***** FOR PUBLICATION *****

CONCURRING AND DISSENTING OPINION BY LEVINSON, J.

The majority appears to conclude that Pacific Meat Co. v. Otagaki, 47 Haw. 652, 655 n.4, 394 P.2d 618, 620 n.4 (1964), contemplates only two sets of circumstances in which a plaintiff has standing to test a criminal statute through a declaratory action: (1) where the statute "affects a continuing course of business" and (2) where the defendants in the declaratory action have "refused to bring criminal proceedings." See id., 47 Haw. at 654, 656, 394 P.2d at 620; majority opinion at 15-16. I respectfully disagree with the majority's implication that the freedom to risk prosecution in the future constitutes an adequate alternative to declaration. Cf. majority opinion at 15-16 & n.12. On the contrary, I believe that the threat of prosecution, in the absence of an actual case pending against the same plaintiff, may justify a declaratory judgment action.

By holding that the mere possibility of prosecution should deafen the circuit court to the appellants' prayer for declaratory relief, the majority leaves the appellants no opportunity to test the applicability of the statutes to their particular circumstances other than by incurring the risk, cost, and embarrassment of prosecution, thereby putting the appellants in such a position that "the only way to determine whether the suspect is a mushroom or a toadstool [would be] to eat it," Edwin M. Borchard, The Constitutionality of Declaratory Judgments, 31 Colum. L. Rev. 561, 589 (1931).[1] This "remedy" is not merely

---

[1] Moreover, the regime imposed by the majority "may work a de facto censorship" by allowing the unchallenged statutes to deter possibly legal activity. See Zeitlin v. Arnebergh, 383 P.2d 152, 155 (Cal. 1963).

"inconvenient and costly" as the majority concedes, majority opinion at 16; it is no remedy at all.

In Steffel v. Thompson, 415 U.S. 452 (1974), the plaintiff had stood on the grounds of a shopping center and distributed handbills protesting the Vietnam War. Id. at 455. Though the plaintiff had been neither arrested nor charged for trespassing (the behavior proscribed by the challenged statute) the police had warned him to stop handbilling. Id. at 454 n.1, 455. Confronting the question whether the trial court should have entertained the plaintiff's declaratory action, the United States Supreme Court observed that "[a] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity," and concluded that "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." Id. at 459, 462. See also Faulkner v. Keene, 155 A. 195 (N.H. 1931) (where plaintiffs wanted to erect filling station and sought declaration that this would not violate statute, noting that "[i]t is true that [the plaintiffs] might translate their claims into actions, and await prosecutions. . . . But that is precisely the dilemma from which [the declaratory judgment act] was designed to afford relief."); Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 201 (N.Y. 1986) ("'[The] general principle of ripeness law now is

that a statute, regulation or policy statement is ripe for challenge when an affected person has to choose between disadvantageous compliance and risking sanctions.'" (quoting 4 Kenneth Culp Davis, Administrative Law Treatise § 25:1 (2d ed. 1978)); Sikora Realty Corp. v. Gillroy, 132 N.Y.S.2d 240, 243 (N.Y. Sup. Ct. 1954) (citation omitted) (noting that "[t]he plaintiff can assert the inapplicability of the . . . requirements . . . as a defense to any criminal prosecution" and holding that "[i]f that is a remedy at all, it is at best negative in character and ought not to be considered a sufficient reason for denying the plaintiff the right to declaratory relief").

The Alaska Supreme Court, in Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937 (Alaska 2004), held that a "risk of prosecution" bestows standing upon a plaintiff. Id. at 942. Following State v. Planned Parenthood, 35 P.3d 30, 34 (Alaska 2001), the Alaska Supreme Court held that the risk of enforcement alone sufficed for standing, since the challenged law 'would require both doctors to change their current practices and would expose them to civil and criminal liability if they failed to comply.'" 102 P.3d at 942.

In the present matter, the appellants have not themselves endured prosecution under HRS § 711-1109(1) and/or MCC § 9.08.010. Nonetheless, "Kahaikupuna stated that . . . he faces the 'real, immediate and adverse threat of criminal prosecution,'" majority opinion at 5. Consequently, the appellants' interests in the challenged statutes lie somewhere

between facing actual litigation -- with its opportunities for case-specific statutory and constitutional interpretation -- and mere curiosity. See Dombrowski v. Pfister, 380 U.S. 479, 489 (1965); Klein v. Leis, 767 N.E.2d 286, 291 (Ohio Ct. App. 2002) ("Since the plaintiffs . . . established that they or their members carry concealed weapons, . . . [and] that they are subject to arrest for doing so, they had standing to seek a declaratory judgment."); Eastern Books v. Bagnoni, 446 F. Supp. 643, 645 (W.D. Pa. 1978) (though "nothing ha[d] been threatened and no other prosecution or other action ha[d] yet been taken," holding that "in view of . . . past harassment by the [c]ity . . . , the seeds of a ripening controversy are pending[,] and . . . this would be a proper case for declaratory . . . relief if a cause of action is otherwise made out"); cf. Younger v. Harris, 401 U.S. 37, 41-42 (1971) (where none of the plaintiffs "ha[d] been indicted, arrested, or even threatened by the prosecutor," declining "to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution"); Gay & Lesbian Advocates & Defenders v. Attorney Gen., 763 N.E.2d 38, 41 (Mass. 2002) (holding that actual controversy requirement not met where, "prior to exhibition, distribution, or any threat of prosecution, the plaintiff sought a declaration that a film was not obscene and that it would not be subject to prosecution if it exhibited or distributed it"). Whereas the majority would apply the same rule to this middle ground as applies to parties defending ongoing criminal prosecutions, I would decline to force these plaintiffs to risk punishment to determine the statutes'

applicability to themselves.

Inasmuch as I would hold that the circuit court properly concluded that the appellants' suit for declaratory judgment was justiciable, I would affirm the circuit court's conclusion "that as a matter of law . . . the [appellants] had standing," see majority opinion at 5-6.

Nonetheless, I believe that the circuit court properly entered judgment in favor of the appellees on the merits. See id. at 6-7 n.9. Although I would reach the same substantive outcome as the majority, the appellants' action warrants greater assurance of the validity of the statutes.