1968). *Cf., Public Service Co. v. Morgan County Rural Electric Membership Corp.*, 360 N.E.2d 1022 (Ind. 1977).

82. See Mattoch, p. 60.

83. *Ibid.*

84. Nichols, vol. 2A, sec. 6.441(3).

85. *Ibid.* Compensation, however, is not awarded for damages that are too uncertain, remote, and speculative. Nichols, vol. 2A, sec. 6.4432(2).

86. Mattoch, p. 63. See discussion of depreciation in value rule.

87. Nichols, vol. 2A, sec. 6.441(1).

88. Mattoch, p. 63.

89. See Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee of the Whole Report No. 6, p. 304.

90. *Ibid.*

91. *Ibid. Hawaii Rev. Stat.*, sec. 101-2, provides the rules for disposal of excess property.

92. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 304.

93. *Ibid.*

94. *Hawaii Rev. Stat.*, secs. 101-25, 101-28, 101-29, and 101-33.

95. See *Hawaii Rev. Stat.*, sec. 101-23.

96. See *United States v. Miller*, 317 U.S. 369, 376 (1943). In general, under *Hawaii Rev. Stat.*, sec. 101-23, just compensation equals value of land taken plus severance damages to the remainder less special benefits to the landowner arising out of the taking. See *State v. Midkiff*, 55 Haw. 190, 516 P.2d 1250 (1973).

97. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Committee of the Whole Report No. 15, p. 357.

98. See text accompanying note 82. Committee of the Whole Report No. 15 also discounted the actionable injury at common law theory and further noted that the power of eminent domain would not affect the exercise of the police power:

> *The amendment is intended to apply to certain of those damages resulting from an undertaking for a public use and not those types of damages normally recoverable in tort actions. The amendment is neither intended to affect governmental bodies in their lawful and proper exercise of police powers to protect public health, safety and welfare, nor apply to instances of zoning and planning, which fall within the proper exercise of such police powers.*

Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Committee of the Whole Report No. 15, p. 357.

99. *Ibid.*, Standing Committee Report No. 55, pp. 235-237.

100. *Ibid.*, p. 235.

101. See Nichols, vol. 2A, sec. 6.4441(9).

102. See Nichols, vol. 2A, sec. 6.4432(2).

103. *Ibid.*

104. See Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 55, p. 235.

105. See *City and County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973); *City and County of Honolulu v. Bonded Investment Co.*, 54 Haw. 385, 507 P.2d 1084 (1973); *State v. Chang*, 50 Haw. 195, 436 P.2d 3 (1967); *Hawaii Housing Authority v. Rodrigues*, 43 Haw. 195 (1959).

106. This rule generally is accepted in other jurisdictions. See *State ex rel. Moore v. Bastion*, 97 Idaho 444, 546 P.2d 399, 403 (1976); *State v. Bryan*, 518 S.W.2d 928, 933 (Tex. 1975). The rationale is that expenses incurred and anticipated profits are "too uncertain and conjectural to be considered." *City and County of Honolulu v. Bonded Investment Co.*, 54 Haw. at 389.

107. 55 Haw. 226, 517 P.2d 7 (1973).

108. 55 Haw. at 231.

109. See text accompanying note 102.

110. *City and County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 231, n. 2.

111. Mattoch, p. 63.

112. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Standing Committee Report No. 20, p. 165.

113. The 19 states which do not have a Saving Clause in their constitutions are: Connecticut, Delaware, Florida, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, New Hampshire, New York, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, and Wisconsin. The *Model State Constitution* does not contain a Saving Clause. See National Municipal League, *Model State Constitution* (6th ed.; New York: 1968).

114. See *Illinois Const.* art. I, sec. 24 (1971), *Commentary*. See also, *Thomas v. Reid*, 285 P.92 (Okla. 1930).

115. *State v. Kantner*, 53 Haw. 327, 340 n.3, 493 P.2d 306 (1972) (Levinson, J., dissenting). The Ninth and Tenth Amendments are distinctly different. The Tenth Amendment reads:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

The exercise of the police power for the general welfare of the public is a right reserved to the states by the Tenth Amendment. See *Brown v. Brannon*, 399 F.Supp. 133, 147 (M.D. N.C. 1975), *affirmed*, 535 F.2d 1249 (1976). The Ninth Amendment is:

> *...a challenge to the states to undertake that work....*

Roscoe Pound, quoted in *Colorado Anti-Discrimination Commission v. Case*, 380 P.2d 34, 41 (Colo. 1962).

116. *State v. Abellano*, 50 Haw. 384, 390 n.3, 441 P.2d 333 (1968) (Levinson, J., concurring).

117. *Ibid.*, at 390. Furthermore, the Ninth Amendment:

> *...is the place to which we must turn for protection of individual liberty from infringements not enumerated, and perhaps not contemplated, by the founding fathers.* *Ibid.*, at 393.

118. *Ibid.* Justice Levinson noted that although one commentator has suggested that the Ninth Amendment directly is applicable to the states, the arguments against direct application and in favor of incorporation through the Fourteenth Amendment seem far more persuasive. *Ibid.*, at 390 n.4.

119. *Griswold v. Connecticut*, 381 U.S. 479, 511-512 (1965) (Black, J., dissenting).

120. 381 U.S. 479. Connecticut's Constitution does not have a Saving Clause.

121. 381 U.S. at 484.

122. 381 U.S. at 493.

123. *Ibid.*

124. 381 U.S. at 499-502 (Justice Harlan); 381 U.S. at 502-507 (Justice White).

125. 410 U.S. 113 (1973).

126. 50 Haw. 384, 441 P.2d 333 (1968).

127. 50 Haw. at 387.

128. 53 Haw. 327, 493 P.2d 306 (1972).

129. 53 Haw. at 331.

130. 53 Haw. at 340 n.3.

131. 56 Haw. 272, 535 P.2d 1394 (1975).

132. 56 Haw. at 282.

133. Article I, section 5, 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;...* (Emphasis added)

133. 56 Haw. at 280. To date only one jurisdiction has recognized a right to privacy in the home which encompasses the use and possession of marihuana. The Alaska Supreme Court in *Ravin v. State*, 537 P.2d 494 (1975), held that no adequate justification exists for the state's intrusion into the citizens' right of privacy by its prohibition of the possession of marihuana by adults for personal consumption in the home.

The *Ravin* decision substantially is based upon the right to privacy provision of the Alaska Constitution. Article I, section 22, of the Alaska Constitution provides in part:

> *The right of the people to privacy is recognized and shall not be infringed.*

The Court mentioned *Griswold's* Ninth Amendment application and *Roe v. Wade* as backdrops to Article I, section 22, but made no reference to Alaska Constitution's Saving Clause.

For a case holding that a statute prohibiting possession of marihuana does not violate the state Saving Clause and the Ninth Amendment, see *People v. Glaser*, 238 Cal. App.2d 819, 48 *Cal. Rptr.* 427, 431-432 (1965).

135. *Walker v. Baker*, 145 Tex. 121, 196 S.W.2d 324 (1946). Texas does not have a Saving Clause in its constitution.

136. *Matthews v. State*, 428 P.2d 371, 372. For the distinction between the Ninth and Tenth Amendments, see note 115 and text accompaniment.

137. *Bennett v. Jackson*, 186 Ind. 533, 116 N.E. 921, cited in *Bates v. Edwards*, 294 So.2d 532, 535 (La. 1974).

138. 116 N.E. at 923.

139. *Ibid.*

140. *Electors of Big Butte Area v. State Board of Education*, 78 Idaho 602, 308 P.2d 225, 231.

141. 308 P.2d at 231. See also, *State v. Idaho Power Co.*, 346 P.2d 596 (Idaho 1959). In *Washington County Election Commission v. Johnson City*, 350 S.W.2d 601, 604 (Tenn. 1961), the Tennessee Supreme Court declared:

> *A Constitution is not the beginning of a community, nor does it originate and create institutions of government. Instead, it assumes the existence of an established system which is to continue in force, and is based on pre-existing rights, laws, and modes of thought.*

In the related area of the limitations imposed upon the power of municipalities by the state Saving Clause, see *Mayor of City of Americus v. Perry*, 40 S.E. 1004 (Ga. 1902); *West v. Trotzier*, 196 S.E. 902 (Ga. 1938); *State ex rel. White v. Barker*, 89 N.W. 204 (Iowa 1902); *City of Providence v. Moulton*, 160 A. 75 (R.I. 1932).

Laws prohibiting the sale and consumption of liquor uniformly have been upheld as against claims that they violate the inherent right under the state Saving Clause to consume and possess liquor. See *State v. Whited*, 396 P.2d 758 (Ore. 1964); *Van Riper v. Oregon Liquor Control Commission*, 365 P.2d 109 (Ore. 1961); *Johnson v. Board of County Commissioners*, 75 P.2d 849 (Kansas 1938); *Stepp v. State*, 33 So.2d 307 (Miss. 1948); *Whitley v. State*, 68 S.E. 716 (Ga. 1910).

At least one court has held that the right to wear one's hair in a manner of choice is a protected right of personal taste under the state Saving Clause and the Ninth Amendment and cannot be infringed upon by the state. See *Murphy v. Pocatello School District No. 25*, 480 P.2d 878, 884 (Idaho 1971).

In criminal law and related areas, 3 Rhode Island cases have favored the power of the legislature over claims of personal rights under the state Saving Clause. Article I, section 23, of the Rhode Island Constitution provides:

> *The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people.*

See *State v. Ramadell*, 109 R.I. 320, 285 A.2d 399 (1971) (upholding legislative abolition of the right to resist arrest as against defendant's contention that the statute deprived the defendant of the right to resist arrest reserved to the defendant by the state Saving Clause); *State v. Storme*, 112 R.I. 121, 308 A.2d 463 (1973) (rejecting defendant's claim that legislation which made it unlawful to carry a pistol or revolver on the person unless licensed to do so infringes upon the right of selfdefense guaranteed by the state Saving Clause); *Berberian v. Berberian*, 109 R.I. 273, 284 A.2d 72 (1971) (in a petition for divorce on grounds of gross misbehavior and extreme cruelty, rejecting appellant's claim that the state Saving Clause preserves to appellant the right to assault spouse).

In *McCracken v. State*, 518 P.2d 85 (Alaska 1974), the trial judge denied petitioner's motion for self-representation in an evidentiary hearing on an application for post-conviction relief, and petitioner appealed. The Alaska Supreme Court addressed itself to petitioner's claim that the petitioner had a right to self-representation under the state Saving Clause. The Court held:

> *We are persuaded that there is such a right [of self-representation] under art. I sec. 21 of the Alaska Constitution, which specifies that "[t]he enumeration of rights in this constitution shall not impair or deny others retained by the people." At the time that the Alaska Constitution was enacted and became effective, the right of self-representation was so well established that it must be regarded as a right "retained by the people."* 518 P.2d at 91. (Emphasis added)

Two cases concerning financial disclosure laws have impinged upon the Saving Clause. See *City of Carmel-by-the-Sea v. Young*, 85 *Cal. Rptr.* 1, 466 P.2d 225 (1970) in which the Court struck down such a statute as an overbroad intrusion into the private financial affairs of persons seeking to hold public office with passing reference to the Ninth Amendment. In *Montgomery v. Walsh*, 274 Md. 489, 336 A.2d 97 (1975), the Court held a county financial disclosure ordinance did not impinge on plaintiff county employee's constitutional right to privacy. The Court rejected the plaintiff's contention that the state Saving Clause guaranteed them a constitutional right to hold public employment.

A. INDEX OF BILL OF RIGHTS PROVISIONS

I. Art./ Sec.	HAWAII BILL OF RIGHTS	ALABAMA	ALASKA	ARIZONA	ARKANSAS	CALIFORNIA	COLORADO	CONNECTICUT	DELAWARE	FLORIDA	GEORGIA	IDAHO	ILLINOIS	INDIANA
(I,1)	Right of Government based on authority of the people	I,2	I,2	II,2	II,1	I,26	II,1	I,2	Pre.	I,1	IB,1	I,2	I,1	I,1
(I,2)	People have inalienable rights	I,1	I,1	-	II,2	I,1	II,3	-	Pre.	I,2	IB,9	I,1	I,1	I,1
(I,2)	People have corresponding obligations and responsibilities	-	I,1	-	-	-	-	-	-	-	-	-	I,23	-
(I,19)	No irrevocable grant of special privileges or immunities	I,22	I,15	II,9	II,18, 19	I,7	II,11	I,1	-	-	IA,7	I,2	I,16	I,23
(I,20)	Constitution not to impair rights retained by people	I,36	I,21	II,33	II,29	I,24	II,28	-	-	I,1	IA,25	I,21	I,24	-
(I,14)	Civilian authority supreme	I,27	I,20	II,20	II,27	I,5	II,22	I,16	I,17	I,7	IB,5	I,12	-	I,33
(I,16)	No quartering of soldiers	I,28	I,20	II,27	II,27	I,5	II,22	I,17	I,18	-	IB,5	I,12	I,21	I,34
(I,15)	Right to bear arms in common defense	I,26	I,19	II,26	II,5	-	II,13	I,15	-	I,8	IA,5	I,11	-	I,32
	in self-defense	I,26	-	II,26	-	-	II,13	I,15	-	I,8	-	-	I,22	I,32
(I,3)	Freedom of religion	I,3	I,4	II,12	II,24	I,4	II,4	I,3	I,1	I,3	IA,2,3	I,4	I,3	I,2,3
(I,3)	Freedom of speech	I,4	I,5	II,6	-	I,2	II,10	I,5	-	I,4	IA,4	I,9	I,4	I,9
(I,3)	Freedom of press	I,4	-	-	II,6	I,2	II,10	I,5	I,5	I,4	IA,4	-	-	I,9
(I,3)	Right of peaceful assembly	I,25	I,6	II,5	II,4	I,3	II,24	I,14	I,16	I,5	IA,6	I,10	I,5	I,31
(I,3)	Right of petition	I,25	I,6	II,5	II,4	I,3	II,24	I,14	I,16	I,5	IA,6	I,10	I,5	I,31
(I,4,6)	Due process of law	I,6	I,7	II,4	II,8	I,7,15	II,25	I,8,9	I,7	I,9	IA,1	I,13	I,2	-
(I,2, 4)	Equal protection	-	I,1	-	II,3	I,7	-	I,20	-	I,2	-	I,2	I,2	-
(I,4)	No denial of civil rights or discrimination because of race[1]	-	I,3	-	II,3	I,8	-	I,20	-	I,2[4]	-	-	I,17	-
	religion[2]	-	I,3	-	-	I,8	-	I,20	-	I,2	-	-	I,17	-
	sex	-	I,3	-	-	I,8	-	-	-	-	-	-	I,17	-
	ancestry[3]	-	I,3	-	II,3	I,8	-	I,20	-	-	-	-	I,17 (I,19)[4]	-

I. Art./ Sec.	HAWAII BILL OF RIGHTS *(Continued)*	ALABAMA	ALASKA	ARIZONA	ARKANSAS	CALIFORNIA	COLORADO	CONNECTICUT	DELAWARE	FLORIDA	GEORGIA	IDAHO	ILLINOIS	INDIANA
(I,7)	No discrimination in military organizations because of race	-	-	-	-	-	-	-	-	-	-	-	-	-
	religion	-	-	-	-	-	-	-	-	-	-	-	-	-
	ancestry	-	-	-	-	-	-	-	-	-	-	-	-	-
(I,12)	No disqualification from jury service because of sex	-	-	-	-	-	-	-	-	-	-	-	-	-
(I,21) (ERA)	Equality of rights regardless of sex	-	I,3	-	-	-	II,29	I,20	-	-	-	-	I,17,18	-
(I,5)	No unreasonable searches, seizures, and invasions of privacy	I,5	I,14, 22	II,8	II,15	I,1,13	II,7	I,7	I,6	I,12	IA,10	I,17	I,6	I,11
(I,5)	Warrants: particularity of persons or things to be seized or communications to be intercepted	-	I,14	-	II,15	I,13	II,7	I,7	I,6	I,12	IA,10	I,17	I,6	I,11
(I,8)	Indictment by grand jury for capital offense or otherwise infamous crime	I,8	I,8	-	II,8	-	-	I,8	-	I,15	-	I,8	I,7	-
(I,8)	No double jeopardy	I,9	I,9	II,10	II,8	I,15	II,18	-	I,8	I,9	IA,15	I,13	I,10	I,14
(I,8)	No self-incrimination	I,6	I,9	II,10	II,8	I,15	II,18	I,8	I,7	I,9	IA,13	I,13	I,10	I,14
(I,9)	No excessive bail	I,16	I,12	II,15	II,9	I,12	II,20	I,8	I,11	I,14	IA,14	I,6	-	I,16
(I,9)	Possibility of dispension of bail except where offense punishable by life imprisonment	-	-	-	-	I,12	-	-	-	-	-	-	-	-
(I,9)	No excessive fines	I,15	I,12	II,15	II,9	I,17	II,20	I,8	I,11	I,17	IA,14	I,6	-	I,16
(I,9)	No cruel or unusual punishment	I,16	I,12	II,15	II,9	I,17	II,20	-	I,11	I,17	IA,14	I,6	-	I,16
(I,11)	Right to trial by jury in criminal cases:	I,6	I,11	II,23 24	II,10	I,15, 16	II,16, 23	I,8	I,7	I,16	IA,11	I,7,13	I,8	I,13
	Right to speedy trial	I,6	I,11	II,24	II,10	I,15	II,16	I,8	I,7	I,16	IA,11	I,13	I,8	-
	Right to public trial	I,6	I,11	II,24	II,10	I,15	II,16	I,8	I,7	I,16	IA,11	I,13	I,8	I,13
	Right to impartial jury	I,6	I,11	II,24	II,10	-	II,16	I,8	I,7	I,16	IA,11	-	I,8	I,13
	Right to confront witnesses	I,6	I,11	II,24	II,10	I,15	II,16	I,8	I,7	I,16	IA,11	-	I,8	I,13
	Right to be informed of accusation	I,6	I,11	II,24	II,10	-	II,16	I,8	I,7	I,16	IA,11	-	I,8	I,13
	Right to compulsory process for obtaining witnesses	I,6	I,11	II,24	II,10	I,15	II,16	I,8	I,7	I,16	IA,11	I,13	I,8	I,13

I. Art./ Sec.	HAWAII BILL OF RIGHTS *(Continued)*	ALABAMA	ALASKA	ARIZONA	ARKANSAS	CALIFORNIA	COLORADO	CONNECTICUT	DELAWARE	FLORIDA	GEORGIA	IDAHO	ILLINOIS	INDIANA
	Right to counsel	I,6	I,11	II,24	II,10	I,15	II,16	I,8	I,7	I,16	IA,11	I,13	I,8	I,13
	Court-appointed counsel when charged with offense punishable by more than 60 days imprisonment	-	-	-	-	-	-	-	-	-	-	-	-	-
(I,13)	Habeas corpus guaranteed	I,17	I,13	II,14	II,11	I,11	II,21	I,12	I,13	I,13	IA,12	I,5	I,9	I,27
(I,13)	Suspension of habeas corpus by legislature	-	-	-	II,11	-	-	I,12	-	-	-	-	-	-
(I,10)	Right to trial by jury in civil cases	I,11	I,16	II,23	II,7	I,16	II,23	I,19	I,4	I,22	IA,11	I,7	I,13	I,20
(I,17)	No imprisonment for debt	I,20	I,17	II,18	II,18	I,10	II,12	-	-	I,11	IA,20	I,15	I,14	I,22
(I,18)	Eminent domain compensation for taking property	I,23	I,18	II,17	II,22	I,19	II,15	I,11	I,8	X,11	IC,1	I,14	I,15	I,21
	damage to property	-	I,18	II,17	II,22	I,19	II,15	-	-	-	IC,1	-	I,15	-

A. INDEX OF BILL OF RIGHTS PROVISIONS
(CONTINUED)

I. Art./ Sec.	HAWAII BILL OF RIGHTS	IOWA	KANSAS	KENTUCKY	LOUISIANA	MAINE	MARYLAND	MASSACHUSETTS	MICHIGAN	MINNESOTA	MISSISSIPPI	MISSOURI	MONTANA	NEBRASKA
(I,1)	Right of Government based on authority of the people	I,2	I,2	4	I,1	I,2	Art.1, 4	Pre. I,7	I,1	I,1	III,5	I,1	II,1	I,1
(I,2)	People have inalienable rights	I,1	I,1	1	I,1	I,1	-	I,1	-	-	-	I,2	II,3	I,1
(I,2)	People have corresponding obligations and responsibilities	-	-	-	-	-	-	I,10	-	-	-	-	II,3	-
(I,19)	No irrevocable grant of special privileges or immunities	I,6	I,2	3	-	-	Art.41	I,6	-	-	-	I,13	II,31	I,16
(I,20)	Constitution not to impair rights retained by people	I,25	I,20	-	I,24	I,24	Art.45	-	I,23	I,16	III,32	-	II,34	I,26
(I,14)	Civilian authority supreme	I,14	I,4	22	-	I,17	Art.30	I,17	I,7	I,14	III,9	I,24	II,32	I,17
(I,16)	No quartering of soldiers	I,15	I,14	22	I,6	I,18	Art.31	I,27	I,8	-	-	I,24	II,32	I,18
(I,15)	Right to bear arms in common defense	-	I,4	1	-	I,16	-	I,17	I,6	-	III,12	I,23	II,12	-
	in self-defense	-	-	1	I,11	-	-	-	I,6	-	III,12	I,23	II,12	-
(I,3)	Freedom of religion	I,3	I,7	I,5	I,8	I,3	Art.36	I,2	I,4	I,16	III,18	I,5	II,5	I,4
(I,3)	Freedom of speech	I,7	I,11	I,8	I,7	I,4	Art.40	I,16	I,5	I,3	III,13	I,8	II,7	I,5
(I,3)	Freedom of press	I,7	I,11	8	I,7	I,4	Art.40	I,16	I,5	I,3	III,13	I,8	II,7	I,5
(I,3)	Right of peaceful assembly	I,20	I,3	1	I,9	I,15	-	I,19	I,3	-	III,11	I,9	II,6	I,19
(I,3)	Right of petition	I,20	I,3	1	I,9	I,15	Art.13	I,19	I,3	-	III,11	I,9	II,6	I,19
(I,4,6)	Due process of law	I,9	-	11	I,2	I,6	Art.23	I,12	I,17	I,7	III,14	I,10	II,17	I,3
(I,2, 4)	Equal protection	-	-	-	I,3	-	-	I,1,10	I,2	-	-	I,2	II,4	I,1
(I,4)	No denial of civil rights or discrimination because of race	-	-	-	I,3[5]	-	-	I,1	I,2	-	-	-	II,4[6]	-
	religion	-	-	-	I,3	-	-	I,1	I,2	-	-	-	II,4	-
	sex	-	-	-	I,3	-	Art.46	I,1	-	-	-	-	II,4	-
	ancestry	-	-	-	-	-	-	I,1	I,2	-	-	-	II,4	-

I. Art./ Sec.	HAWAII BILL OF RIGHTS *(Continued)*	IOWA	KANSAS	KENTUCKY	LOUISIANA	MAINE	MARYLAND	MASSACHUSETTS	MICHIGAN	MINNESOTA	MISSISSIPPI	MISSOURI	MONTANA	NEBRASKA
(I,7)	No discrimination in military organizations because of race	-	-	-	-	-	-	-	-	-	-	-	-	-
	religion	-	-	-	-	-	-	-	-	-	-	-	-	-
	ancestry	-	-	-	-	-	-	-	-	-	-	-	-	-
(I,12)	No disqualification from jury service because of sex	-	-	-	-	-	-	-	-	-	-	I, 22(b)	-	-
(I,21) (ERA)	Equality of rights regardless of sex	-	-	-	-	-	Art.46	I,1	-	-	-	-	II,4	-
(I,5)	No unreasonable searches, seizures, and invasions of privacy	I,8	I,15	10	I,5	I,5	Art.26	I,14	I,11	I,10	III,23	I,15	II,10, 11	I,7
(I,5)	Warrants: particularity of persons or things to be seized or communications to be intercepted	I,8	I,15	10	I,5	I,5	Art.26	I,14	I,11	I,10	III,23	I,15	II,11	I,7
(I,8)	Indictment by grand jury for capital offense or otherwise infamous crime	I,11	-	12,248	I,15	I,7	-	-	-	-	III,27	I,16	-	I,10
(I,8)	No double jeopardy	I,12	I,10	13	I,15	I,8	-	-	I,15	I,7	III,22	I,19	II,25	I,12
(I,8)	No self-incrimination	-	I,10	11	I,16	I,6	Art.22	I,12	I,17	I,7	III,26	I,19	II,25	I,12
(I,9)	No excessive bail	I,17	I,9	17	I,18	I,9	Art.25	I,26	I,16	I,5	III,29	I,21	II,22	I,9
(I,9)	Possibility of dispension of bail except where offense punishable by life imprisonment	-	-	-	-	-	-	-	-	-	-	-	-	-
(I,9)	No excessive fines	I,17	I,9	17	-	I,9	Art.25	I,26	I,16	I,5	III,28	I,21	II,22	I,9
(I,9)	No cruel or unusual punishment	I,17	I,9	17	I,20	I,9	Art. 16,25	I,26	I,16	I,5	III,28	I,21	II,22	I,9
(I,11)	Right to trial by jury in criminal cases:	I,9,10	I,10	11	I,16, 17	I,6	Art.21	I,12	I,14, 20	I,6	III,26	I,18(a) 22	II,24, 26	I,11
	Right to speedy trial	I,10	I,10	11	I,16	I,6	Art.21	-	I,20	I,6	III,26	I,18(a)	II,24	I,11
	Right to public trial	I,10	I,10	11	I,16	I,6	-	-	I,20	I,6	III,26	I,18(a)	II,24	I,11
	Right to impartial jury	I,10	I,10	11	I,16	I,6	Art.21	-	I,20	I,6	III,26	I,18(a)	II,24	I,11
	Right to confront witnesses	I,10	I,10	11	I,16	I,6	Art.21	I,12	I,20	I,6	III,26	I,18(a)	II,24	I,11
	Right to be informed of accusation	I,10	I,10	11	I,13	I,6	Art.21	I,12	I,20	I,6	III,26	I,18(a)	II,24	I,11
	Right to compulsory process for obtaining witnesses	I,10	I,10	11	I,16	I,6	Art.21	-	I,20	I,6	III,26	I,18(a)	II,24	I,11

I. Art./ Sec.	HAWAII BILL OF RIGHTS *(Continued)*	IOWA	KANSAS	KENTUCKY	LOUISIANA	MAINE	MARYLAND	MASSACHUSETTS	MICHIGAN	MINNESOTA	MISSISSIPPI	MISSOURI	MONTANA	NEBRASKA
	Right to counsel	I,10	I,10	11	I,13	I,6	Art.21	I,12	I,20	I,6	III,26	I,18(a)	II,24	I,11
	Court-appointed counsel when charged with offense punishable by more than 60 days imprisonment	–	–	–	I,13	–	–	–	–	–	–	–	–	–
(I,13)	Habeas corpus guaranteed	I,13	I,8	16	I,21	I,10	–	–	I,12	I,7	III,21	I,12	II,19	I,8
(I,13)	Suspension of habeas corpus by legislature	–	–	–	–	–	–	–	–	–	III,21	I,12	–	–
(I,10)	Right to trial by jury in civil cases	I,9	I,5	7	–	I,20	Art.5	I,15	I,14	I,4	III,31	I,22(a)	II,26	I,6
(I,17)	No imprisonment for debt	I,19	I,16	18	–	–	–	–	I,21	I,12	III,30	I,11	II,21	I,20
(I,18)	Eminent domain compensation for taking property	I,18	–	13	I,4	I,21	–	I,10	–	I,13	III,17	I,26	II,29	I,21
	damage to property	–	–	–	I,4	–	–	–	–	I,13	III,17	I,26	II,29	I,21

A. INDEX OF BILL OF RIGHTS PROVISIONS
(CONTINUED)

I. Art./ Sec.	HAWAII BILL OF RIGHTS	NEVADA	NEW HAMPSHIRE	NEW JERSEY	NEW MEXICO	NEW YORK	NORTH CAROLINA	NORTH DAKOTA	OHIO	OKLAHOMA	OREGON	PENNSYLVANIA	RHODE ISLAND	SOUTH CAROLINA
(I,1)	Right of Government based on authority of the people	I,2	I,1	I,2	II,2	-	I,2	I,2	I,2	II,1	I,1	I,2	I,1	I,1
(I,2)	People have inalienable rights	I,1	I,2	I,1	II,4	-	I,1	I,1	I,1	II,2	I,1	I,1	-	-
(I,2)	People have corresponding obligations and responsibilities	-	-	-	-	-	-	-	-	-	-	-	-	-
(I,19)	No irrevocable grant of special privileges or immunities	-	I,36	-	-	-	I,32, 34	I,20	I,2	II,32	I,20	I,17	-	-
(I,20)	Constitution not to impair rights retained by people	I,20	-	I,21	II,23	-	I,36	-	I,20	II,33	I,33	I,26	I,23	-
(I,14)	Civilian authority supreme	I,11	I,26	I,15	II,9	-	I,30	I,12	I,4	II,14	I,27	I,22	I,18	I,20
(I,16)	No quartering of soldiers	I,12	I,27	I,16	II,9	-	I,31	I,12	I,13	II,14	I,28	I,23	I,19	I,20
(I,15)	*Right to bear arms*													
	in common defense	-	-	-	-	-	I,30	-	I,4	II,26	I,27	I,21	I,22	I,20
	in self-defense	-	-	-	II,6	-	-	-	-	II,26	I,27	I,21	-	-
(I,3)	Freedom of religion	I,4	I,5	I,3	II,11	I,3	I,13	I,4	I,7	I,2	I,2	I,3	I,3	I,2
(I,3)	Freedom of speech	I,9	I,22	I,6	II,17	I,8	I,14	I,9	I,11	II,22	I,8	I,7	-	I,2
(I,3)	Freedom of press	I,9	I,22	I,6	II,17	I,8	I,14	-	I,11	II,22	I,8	I,7	I,20	I,2
(I,3)	Right of peaceful assembly	I,10	I,32	I,18	-	I,9	I,12	I,10	I,3	II,3	I,26	I,20	I,21	I,2
(I,3)	Right of petition	I,10	I,32	I,18	-	I,9	I,12	I,10	I,3	II,3	I,26	I,20	I,21	I,2
(I,4,6)	Due process of law	I,8	I,15	-	II,18	I,6	I,19	I,13	-	II,7	-	I,9	I,10	I,3
(I,2, 4)	Equal protection	-	I,2	-	II,18	I,11	I,19	-	-	-	-	-	-	I,3
(I,4)	No denial of civil rights or discrimination because of													
	race	-	I,2	I,5	-	I,11	I,19	-	-	-	-	-	-	-
	religion	-	I,2	I,5	-	I,11	I,19	-	-	-	-	-	-	-
	sex	-	I,2	-	II,18	-	-	-	-	-	-	I,28	-	-
	ancestry	-	I,2	I,5	-	I,11	I,19	-	-	-	-	-	-	-

I. Art./ Sec.	HAWAII BILL OF RIGHTS *(Continued)*	NEVADA	NEW HAMPSHIRE	NEW JERSEY	NEW MEXICO	NEW YORK	NORTH CAROLINA	NORTH DAKOTA	OHIO	OKLAHOMA	OREGON	PENNSYLVANIA	RHODE ISLAND	SOUTH CAROLINA
(I,7)	No discrimination in military organizations because of race	-	-	I,5	-	-	-	-	-	-	-	-	-	-
	religion	-	-	I,5	-	-	-	-	-	-	-	-	-	-
	ancestry	-	-	I,5	-	-	-	-	-	-	-	-	-	-
(I,12)	No disqualification from jury service because of sex	-	-	-	-	-	I,26	-	-	-	-	-	-	-
(I,21) (ERA)	Equality of rights regardless of sex	-	I,2	-	II,18	-	-	-	-	-	-	I,28	-	-
(I,5)	No unreasonable searches, seizures, and invasions of privacy	I,18	I,19	I,7	II,10	I,12	I,20	I,18	I,14	II,30	I,9	I,8	I,6	I,10
(I,5)	Warrants: particularity of persons or things to be seized or communications to be intercepted	I,18	I,19	I,7	II,10	I,12	I,20	I,18	I,14	II,30	I,9	I,8	I,6	I,10
(I,8)	Indictment by grand jury for capital offense or otherwise infamous crime	I,8	-	I,8	II,14	I,6	-	I,8	I,10	II,17	-	-	I,7	I,11
(I,8)	No double jeopardy	I,8	I,16	I,11	II,15	I,6	-	I,13	I,10	II,21	I,12	I,10	I,7	I,12
(I,8)	No self-incrimination	I,8	I,15	-	II,15	I,6	I,23	I,13	I,10	II,21	I,12	I,9	I,13	I,12
(I,9)	No excessive bail	I,6	I,33	I,12	II,13	I,5	I,27	I,6	I,9	II,9	I,16	I,13	I,8	I,15
(I,9)	Possibility of dispension of bail except where offense punishable by life imprisonment	-	-	-	-	-	-	-	-	-	-	-	-	-
(I,9)	No excessive fines	I,6	I,33	I,12	II,13	I,5	I,27	I,6	I,9	II,9	I,16	I,13	I,8	I,15
(I,9)	No cruel or unusual punishment	I,6	I,33	I,12	II,13	I,5	I,27	I,6	I,9	II,9	I,16	I,13	I,8	I,15
(I,11)	Right to trial by jury in criminal cases:	I,3	I,16	I,9,10	II,12, 14	I,2	I,24	I,7,13	I,5,10	II,19, 20	I,11	I,6,9	I,10	I,14
	Right to speedy trial	-	-	I,10	II,14	-	-	I,13	I,10	II,20	-	I,9	I,10	I,14
	Right to public trial	-	-	I,10	II,14	-	-	I,13	I,10	II,20	I,11	I,9	I,10	I,14
	Right to impartial jury	-	-	I,10	II,14	-	-	-	I,10	II,20	I,11	I,9	I,10	I,14
	Right to confront witnesses	-	I,15	I,10	II,14	I,6	I,23	-	I,10	II,20	I,11	I,9	I,10	I,14
	Right to be informed of accusation	-	I,15	I,10	II,14	I,6	I,23	-	I,10	II,20	I,11	I,9	I,10	I,14
	Right to compulsory process for obtaining witnesses	-	-	I,10	II,14	-	-	I,13	I,10	II,20	I,11	I,9	I,10	I,14

I. Art./ Sec.	HAWAII BILL OF RIGHTS *(Continued)*	NEVADA	NEW HAMPSHIRE	NEW JERSEY	NEW MEXICO	NEW YORK	NORTH CAROLINA	NORTH DAKOTA	OHIO	OKLAHOMA	OREGON	PENNSYLVANIA	RHODE ISLAND	SOUTH CAROLINA
	Right to counsel	I,8	I,15	I,10	II,14	I,6	I,23	I,13	I,10	II,20	I,11	I,9	I,10	I,14
	Court-appointed counsel when charged with offense punishable by more than 60 days imprisonment	"	"	"	"	"	"	"	"	"	"	"	"	"
(I,13)	Habeas corpus guaranteed	I,5	II,91	I,14	II,7	I,4	I,21	I,5	I,8	II,10	I,23	I,14	I,9	I,18
(I,13)	Suspension of habeas corpus by legislature	"	"	"	"	"	"	"	"	"	"	"	I,9	"
(I,10)	Right to trial by jury in civil cases	I,3	I,20	I,9	II,12	I,2	I,25	I,7	I,5	II,19	I,17	I,6	I,15	I,14
(I,17)	No imprisonment for debt	I,14	"	I,13	II,21	"	I,28	I,15	I,15	II,13	I,19	I,16	I,11	I,19
(I,18)	Eminent domain compensation for taking property	I,8	I,12	I,20	II,20	I,7	"	I,14	I,19	II,24	I,18	I,10	I,16	I,13
	damage to property	"	"	"	II,20	"	"	I,14	"	II,24	"	"	"	"

A. INDEX OF BILL OF RIGHTS PROVISIONS

(CONTINUED)

I Art./ Sec.	HAWAII BILL OF RIGHTS	SOUTH DAKOTA	TENNESSEE	TEXAS	UTAH	VERMONT	VIRGINIA	WASHINGTON	WEST VIRGINIA	WISCONSIN	WYOMING	TOTAL OF STATES PROVIDING PROVISION (Excluding Hawaii)
(I,1)	Right of Government based on authority of the people	VI,1, 26	I,1	I,2	I,2	I,6	I,2	I,1	III,2	I,1	I,1	48
(I,2)	People have inalienable rights	VI,1	-	I,3	I,1	I,1	I,1	-	III,1	I,1	-	37
(I,2)	People have corresponding obligations and responsibilities	-	-	-	-	-	I,15	-	-	-	-	5
(I,19)	No irrevocable grant of special privileges or immunities	VI,12 18	I,22	I,3,26	I,23	I,9	I,4	I,12,8	-	-	I,30	34
(I,20)	Constitution not to impair rights retained by people	-	-	-	I,25	-	I,17	I,30	-	-	I,36	33
(I,14)	Civilian authority supreme	VI,16	I,24	I,24	I,20	-	I,13	I,18	III,12	I,20	I,25	45
(I,16)	No quartering of soldiers	VI,16	I,27	I,25	I,20	-	-	I,31	III,12	-	I,25	42
(I,15)	Right to bear arms in common defense	VI,24	I,26	I,23	I,6	I,16	-	I,24	-	-	I,24	32
	in self-defense	VI,24	-	I,23	-	I,16	-	I,24	-	-	I,24	22
(I,3)	Freedom of religion	VI,3	I,3	I,6	I,1,4	I,3	I,16	I,11	III,15	I,18	I,18	49
(I,3)	Freedom of speech	VI,5	I,19	I,8	I,15	I,13	I,12	I,5	III,7	I,3	I,20	46
(I,3)	Freedom of press	-	I,19	I,8	I,15	I,13	I,12	-	III,7	I,3	I,20	42
(I,3)	Right of peaceful assembly	VI,4	I,23	I,27	I,1	I,20	I,12	I,4	III,16	I,4	I,21	46
(I,3)	Right of petition	VI,4	I,23	I,27	I,1	I,20	I,12	I,4	III,16	I,4	I,21	47
(I,4,6)	Due process of law	VI,2	I,8	I,19	I,7	I,10	I,11	I,3	III,10	I,8	I,6	44
(I,2, 4)	Equal protection	-	-	I,3	I,2 IV,1	-	I,1	-	-	-	I,3	22
(I,4)	No denial of civil rights or discrimination because of race	-	-	I,3a	-	-	I,11	-	-	-	I,3	17
	religion	-	-	I,3a	-	-	I,11	-	-	-	-	15
	sex	-	-	I,3a	IV,1	-	I,11	XXXI,1	-	-	I,3	15
	ancestry	-	-	I,3a	-	-	I,11	-	-	-	I,3	15

HAWAII BILL OF RIGHTS *(Continued)*	SOUTH DAKOTA	TENNESSEE	TEXAS	UTAH	VERMONT	VIRGINIA	WASHINGTON	WEST VIRGINIA	WISCONSIN	WYOMING	TOTAL OF STATES PROVIDING PROVISION (Excluding Hawaii)
No discrimination in military organizations because of race	-	-	-	-	-	-	-	-	-	-	1
religion	-	-	-	-	-	-	-	-	-	-	1
ancestry	-	-	-	-	-	-	-	-	-	-	1
No disqualification from jury service because of sex	-	-	-	-	-	-	-	III,21	-	-	3
Equality of rights regardless of sex	-	-	I,3a	IV,1	-	I,11	XXXI,1	-	-	I,3	15
No unreasonable searches, seizures, and invasions of privacy	VI,11	I,7	I,9	I,14	I,11	I,10	I,7	III,6	I,11	I,4	49
Warrants: particularity of persons or things to be seized or communications to be intercepted	VI,11	I,7	I,9	I,14	I,11	I,10	-	III,6	I,11	I,4	46
Indictment by grand jury for capital offense or otherwise infamous crime	-	-	I,10	-	-	-	-	III,4	-	I,13	26
No double jeopardy	VI,9	I,10	I,14	I,12	-	I,8	I,9	III,5	I,8	I,11	44
No self-incrimination	VI,9	I,9	I,10	I,12	I,10	I,8	I,9	III,5	I,8	I,11	47
No excessive bail	VI,23	I,16	I,13	I,9	II,40	I,9	I,14	III,5	I,6	I,14	48
Possibility of dispension of bail except where offense punishable by life imprisonment	-	-	-	-	-	-	-	-	-	-	1
No excessive fines	VI,23	I,16	I,13	I,9	-	I,9	I,14	III,5	I,6	I,14	46
No cruel or unusual punishment	VI,23	I,16	I,13	I,9	-	I,9	I,14	III,5	I,6	I,14	46
Right to trial by jury in criminal cases:	VI,6,7	I,9	I,10, 15	I,10, 12	I,10	I,8	I,22	III,14	I,7	I,9,10	49
Right to speedy trial	VI,7	I,9	I,10	I,12	I,10	I,8	I,22	-	I,7	I,10	41
Right to public trial	VI,7	I,9	I,10	I,12	I,10	I,8	I,22	-	I,7	-	41
Right to impartial jury	VI,7	I,9	I,10	I,12	I,10	I,8	I,22	-	I,7	I,10	40
Right to confront witnesses	VI,7	I,9	I,10	I,12	I,10	I,8	I,22	III,14	I,7	I,10	46
Right to be informed of accusation	VI,7	I,9	I,10	I,12	I,10	I,8	I,22	III,14	I,7	I,10	45
Right to compulsory process for obtaining witnesses	VI,7	I,9	I,10	I,12	-	-	I,22	III,14	I,7	I,10	42

I Art./ Sec.	HAWAII BILL OF RIGHTS *(Continued)*	SOUTH DAKOTA	TENNESSEE	TEXAS	UTAH	VERMONT	VIRGINIA	WASHINGTON	WEST VIRGINIA	WISCONSIN	WYOMING	TOTAL OF STATES PROVIDING PROVISION (Excluding Hawaii)
	Right to counsel	VI,7	I,9	I,10	I,12	I,10	-	I,22	III,14	I,7	I,10	48
	Court-appointed counsel when charged with offense punishable by more than 60 days imprisonment	-	-	-	-	-	-	-	-	-	-	1
(I,13)	Habeas corpus guaranteed	VI,8	I,15	I,12	I,5	II,41	I,9	I,13	III,4	I,8	I,17	47
(I,13)	Suspension of habeas corpus by legislature	-	I,15	-	-	-	-	-	-	-	-	6
(I,10)	Right to trial by jury in civil cases	VI,6	I,6	I,15	I,10	I,12	I,13	I,21	III,13	I,5	I,9	48
(I,17)	No imprisonment for debt	VI,15	I,18	I,18	I,16	-	-	I,17	-	I,16	I,5	38
(I,18)	Eminent domain compensation for taking property	VI,13	I,21	I,17	I,22	I,2	I,11	I,16	III,9	I,13	I,32	45
	damage to property	VI,13	-	I,17	I,22	-	I,11	I,16	III,9	-	I,32,33	23

This analysis should not be construed to include interpretive construction of constitutional provisions. Some interpretation is included where precise language is not identical but appears the same in meaning.

1. *Race includes color or previous condition.*
2. *Religion includes creed.*
3. *Ancestry includes national or ethnic origin, culture.*
4. *Prohibits discrimination against the handicapped.*
5. *Prohibits discrimination on the basis of age and political ideas or affiliations.*
6. *Prohibits discrimination on the basis of social origin or condition, political or religious ideas.*

B. INDEX OF BILL OF RIGHTS PROVISIONS NOT FOUND IN HAWAII

RIGHTS FOUND IN OTHER BILLS OF RIGHTS BUT NOT IN HAWAII'S	ALABAMA	ALASKA	ARIZONA	ARKANSAS	CALIFORNIA	COLORADO	CONNECTICUT	DELAWARE	FLORIDA	GEORGIA	IDAHO	ILLINOIS	INDIANA
All courts open	I,13	-	-	-	-	II,6	I,10	I,9	I,21	-	I,18	-	I,12
Right to legal remedy	I,13	-	-	I,13	-	II,6	I,10	I,9	I,21	IA,9	I,18	I,12	I,12
Right to bail	I,16	I,11	II,22	II,8	I,12	II,19	I,8	I,12	I,14	-	I,6	I,9	I,17
No bill of attainder	-	I,15	II,25	II,17	I,9	-	-	-	I,10	IA,7	I,16	-	-
No ex post facto law	I,22	I,15	II,25	II,17	I,9	II,11	-	-	I,10	IA,7	I,16	I,16	I,24
Deportation outlawed	I,30	-	-	II,21	-	-	-	-	-	-	-	I,11	-
Attainder of blood	I,19	I,15	II,16	II,17	-	II,9	-	I,15	-	-	-	I,11	I,30
Treason	I,18	I,10	II,28	II,14	I,18	II,9	I,13	-	I,20	IA,16	-	-	I,28
Rights of aliens	I,34	-	-	II,20	I,20	II,27	-	-	-	-	-	-	-
No religious test for office	I,3	-	II,12	II,26	-	-	-	I,2	-	IA,3	I,4	-	I,5
No hereditary privileges	I,29	-	II,29	II,19	-	-	I,18	I,19	-	-	-	-	I,35
Collective bargaining													
Public	-	-	-	-	-	-	-	-	-	-	-	-	-
Private	-	-	-	-	-	-	-	-	I,6	-	-	-	-

B. INDEX OF BILL OF RIGHTS PROVISIONS NOT FOUND IN HAWAII (CONTINUED)

RIGHTS FOUND IN OTHER BILLS OF RIGHTS BUT NOT IN HAWAII'S	IOWA	KANSAS	KENTUCKY	LOUISIANA	MAINE	MARYLAND	MASSACHUSETTS	MICHIGAN	MINNESOTA	MISSISSIPPI	MISSOURI	MONTANA	NEBRASKA
All courts open	-	-	14	I,22	-	-	-	-	-	III,24	I,14	II,16	I,13
Right to legal remedy	-	I,18	14	I,22	19	Art.19	I,11	I,13	I,8	III,24	I,14	II,16	I,13
Right to bail	I,12	I,9	16	I,18	-	-	-	I,15	I,7	III,29	I,20	II,21	I,9
No bill of attainder	I,21	-	-	I,23	I,11	Art.18	-	I,10	I,11	-	-	-	I,16
No ex post facto law	I,21	-	19	I,23	I,11	Art.17	I,24	I,10	I,11	III,16	I,13	II,31	I,16
Deportation outlawed	-	-	-	-	-	-	-	-	-	-	-	-	I,15
Attainder of blood	-	-	20	-	I,11	Art.27	-	-	I,11	-	I,30	II,30	I,15
Treason	I,16	I,13	229	-	I,12	-	I,25	I,22	I,9	III,10	I,30	II,30	I,14
Rights of aliens	I,22	I,17	-	-	-	-	-	-	-	-	-	-	I,25
No religious test for office	I,4	I,7	-	-	I,3	-	-	-	I,17	III,18	-	-	I,4
No hereditary privileges	-	I,19	23	-	I,23	Art.42	I,6	-	-	-	-	-	-
Collective bargaining													
Public	-	-	-	-	-	-	-	-	-	-	I,29	-	-
Private	-	-	-	-	-	-	-	-	-	-	I,29	-	-

B. INDEX OF BILL OF RIGHTS PROVISIONS NOT FOUND IN HAWAII
(CONTINUED)

RIGHTS FOUND IN OTHER BILLS OF RIGHTS BUT NOT IN HAWAII'S	NEVADA	NEW HAMPSHIRE	NEW JERSEY	NEW MEXICO	NEW YORK	NORTH CAROLINA	NORTH DAKOTA	OHIO	OKLAHOMA	OREGON	PENNSYLVANIA	RHODE ISLAND	SOUTH CAROLINA
All courts open	-	-	-	-	-	I,18	I,22	I,16	II,6	I,10	I,11	-	I,9
Right to legal remedy	-	I,14	-	-	-	I,18	I,22	I,16	II,6	I,10	I,11	I,5	I,9
Right to bail	I,7	-	I,11	II,13	-	-	I,6	I,9	II,8	I,14	I,14	I,9	I,15
No bill of attainder	I,15	-	-	II,19	-	-	I,16	-	II,15	-	I,18	-	I,4
No ex post facto law	I,15	I,23	-	II,19	-	I,16	I,16	-	II,15	I,21	I,17	I,12	I,4
Deportation outlawed	-	-	-	-	-	-	-	I,12	II,29	-	-	-	-
Attainder of blood	-	-	-	-	-	I,29	-	I,12	II,15	I,25	I,19	-	I,4
Treason	I,19	-	I,17	II,16	-	I,29	I,19	-	II,16	I,24	-	-	I,17
Rights of aliens	-	-	-	-	-	-	-	-	-	I,31	-	-	-
No religious test for office	-	-	I,4	-	-	-	-	I,7	-	I,4	-	I,3	-
No hereditary privileges	-	I,9	-	-	-	I,33	-	I,17	-	I,29	I,24	-	I,4
Collective bargaining													
Public	-	-	I,19	-	I,17	-	-	-	-	-	-	-	-
Private	-	-	I,19	-	I,17	-	-	-	-	-	-	-	-

B. INDEX OF BILL OF RIGHTS PROVISIONS NOT FOUND IN HAWAII
(CONTINUED)

RIGHTS FOUND IN OTHER BILLS OF RIGHTS BUT NOT IN HAWAII'S	SOUTH DAKOTA	TENNESSEE	TEXAS	UTAH	VERMONT	VIRGINIA	WASHINGTON	WEST VIRGINIA	WISCONSIN	WYOMING	TOTAL OF STATES PROVIDING PROVISION
All courts open	VI,20	I,17	I,13	I,11	-	-	I,10	III,17	-	I,8	27
Right to legal remedy	VI,20	I,17	I,13	I,11	I,4	-	-	III,17	I,9	-	38
Right to bail	VI,8	I,15	I,11	I,8	II,40	-	I,20	-	I,8	I,14	40
No bill of attainder	-	-	I,16	I,18	-	I,9	I,23	III,4	I,12	-	26
No ex post facto law	VI,12	I,11	I,16	I,18	-	I,9	I,23	III,4	I,12	I,35	42
Deportation outlawed	-	-	I,20	-	-	-	-	III,5	-	-	8
Attainder of blood	-	I,12	I,21	-	-	-	I,15	III,18	I,12	-	26
Treason	VI,25	-	I,22	I,19	-	-	I,27	II,6	I,10	I,26	36
Rights of aliens	VI,14	-	-	-	-	-	-	-	I,15	I,29	11
No religious test for office	-	I,4	-	I,4	-	-	I,11	III,15	I,19	I,18	23
No hereditary privileges	-	I,30	-	-	-	I,4	I,28	III,19	-	-	21
Collective bargaining											
Public	-	-	-	-	-	-	-	-	-	-	3
Private	-	-	-	-	-	-	-	-	-	-	4