Essay

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Aloha Jurisprudence: Equity Rules in Property

William Blackstone's refrain that "[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion" is echoed seemingly everywhere these days.[1] Property scholarship is increasingly emphasizing the right of exclusion.[2] Takings jurisprudence, one of the great barometers of respect for private property, has expanded, even if it has not been as respectful of property as some would like.[3] Some schol-

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1 WILLIAM BLACKSTONE, 2 COMMENTARIES *2; *see also* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 30-36 (1996); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 545-59 (2005) (suggesting an elevation of the right to redress to a status afforded to such rights as property).

2 *See, e.g.*, David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39 (2000); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

3 Perhaps the leading example of takings jurisprudence diminishing property rights is *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), now provides for a natural rights interpretation of property independent of (and greater than) investment-backed expectations. As Justice Kennedy said in denying a claim that the purchasers took the property with limitations already in place, "Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 627.

ars, including the influential University of Chicago professor Richard Epstein,[4] are calling for a return to an era that is more protective of private property, such as the one that existed before the New Deal.[5] Epstein builds on several decades of scholarship that has examined the early twentieth-century respect for property rights.[6] Running alongside these developments is increased respect by the federal government's executive branch for cost-benefit analysis, which further protects against regulation.[7]

Yet in one place, rather remote from the agitation over property rights in Washington, D.C., there is another refrain. It declares respect for the rights of the community to use private property, careful consideration of the rights of people who have been ousted from property, and the weighing of equities to determine the appropriate balance between property rights, the rights of neighbors, and the rights of the community more generally. In Hawaii, the legislature has gone so far as to instruct courts to apply the "aloha spirit." Hawaii's Revised Statutes instruct:

> In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit."[8]

The rhetorical backlash against broad eminent domain powers appears in Alberto Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-*Kelo, 41 WAKE FOREST L. REV. 237 (2006). *See generally* David L. Callies, *Regulatory Takings and the Supreme Court: How Prospectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999).

4 *See* James W. Ely, Jr., *Impact of Richard A. Epstein*, 15 WM. & MARY BILL RTS. J. (forthcoming Dec. 2006), *available at* http://ssrn.com/abstract=825045.

5 *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

6 *See, e.g.*, BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT (2001); David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797 (1998).

7 *See, e.g.*, Lisa Heinzerling, *Risking It All*, 57 ALA. L. REV. 103 (2005) (critiquing the shift to cost-benefit analysis in regulatory and judicial settings). The recent history of cost-benefit analysis in the regulatory setting begins with *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), and Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). This Order reads a requirement of cost-benefit analysis into the regulation of a potential carcinogen.

8 HAW. REV. STAT. § 5-7.5(b) (1993).

Hawaii's Revised Statutes further state that aloha is "mutual regard and affection and extends warmth in caring with no obligation in return. 'Aloha' is the essence of relationships in which each person is important to every other person for collective existence."[9] They add that aloha spirit was "the working philosophy of native Hawaiians" which "was presented as a gift to the people of Hawaii."[10] Hawaiian courts are following those instructions and developing what one might call an "aloha property jurisprudence."

This Essay explores some of the contours of that jurisprudence. Part I briefly sketches the conflict over property and community rights in American history to help establish the historical legitimacy of aloha jurisprudence. Part II then turns to Hawaii in the years following western contact to set some of the stage for a consideration of the role of property rights in Hawaiian society. The Essay moves to contemporary law in Part III with a study of Native Hawaiian rights to access property and a few statutory and constitutional provisions that run alongside Hawaiian case law. It also discusses cases involving adverse possession against cotenants and others involving enforcement of covenants by injunctions or money damages. The adverse possession and covenant cases reveal that the aloha spirit may have implications outside of a narrowly confined set of Native Hawaiian rights cases. Part IV concludes with a discussion of legislative restrictions on property rights that illuminates the popular conception of the community's interest in property rights. This Essay, thus, shows a few ways that the aloha spirit has appeared in Hawaiian jurisprudence and suggests a few ways that it might continue to grow in the future, much as law and literature,[11] feminist,[12] and critical race scholarship suggest the alternative worlds that might be.[13]

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[9] *Id.* § 5-7.5(a).

[10] *Id.*

[11] *See, e.g.*, Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN'S L.J. 179, 180 (1998) (discussing how "Austen and Brontë were able to create heroines who transcended the coverture-wife model").

[12] *See, e.g.*, Felice Batlan, *Law and the Fabric of Everyday: The Settlement Houses, Sociological Jurisprudence, and the Gendering of Urban Legal Culture*, 15 S. CAL. INTERDISC. L.J. 235 (2006).

[13] *See, e.g.*, David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627 (2006) (proposing methods, such as

I

A Sketch of Alternative Visions of Property

We have heard echoes of an alternative property jurisprudence at various times and places in American history. John Adams's 1765 essay, *A Dissertation on the Canon and Feudal Law*, discussed ways in which the legacy of feudalism and the resulting hierarchy has corrupted English property law.[14] Adams's *Dissertation* was largely concerned with the public, as opposed to private, law of feudalism. During the American Revolution, Thomas Paine's *Common Sense* indicted political power based on feudalism. Before going on to attack the idea of heredity succession, Paine wrote the following about William the Conqueror: "A French bastard landing with an armed banditti, and establishing himself King of England against the consent of the natives, is, in plain terms a very paltry, rascally original. It certainly hath no divinity in it."[15] Those rights of heredity succession had most direct importance in considering who would rule; however, Paine later wrote about what he thought should be the limited rights of heredity in *Rights of Man*, his defense of the French Revolution:

> Every generation is, and must be competent to all the purposes which its occasions require. It is the *living*, and not the *dead*, that are to be accommodated. When man ceases to BE, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its government shall be organised, or how administered.[16]

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changes in statutory construction, to introduce the idea of humanity from human rights norms into United States immigration law).

[14] JOHN ADAMS, *A Dissertation on the Canon and Feudal Law*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 21 (C. Bradley Thompson ed., 2000).

[15] THOMAS PAINE, COMMON SENSE 9-10 (London, H.D. Symonds, Paternoster-Row 1793) (1776).

[16] THOMAS PAINE, RIGHTS OF MAN 5 (London-Derry, Soc'y of Gentlemen 1791). Paine later wrote about the ways that hereditary rights might limit the rights of future generations:

> *A* cannot make a will to take from *B* the property of *B*, and give it to *C*; yet this is the manner in which what is called hereditary succession by law operates. A certain generation makes a will, under the form of a law, to take away the rights of the commencing generation, and of all future generations, and convey those rights to a third person, who afterwards comes forward, and assumes the government in consequence of that illicit conveyance.

THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT 11 (London, Daniel Isaac Eaton pub. 1795).

Throughout the early nineteenth century, Americans questioned the appropriate limits of vested rights. As we moved away from property-rights qualifications for voting, courts periodically limited the rights of property. In the 1820s, the courts confronted (and frequently invalidated) legislative attempts to extend bankruptcy protection and thus interfere with creditors' expectations.[17] Similarly, the Taney Court's limitation of a company's rights to prevent competition in *Charles River Bridge v. Warren Bridge*[18] led to fears that courts were unduly limiting property rights. In his opinion for the Court, Chief Justice Taney warned against too much respect for private property: "While the rights of private property are sacredly guarded, we must not forget, that the community also have [sic] rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[19] The decision led Chancellor Kent to write in the *New York Review* about his fear that the Supreme Court was no longer protecting property rights. His review of the case began with an examination of the august place of the United States Supreme Court:

> It is looked up to as the last asylum of persecuted justice. . . . If civil liberty should, in the progress of human events, find no other resting place where her rights and her blessings could be secure, it was fondly hoped, by those eminent patriots and statesmen who framed, adopted, defended, and for many years cherished the Constitution of the United States, that they had at length provided a tribunal where all citizens, and all local communities, might find redress, and none be permitted to oppress . . . .[20]

[17] Theodore W. Ruger, *"A Question Which Convulses the Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 827, 844-55 (2004) (detailing the Kentucky legislature's debate over the interference with expectations through bankruptcy legislation). *See also* William W. Fisher III, *Making Sense of Madison: Nedelsky on Private Property*, 18 L. & SOC. INQ. 547, 554-57 (1993) (reviewing JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990)); James L. Huston, *The American Revolutionaries, the Political Economy of Aristocracy, and the American Concept of the Distribution of Wealth, 1765–1900*, 98 AM. HIST. REV. 1079 (1993). Daniel Hulsebosch provides a context for the competing visions of takings in the early United States. *See* Daniel J. Hulsebosch, *The Anti-Federalist Tradition in Nineteenth-Century Takings Jurisprudence*, 1 N.Y.U. J.L. & LIBERTY 967 (2005).

[18] 36 U.S. 420 (1837).

[19] *Id.* at 548.

[20] James Kent, *Supreme Court of the United States*, 2 N.Y. REV. 372, 372 (1838). *See also* Alfred Laurence Brophy, The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise Through Civil War (June

The Taney Court was not living up to Kent's vision: "The change is so great and so ominous, that a gathering gloom is cast over the future. We seem to have sunk suddenly below the horizon, to have lost the light of the sun . . . ."[21] He found "most alarming and most heretical . . . the new-fangled doctrine, that the contracts of the State are to be construed strictly as against the grantee."[22]

At other times, courts even applied limitations on well-established property rights in private law cases. In *Dyett v. Pendleton*, for example, the New York Court of Errors relieved a modest, middle-class family of a lease in a building where the landlord operated a house of "ill repute."[23] The court concluded it "was no longer respectable for moral and decent persons to dwell or enter therein"[24] so there was a moral basis for excusing performance of a clear contract.[25] Another example of judicial employment of such considerations of morality comes from the early twentieth century, when the doctrine of unconscionability was expanded by courts interpreting grossly unfair contracts entered into by illiterate African-Americans.[26]

In the same era as *Dyett*, the *United States Magazine and Democratic Review* asked about the basis for assertions of property rights. In an essay entitled *What Is the Reason?*, it asked why some people have property and others have none.[27] In the New York anti-rent movement, which convulsed upstate New York from 1839 through the Civil War, some courts addressed the question of whether long-term tenants could be held to covenants signed long ago.[28] In fact, the entire anti-rent movement

2001) (unpublished Ph.D. dissertation, Harvard University) (on file with author) (describing conflicting attitudes of Whigs and Democrats towards property).

[21] Kent, *supra* note 20, at 385.

[22] *Id.* at 389.

[23] 8 Cow. 727, 735 (N.Y. 1826).

[24] *Id.* at 736.

[25] For further discussion of the case, see Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1198 (1999) (reviewing PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997)).

[26] *See, e.g.*, Hall v. Russell, 178 P. 679 (Okla. 1919); First Nat'l Bank of Watonga v. Wade, 111 P. 205 (Okla. 1913). Rachel D. Godsil has a somewhat different interpretation of early twentieth-century judicial protections of African-Americans. *See* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006).

[27] *What Is the Reason?*, 16 U.S. MAG. & DEMOCRATIC REV. 17, 23 (1845).

[28] *See* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865 (2001).

tapped into controversies over long-term vested rights against claims of community rights. One proposed solution was legislation that would allow long-term leaseholders to purchase their way out of those obligations. In the movement's final stages after 1850, court decisions left the movement with little room for maneuvering: there could be no eminent domain and no alteration of landlords' ability to obtain distraint. Some tenants began to settle, and landlords sold off their estates.[29]

In response to the confrontation, a series of court decisions limited the rights of landlords. The 1850 decision in *Overbagh v. Patrie* invalidated the quarter-sale right, which permitted a landlord to obtain a quarter of the sale price when tenants sold their interest in land.[30] The key to Judge Amasa Parker's decision for a three-judge panel of the New York Supreme Court in *Overbagh* was his discussion of public policy regarding enforcement of the quarter-rent provisions. He concluded that feudalism was "utterly unsuited, every vestige of it, to the institutions under which we live, and to the personal independence and equality of political rights enjoyed by our citizens."[31] Parker saw the incidents of feudalism as inconsistent with the political ideas of the time:

> The progress of man in intelligence, in knowledge, in the arts of peace and in political advancement, now calls for tenures in accordance with perfect political equality, and entire personal freedom; and if there be vestiges of feudal tenure still remaining here, they should be eradicated as speedily as is consistent with a strict regard to the rights of property of those concerned.[32]

He also saw the quarter-rent provisions as excessive, an interference with land alienability, and a discouragement to land development: "After twelve alienations [the landlord] will have received twice the improved value of the farm, in addition to the price paid on the original purchase. Yet their claim will be in no respect lessened—the demand will be insatiable—its existence

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[29] For those interested in the conflict over vested rights, James Fenimore Cooper's trilogy on the anti-rent movement provides a defense of the rights of property owners. *See* J. FENIMORE COOPER, SATANSTOE (Boston, Houghton, Mifflin & Co. 1845); J. FENIMORE COOPER, THE CHAINBEARER (Boston, Houghton, Mifflin & Co. 1845); and J. FENIMORE COOPER, THE REDSKINS (Boston, Houghton, Mifflin & Co. 1846).

[30] 8 Barb. 28, 43-46 (N.Y. Gen. Term 1850).

[31] *Id.* at 43.

[32] *Id.*

interminable."[33] The legal basis running parallel to Judge Parker's public policy discussion was his equation of the quarter-rents with "fines on alienation"—feudal incidents that required payment to a lord upon alienation of property.[34] A 1787 Act of the New York legislature had abolished such tenures.[35] Judge Parker reasoned that in the case of the quarter-rents, there was no reversion and hence the grantors had no estate upon which they might condition the payment of the quarter-rent.[36]

The New York Court of Appeals' 1852 decision in *De Peyster v. Michael*[37] confirmed the holding of the lower court's decision in *Overbagh*. *De Peyster* interpreted a grant from 1785, before the New York legislature prohibited feudal tenures.[38] Hence, Chief Justice Charles H. Ruggles had to apply the statute retroactively to find that there could be no reversion from leases in fee. Ruggles concluded, with somewhat ambiguous rationale, that

> after a careful examination of the grounds on which these restraints on alienations in fee were originally sustained in England; of the change in the law there by statute nearly 600 years ago; of the mode in which that change was wrought; and finding that the same change has taken place here by our own statutes, we cannot entertain a doubt that the condition to pay sale money on leases in fee, is repugnant to the estate granted, and therefore void in law.[39]

Thus, if landlords had no reversion, they could not restrain alienation, which was necessary to effectively enforce the quarter-rents.

During the Civil War, there were alternative views of property in operation when some radical republicans advocated broad confiscation and redistribution of Confederate property. Among the examples one might cite are the Second Confiscation Act, the Doolittle Act, and the Emancipation Proclamation itself. And while loyal slaveholders in the District of Columbia received minor compensation for slaves who were freed, the Thirteenth Amendment subsequently barred compensation to slaveholders. For, as Senator Charles Sumner said:

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33 *Id.* at 44.
34 *Id.* at 45.
35 *Id.* at 42.
36 *Id.* at 34.
37 6 N.Y. 467 (1852).
38 *Id.* at 489.
39 *Id.* at 505.

> [I]f money is to be paid as compensation, clearly it cannot go to the master, who for generations has robbed the slave of his toil and all its fruits, so that, in justice, he may be regarded now as the trustee of accumulated earnings with interest which he has never paid over. Any money paid as compensation must belong every dollar of it to the slave.[40]

The emancipation of slavery represented a huge abolition of property rights. There was consideration of further uncompensated takings, but the hold of private property and the politics of reconciliation were too strong to allow that.

While we heard much talk of expansive property rights during the Gilded Age and the Progressive Era, there were important strands of thought advocating limits to property rights. For example, Progressive Era jurists upheld zoning,[41] while politicians embraced the estate tax. President Franklin Delano Roosevelt's 1935 letter to Congress in which he proposed expansion of the estate tax sounds distant to twenty-first century ears, which are so used to the protection of wealth and a desire to reduce taxes:

> The transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideals and sentiments of the American people.
>
> The desire to provide security for one's self and one's family is natural and wholesome, but it is adequately served by a reasonable inheritance. Great accumulations of wealth cannot be justified on the basis of personal and family security. In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others.
>
> Such inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government.[42]

The 1960s war on poverty led to dramatically increased concern for tenants and those with even less property, such as welfare recipients.[43] However, the foundational principle always was—

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[40] CONG. GLOBE, 38th Cong., 1st Sess. 1481 (1864). *See also* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 108-09 (2001) (discussing the debate).

[41] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[42] H.R. REP. NO. 1681-74, at 2 (1935).

[43] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (finding an implied warranty of habitability); Hillview Assocs. v. Bloomquist, 440 N.W.2d 867 (Iowa 1989) (finding a retaliatory eviction); Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984) (finding an implied warranty of habitability).

and almost certainly always will be—protection of private property. Those rights are growing stronger as evidenced by the repeal of the estate tax and the extension of copyright protection, to take only two examples. But at the margins, courts and legislators still debate the appropriate boundaries of vested property rights.

II

Hawaiian Property Rights in Historical Perspective

Hawaii's legal history primarily grapples with one central event: the adoption of a land regime based on western conceptions of individual ownership during the Great Mahele of 1848. The Great Mahele marked the transition from native patterns of ownership, where all land was held by the king, to common law ownership. During the Mahele, people testified about their land in order to make out a case for being assigned rights to it. During this process they recounted who lived there, when and how they used the property, and how they thought about their relationships to other occupiers of the land.[44]

Because of the Mahele's importance to subsequent rights in land, interpretations of the event have varied rather dramatically. Some early interpretations saw it as part of a process of "civilization." This is illustrated perhaps most clearly in the writings of missionaries like Hiram Bingham, whose 1855 book, *A Residence of Twenty-One Years in the Sandwich Islands*, charts changes in property regimes from native practices to western-based property rights. Bingham begins the discussion of his 1820 arrival in Hawaii with this provocative statement about his views of the natives and his goals there:

> Their manœuvres in their canoes, some being propelled by short paddles, and some by small sails, attracted the attention of our little group, and for a moment, gratified curiosity; but the appearance of destitution, degradation, and barbarism, among the chattering, and almost naked savages, whose heads and feet, and much of their sunburnt swarthy skins, were bare, was appalling. Some of our number, with gushing tears,

[44] The records of the Great Mahele are a gold mine for historians and anthropologists. Patrick V. Kirch and Marshall Sahlins rely upon the records to reconstruct a community on the north side of Oahu in their 1992 book, *Anahulu: The Anthropology of History in the Kingdom of Hawaii*. *See* 1 Patrick V. Kirch & Marshall Sahlins, Anahulu: The Anthropology of History in the Kingdom of Hawaii (1992).

> turned away from the spectacle. Others with firmer nerve continued their gaze, but were ready to exclaim, "Can these be human beings! How dark and comfortless their state of mind and heart! How imminent the danger to the immortal soul, shrouded in this deep pagan gloom! Can such beings be civilized? Can they be Christianized?"[45]

Thus, Bingham focused on the goal of converting the natives to Christianity and creating civilization.

The role of property and the rule of law played an important part in Bingham's story. In his short recitation of the history of the islands, one can hear echoes of the period's celebration of property rights. Bingham portrayed Hawaiian land ownership as a feudal system and suggested that such patterns of ownership (and a lack of the rule of law, more generally) left the people without an incentive to develop economically:

> Claiming the right of soil throughout his realm, and the right to make and abrogate regulations at pleasure, and using the privilege of a conqueror who could not endure to have others enjoy their just rights, Kamehameha wielded a despotism as absolute probably as the islands ever knew. Retaining a part of the lands as his individual property, which he intended should be inherited by his children, he distributed the remaining lands among his chiefs and favorites, who, for their use, were to render public service in war or peace, and in raising a revenue. These let out large portions of their divisions to their favorites or dependants, who were in like manner to render their service, and bring the rent; and these employed cultivators on shares, who lived on the products which they divided, or shared with their landlord, rendering service when required, so long as they chose to occupy the land. Thus, from the poor man who could rent 1/8 or 1/4 of an acre, up to the sovereign, each was, in some sense, dependent on the will of a superior, and yet, almost all had one or more under them whom they could control or command.
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> This, in a conquered, ignorant and heathen country, without the principles of equity, was a low and revolting state of society; where the mass could have no voice in enacting laws, or levying taxes, or appropriating the revenue, or in establishing a limited rent for the use of lands, fisheries or fish-ponds. To conceive of all as supremely selfish, and each superior as desirous to aggrandize himself at the expense of others, would do them no injustice.
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> With the limited knowledge and skill they possessed, it would hardly be expected that cheerful and productive industry would thrive, even in such a clime and soil, unless the prin-

[45] Hiram Bingham, A Residence of Twenty-One Years in the Sandwich Islands 81 (3d ed., Canadaigua, N.Y., H.D. Goodwin 1855).

> ciples of benevolence or a high public spirit could be engrafted in the hearts of the people, or that the population could multiply while the means of subsistence were scanty, clothing and lodging miserable, possessions utterly insecure, and all inheritance hopeless or uncertain.[46]

Bingham thought the process of civilization entailed the development of Christian beliefs, middle-class modesty, and the market economy.[47] However, many people were limited in their property rights; and that, along with a lack of capital, impeded the process of conversion:

> But how difficult and long must be the process of learning to make use, or keep in order and enjoy the variety of useful articles which the arts of civilized life supply, had the chiefs and people possessed money or exportable products in abundance, to purchase the materials at pleasure! But not one in a thousand had the money or the exportable products at command, and while it seemed to us a difficult thing for the chiefs to pay for half a dozen brigs and schooners, for which they had contracted, and to build and furnish houses for themselves, it seemed equally difficult for the common people to supply themselves, who had not the means to purchase the soil they cultivated, if they had been allowed to buy it, nor the capital to put a plough, a pair of oxen, and a cart upon a farm, if farms were given them in fee simple; nor the skill and enterprise to use them advantageously, if every hand-spade-digger of kalo and potatoe ground had been gratuitously furnished with land, teams, and implements of husbandry, like the yeomanry of New England.[48]

But Bingham saw some evidence of civilization in the decline of surfing, a decline he attributed to time natives spent harvesting sandalwood. Indeed, Bingham provided one of the earliest descriptions of surfing:

> [The royal parties] resorted to the favorite amusement of all classes—sporting on the surf, in which they distinguish themselves from most other nations. In this exercise, they generally avail themselves of the surf-board, an instrument manufactured by themselves for the purpose. It is made of buoyant wood, thin at the edges and ends, but of considerable thickness in the middle, smooth, and ingeniously adapted to the purpose of sustaining a moderate weight and gliding rapidly on the surface of the water. It is of various dimensions, from three feet in length, and six or eight inches in breadth, to fourteen feet in length, and twenty inches in breadth. In the use of

[46] *Id.* at 49-50.
[47] *Id.* at 169.
[48] *Id.* at 170.

> it, the islander, placing himself longitudinally upon the board as it rests upon the surface of the water, and using his naked arms and hands as a pair of oars, rows off from the sand-beach a quarter, or half a mile into the ocean. Meeting the succession of surges as they are rolling towards the shore, he glides with ease over such as are smooth, plunges under or through such as are high and combing, allowing them to roll over him and his board, and coming out unhurt on the other side, he presses on till his distance is sufficient for a race, or till he has passed beyond the breaking or combing surf. After a little rest, turning around and choosing one of the highest surges for his *locomotive*, he adjusts himself and board, continuing longitudinally upon it, directing his head towards the shore, and just before the highest part of the wave reaches him, he gives two or three propelling strokes with his spread hands. The board, having its hindmost end now considerably elevated, glides down the moving declivity, and darts forward like a weaver's shuttle. He rides with railroad speed on the forefront of the surge, the whitening surf foaming and roaring just behind his head, and is borne in triumph to the beach. Often in this rough riding, which is sometimes attended with danger, several run the race together.[49]

And yet, after describing that fun practice, Bingham observes how surfing declined from the early 1820s, when he arrived, through the early 1850s. He did not believe this decline was caused by specific prohibitions adopted by the missionaries against it. Rather, he attributes it to changing habits of dress, behavior, religion, and the rise of the market for sandalwood on the islands, which led people to work rather than surf:

> The decline or discontinuance of the use of the surf-board, as civilization advances, may be accounted for by the increase of modesty, industry or religion, without supposing, as some have affected to believe, that missionaries caused oppressive enactments against it. These considerations are in part applicable to many other amusements. Indeed, the purchase of foreign vessels, at this time, required attention to the collecting and delivering of 450,000 lbs. of sandal-wood, which those who were waiting for it might naturally suppose would, for a time, supersede their amusements.[50]

Another missionary who arrived in the 1820s, Rufus Anderson, concluded that property rights were central to the process of civilization:

> The government could not remain unchanged, and the people become free and civilized. The people must own property,

[49] *Id.* at 136.
[50] *Id.* at 137.

> have acknowledged rights, and be governed by written, well-known, established laws. This was far from their condition before the year 1838. The government was then a despotism. The will of the king was law, his power absolute; and this was true of the chiefs, also, in their separate spheres, so far as the common people were concerned. All right of property, in the last resort, was with the king. How were the people to attain the true Christian position? Obviously the rulers had duties to learn and to perform, equally with the people; and the missionaries were the Christian teachers of both classes, with God's Word for their guide.[51]

In the minds of the missionaries and many other Americans, Christianity, property rights, and the common law were closely connected. Each grew in conjunction with the other. Accordingly, the missionaries set as their goal the propagation of "Christian civilization." By that they meant the alteration of moral character, which in turn meant establishing property rights. Missionaries, then, were both advocates of the conversion to western property holdings and among the leading commentators on Hawaii's transformation of property rights.

Missionaries' admiration of the market economy also continued into more recent scholarship. Legal scholars and historians from Bingham's time until the late twentieth century frequently praised the development of property rights in Hawaii. For example, Ralph S. Kuykendall's 1938 book, *The Hawaiian Kingdom 1778–1854: Foundation and Transformation* presents a history of the Great Mahele that locates it in a line of progress toward a modern market economy.[52] The most positive (though not very positive) recent scholarly interpretation of the Great Mahele comes in Stuart Banner's article, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*.[53] Banner sees the Great Mahele as a process of accommodation between natives and colonizers in which the natives "prepare[d] to be colonized" by adopting western patterns of landholding.[54]

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[51] RUFUS ANDERSON, THE HAWAIIAN ISLANDS: THEIR PROGRESS AND CONDITION UNDER MISSIONARY LABORS 232 (3d ed., Boston, Gould & Lincoln 1865).

[52] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778–1854: FOUNDATION AND TRANSFORMATION (1938).

[53] *See* Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW & SOC'Y REV. 273 (2005).

[54] *Id.* at 309. Similarly, Sally Engle Merry depicts the increasing power of westerners in the Hawaiian legal system in the years around the Mahele. SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW (2000); *see also* JOCELYN LINNEKIN, SACRED QUEENS AND WOMEN OF CONSEQUENCE: RANK, GENDER, AND COLONIALISM IN THE HAWAIIAN ISLANDS (1990).

In more recent years, there has been an interpretive turn away from praising the process of colonization and the development of property rights that came along with it. Lilikalā Kame'eleihiwa's *Native Land and Foreign Desires* sees the adoption of western land holdings as a process of colonization. In Kame'eleihiwa's eyes, it was the combination of Christianity, the protection of property, and capitalism that led to the undoing of Hawaiian culture.[55] Other scholars identify similar patterns.[56] Robert H. Stauffer's *Kahana: How the Land Was Lost*,[57] recounting forfeiture of native lands in the late nineteenth century, and Noenoe K. Silva's *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism*,[58] which details natives' protests against colonization in the 1890s, are both important representatives of the dominant interpretation: colonization led to loss of land and other rights.

As further evidence of the process of colonization, one might look to the immediate post-Mahele actions of the Hawaiian courts. In the 1858 case *Oni v. Meek*, the Hawaii Supreme Court rejected a claim seeking pasturing rights based on pre-Mahele tradition.[59] Together, these scholarly interpretations suggest that native rights were extinguished effectively, if not unjustly, in the nineteenth century. In the wake of *Oni*, it is hard to see what native rights might have survived.

III

Judicial Recognition of Native Hawaiian Rights

Recent cases tell a story of increasing respect for Native Hawaiian rights. Building on the 1978 state constitution, which protects the rights of Native Hawaiians,[60] the cases hearken back to

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55 Lilikalā Kame'eleihiwa, Native Land and Foreign Desires 174-78 (1992).

56 Mari Matsuda found, for instance, the growth of a western legal system in her detailed study, *Law and Culture in the District Court of Honolulu, 1844–1845: A Case Study of the Rise of Legal Consciousness*, 32 Am. J. Legal Hist. 16 (1988).

57 Robert H. Stauffer, Kahana: How the Land Was Lost (2004).

58 Noenoe K. Silva, Aloha Betrayed: Native Hawaiian Resistance to American Colonialism (2004).

59 2 Haw. 87, 95 (1858).

60 *See* Haw. Const. art. 12, § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.")

the era before the Mahele and find native rights of access across private property to reach beaches and harvest native foods. They also suggest that those rights continued, even if not always judicially recognized, in the post-Mahele years.

These cases may in some ways have confirmed Justice Oliver Wendell Holmes's 1904 decision about Hawaiian fishing rights in *Damon v. Hawaii*.[61] *Damon* addressed the right to restrict the taking of fish within a coral reef at Moanalua, Oahu.[62] The plaintiff sought protection for his exclusive fishing right based on an 1846 Act, which provided that fishing rights within a coral reef were the exclusive property of a landlord (and his tenants) who owned land adjoining the reef.[63] The plaintiff had purchased adjacent land from the owner sometime after 1846. The Organic Act of the Territory of Hawaii, however, repealed all licenses for fishing while leaving vested property rights intact.[64] Therefore the question became: was Damon's right akin to a license or property? Holmes acknowledged that the fishing rights were strange; indeed, such a right was unknown at common law.[65] However, Holmes found that the right

> seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.[66]

The Court concluded that the fishing right was, indeed, a vested right and was not abrogated by the Organic Act.[67]

Damon may derive from the Supreme Court's concern for property rights at the time. However, it was also about the protection of Native Hawaiian rights and, as Hawaiian courts recognized about the same time, the fact that there are local rights that survived the missionaries' law. For instance, in holding that a

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[61] 194 U.S. 154 (1904).
[62] *Id.* at 157.
[63] *Id.* at 158-59.
[64] *Id.* at 157.
[65] *Id.* at 158.
[66] *Id.*
[67] *Id.* at 159-60.

deed written in Hawaiian did not need to have the words "heirs"[68] to create a fee simple, the Supreme Court of the Territory of Hawaii stated:

> The New Englanders who early settled here did not come as a colony or take possession of these islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted until 1893 and then subject to judicial precedents and Hawaiian national usage. Prior to that time the courts were at first without statutory suggestion as to what law they should follow in the absence of statutes, and later were expressly permitted by statute to appeal to "natural law and reason, or to received usage, and . . . the laws and usages of other countries" and "to adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, so far as . . . founded in justice, and not in conflict with the laws and customs" of this country. The courts usually followed the common law when applicable. But they felt free to reject it, and did as a rule when, as in the present case, it was based on conditions that no longer exist, and when it had come to be generally recognized as merely technical and subversive of justice or the intentions of the parties to instruments and when it had in consequence been generally altered or abrogated by statute elsewhere.[69]

The recent case law on Native Hawaiian rights has several key features. At its center is the right to cross private property, especially for beach access. Second, these cases try to insure that no more property is lost through adverse possession or partition. The cases, beginning with *Palama v. Sheehan* in 1968,[70] and running through *Kalipi v. Hawaiian Trust Co.* in 1982,[71] *Pele Defense Fund v. Paty* in 1992,[72] and *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* in 1995,[73] are working toward an understanding of the background rights of crossing land for fishing, visiting the beach, and gathering food.

It is difficult to tell exactly where these cases are going and what their limits will be. Talk of community rights—or what is

[68] That is, the court refused to apply the archaic rule that unless a grantor used phrases like "and his heirs," the grantee took only a life estate. Branca v. Makuakane, 13 Haw. 499, 500 (1901).

[69] *Id.* at 504-05 (citation omitted) (omissions in original).

[70] 440 P.2d 95 (Haw. 1968).

[71] 656 P.2d 745 (Haw. 1982).

[72] 837 P.2d 1247 (Haw. 1992).

[73] 903 P.2d 1246 (Haw. 1995).

increasingly known as individuals' rights in the web of the community[74]—can, of course, quickly become a euphemism for abusing the rights of the politically or economically weak. But there are some possibilities hiding in the shadows.

A. Native Hawaiian Rights: Access and Harvesting Rights

Our modern story begins with the 1968 case *Palama v. Sheehan*, which involved a controversy over the Palamas' right to cross a neighbor's property in order to reach their small tracts of land.[75] The Palamas had crossed their neighbor's land for decades, ever since the land they owned had apparently been divided from the land they crossed. Perhaps, as the court stated, the question could have been handled through finding an easement implied by necessity.[76] But the court spent most of its time talking about the Native Hawaiian right to cross land in order to access taro patches and the ocean.[77] The court took evidence of the Palamas' use of the property for such purposes and concluded there "was sufficient evidence on which the trial court could find that an ancient Hawaiian right of way through plaintiffs' land existed and was used as such by [the Palamas'] predecessors in title."[78]

Upon reading this case with my class at the University of Hawaii School of Law in spring 2006, I asked why the court did not just rest on the easement by necessity rather than get involved in the complex issue of a Native Hawaiian right. Elizabeth Wilcox, who is from the island where the case arose, suggested that the court had a particular desire to contribute to the resurrection of Native Hawaiian rights. I think she is right. And as aloha jurisprudence began to gather strength, it was recognized under the name of judicial legislation and criticized as such.[79]

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[74] *See* Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 331-63 (2002); *see also* Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314-25 (2006) (identifying popular tropes of property ownership and the rights and obligations that go along with them).

[75] 440 P.2d at 96.

[76] *Id.* at 98.

[77] *Id.* at 97-98.

[78] *Id.* at 98.

[79] *See, e.g.*, J. Russell Cades, *Judicial Legislation in the Supreme Court of Hawaii: A Brief Introduction to the "Knowne Uncertaintie" of the Law*, 7 HAW. B.J. 58, 65 (1970).

But the process of common law evolution was rather slow. Fourteen years later in *Kalipi v. Hawaiian Trust Co.*, the Hawaii Supreme Court faced a claim for access to property by William Kalipi to go onto another's land on the island of Molokai to gather indigenous crops.[80] Kalipi based the claim on Hawaii Revised Statute section 7-1, which recognizes the rights of "tenants" to access lands to take certain agricultural products for their own use:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and water-courses, which individuals have made for their own use.[81]

The court interpreted the rights of people who lived in an ahupuaa, a traditional division of property.[82] These are pie-shaped divisions of land that run from the coast to the mountains. Residents of each ahupuaa have the ability to access the water as well as farmland within their ahupuaa.[83] In dictum, the court stated that those who lived within an ahupuaa had the right to gather within that ahupuaa.[84] But because Kalipi did not live in the ahupuaa where he sought to gather, the court concluded that he did not have a right to gather there.[85]

A decade later, in *Pele Defense Fund v. Paty*, the court dealt with a case of a group who—like Kalipi—did not live in the ahupuaa they sought to access.[86] In *Pele*, the claim was based on Hawaii Revised Statute section 1-1, which provides for the preservation of customary Hawaiian rights:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by

[80] 656 P.2d 745, 747 (Haw. 1982).
[81] HAW. REV. STAT. § 7-1 (1993).
[82] *Kalipi*, 656 P.2d at 747.
[83] *Id.* at 748-49 (citing *In re* Boundaries of Pulehunui, 4 Haw. 239, 241 (1879)).
[84] *Id.* at 749.
[85] *Id.*
[86] 837 P.2d 1247, 1271 (Haw. 1992).

> the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . .[87]

Thus, in *Pele* the issue of right of access was divorced from residency on a particular ahupuaa. The court held that there were rights to access private property for "traditionally exercised subsistence, cultural and religious practices" as long as the land had not already been developed.[88] *Pele* thus presented an advance from *Kalipi* by providing for a right of access, though its contours are seemingly limited and certainly ambiguous.

The best-known case involving native rights is *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission.* Popularly known as *PASH*,[89] this case opens up some possibilities for public rights to use private property. *PASH* arose in a strange posture: a challenge to a construction permit for a hotel along the shore on the island of Hawaii.[90] The permit was challenged with the allegation that the building authority failed to take adequate account of Native Hawaiian rights, such as the right to access the shore.[91] That naturally led the court to an in-depth discussion of just what those rights are and how much they should be protected. As a preliminary matter, the court permitted third parties to challenge the issuance of the permit. From there, it found that it was improper to permit building without doing more to preserve rights of access to the shore.[92] The court, in essence, recognized an extensive right of access.[93] In *PASH*,

87 HAW. REV. STAT. § 1-1 (1993).

88 *Pele*, 837 P.2d at 1273.

89 903 P.2d 1246 (Haw. 1995).

90 *Id.* at 1250.

91 *Id.* at 1251.

92 *Id.* at 1273.

93 *PASH* offers an alternative way of conceptualizing and protecting the right of beach access, which has received a modest amount of court protection in New Jersey and Oregon. Other states that have protected beach access have done so on the basis of public trust rationale. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364-66 (N.J. 1984); Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (Or. 1993). In Florida, one case from the early 1970s, which perhaps relied on aberrational senses left over from the 1960s about community rights to property, also upheld the right of access based on a prescriptive easement. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 81 (Fla. 1974); *see also* Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970), *superceded by statute as stated in* Friends of the Trail v. Blasius, 93 Cal. Rptr. 2d 193, 202 (Ct. App. 2000) (finding an implied dedication of plaintiff's beach property to public use). For further commentary, see Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869 (2000). I shall leave analysis of what one might call "hippie jurisprudence" to another day, though one might begin to mark out its contours (and limited utility to those who

the Hawai'i County Planning Commission granted permission to build a hotel along the beach; the "exaction" the Hawaii Supreme Court considered was permission for the public to cross the hotel's property.[94]

PASH's possibilities remain underdeveloped. More than a decade after the case was decided, it has been cited little and relied upon even less. Moreover, subsequent development in the United States Supreme Court calls significant pieces of *PASH* into question. The relationship between *PASH* and exactions analysis is still somewhat unclear. There may be a preexisting right of access that is part of the background principles of property law, which will allow restrictions on the right to exclude. However, conditioning a right of building on the right of access looks more like an exaction. *PASH* did little more than cite two exactions cases, *Nollan v. California Coastal Commission*[95] and *Dolan v. City of Tigard*,[96] before concluding that access to the beach was protected by the Hawaii Constitution.[97] Requiring access in exchange for a building permit may pass scrutiny under *Nollan*, which stated that there must be a nexus between a land use grant and an exaction that is required in return for the

respect the rule of law) with Abbie Hoffman's *Steal This Book*. ABBIE HOFFMAN, STEAL THIS BOOK (1971), *available at* http://www.tenant.net/Community/steal/steal.html.

Along those lines, one might also look to *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. Ct. 2002), which affirmed a preliminary injunction against sale of the trust's controlling share of the Hershey Company. The injunction was premised in part on the "symbiotic relationship among the School, the community, and the Company." *Id.* at 332. The Hershey Company was essential to the town, and its sale would have been devastating to the community. *See* Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. PITT. L. REV. 1 (2003). The case represents an instance of what Joseph William Singer identified as "the reliance interest in property." Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614, 622-23 (1987). In the context of charitable trusts, we might refer to the concept as "the implied trust beneficiary" or maybe "Quaker jurisprudence." *Cf.* Alfred L. Brophy, *"Ingenium est Fateri per quos profeceris": Francis Daniel Pastorius'* Young Country Clerk's Collection *and Anglo-American Legal Literature, 1682–1716*, 3 U. CHI. L. SCH. ROUNDTABLE 637 (1996) (discussing jurisprudence of early Pennsylvania and its connections to Quaker religious thought).

[94] 903 P.2d at 1250, 1273. The court concluded that "[i]n the instant case, the HPC must consider PASH's alleged customary rights on remand. . . . [I]f such rights are established, the HPC will be obligated to protect them to the extent possible. This may involve the placement of conditions on Nansay's permit to develop its land." *Id.* at 1273.

[95] 483 U.S. 825 (1987).

[96] 512 U.S. 374 (1994).

[97] 903 P.2d at 1257-58, 1273.

grant.[98]

There may be a right of access under Native Hawaiian rights that existed since 1848. But it is harder to see how that right, which went for decades without being recognized, might now be rediscovered. It is especially troubling because a large amount of property has been purchased with the understanding that those rights did not exist. Thus, under recent takings analysis, it is hard to see how those rights survive.[99]

One might, of course, argue that aloha principles are background principles of property law, which define the rights of exclusion. However, that argument is increasingly difficult to sustain. Justice Kennedy seems to largely reject it in *Palazzolo v. Rhode Island* when he wrote in response to the argument that people who purchase property with land use restrictions should not be entitled to challenge those restrictions. There are echoes of Jefferson's statement that each generation must be able to free itself from the contracts of previous generations[100] in Kennedy's respinning, which provides that each generation of landowners must be able to relook at land use restrictions. Kennedy said:

> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The

98 483 U.S. at 837.

99 *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (noting that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land").

100 In Thomas Jefferson's phrasing, it was the right of each generation to free itself of past bargains:

> The generations of men may be considered as bodies or corporations. Each generation has the usufruct of the earth during the period of its continuance. When it ceases to exist, the usufruct passes on to the succeeding generation, free and unincumbered, and so on, successively, from one generation to another forever. We may consider each generation as a distinct nation, with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country. Or the case may be likened to the ordinary one of a tenant for life, who may hypothecate the land for his debts, during the continuance of his usufruct; but at his death, the reversioner (who is also for life only) receives it exonerated from all burthen.

Letter from Thomas Jefferson to John W. Eppes (June 24, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 269, 270 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

In Justice Kennedy's hands, the idea that we are not bound by past decisions becomes the right of individuals to challenge land use restrictions, though they have failed in the past.

> Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[101]

PASH has received substantial attention and criticism on several bases. Professor Richard Epstein said of the decision in a *Honolulu Advertiser* opinion piece:

> The inchoate value of the traditional gathering rights makes planning difficult. The underlying landowner would find it virtually impossible to repurchase these rights from its diffuse class of beneficiaries. PASH's admonition that regulatory authorities give these inchoate rights "appropriate regulations" introduces massive levels of uncertainty that negatively impacts the development of Hawaiian lands, a high price to pay in troubled economic times.
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> . . . .
>
> . . . [T]he traditional western virtues of definiteness, consistency and clarity are not birds of passage for some particular culture, but guiding principles for the ages.[102]

There has been relatively little development since 1995; however, several cases suggest continued court concern with public rights, even as the legislature is seeking to limit rights recognized under *PASH*.[103] One issue left open by *PASH* was the nature of rights of access on developed property. The Hawaii Supreme Court has begun to clarify this area through the case of *State v.*

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[101] *Palazzolo*, 533 U.S. at 627 (citation omitted). This lends even further weight to the argument in David L. Callies and J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339 (2002). *See also* David Callies et al., *Three Case Studies from Hawaii, Norway and Greenland*, *in* THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT 43, 43-88 (Peter Ørebech et al. eds., 2005).

[102] Richard A. Epstein, Op-Ed., *Who Owns Property Rights?* PASH *Decision Reflects Worldwide Disputes*, HONOLULU ADVERTISER, June 22, 1997, at B3.

[103] *See* D. Kapua Sproat, Comment, *The Backlash Against* PASH*: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998).

Hanapi, which involved a trespass prosecution against Alapai Hanapi, who claimed a right of access to his neighbor's property.[104] Hanapi, a Native Hawaiian man, trespassed on the property of his neighbor, Gary Galiher, to inspect repairs the neighbor had done to the shoreline.[105] When Hanapi refused to leave, he was arrested.[106] The Hawaii Supreme Court required three elements to establish a Native Hawaiian easement to access land: (1) the claim must be by a Native Hawaiian; (2) access must be for a recognized customary or traditional right; and (3) the land had to be undeveloped (or at least not fully developed).[107] In its analysis, the court concluded that Hanapi failed to demonstrate that he was exercising a traditional right.[108]

In the 2004 case *In re Wai'ola O Moloka'i, Inc.*, the Hawaii Supreme Court applied the public trust doctrine to preserve the "community's" fresh water rights.[109] The public trust doctrine, which in many ways is better developed in Oregon than Hawaii,[110] holds the potential for a fairly flexible intellectual grounding for the assertion of community rights. Although the modern origins of the public trust concept arose in the context of a generous land sale from the people of Chicago to a railroad—and thus might have reasonably been limited to the principle that certain core public rights, like the right to eminent domain, may not be alienated[111]—it has since grown to encompass public

[104] 970 P.2d 485, 486-87 (Haw. 1998).

[105] *Id.*

[106] *Id.* at 487.

[107] *Id.* at 494-95.

[108] The Supreme Court concluded that there was no evidence that "'stewardship' or 'restoration and healing of lands'" were traditional Hawaiian practices. *Id.* at 495. This is an important limitation.

[109] 83 P.3d 664, 693-94 (Haw. 2004). Similarly, in *Ka Pa'akai O Ka'Aina v. Land Use Commission*, 7 P.3d 1068, 1071 (Haw. 2000), the Hawaii Supreme Court dealt with a claim that the state land use commission failed to adequately protect Native Hawaiian use rights when it reclassified one thousand acres on the Island of Hawaii from "conservation district" to "urban district." *Id.* at 1071. It affirmed a lower court decision that the commission had made inadequate findings about the preservation of Native rights and, therefore, ordered further hearings. *Id.* at 1090. This is consistent with judicial scrutiny of government and private action that may deprive natives of traditional rights.

[110] *Compare* State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969), *with* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10003, 10017-19 (2000), Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 220-22 (2006) (classifying Native Hawaiian rights cases as custom cases), *and* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).

[111] Joseph D. Kearney and Thomas W. Merrill emphasize the limited origins of

claims to beach access.[112] In Hawaii, the most significant invocation of the public trust was in the 2000 case *In re Water Use Permit Applications*.[113] In that case, the Hawaii Supreme Court broadly construed the public trust doctrine to reserve the state's right to groundwater. The court noted that

> the king's reservation of his sovereign prerogatives respecting water *constituted much more than restatement of police powers, rather we find that it retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce* and which necessarily limited the creation of certain private interests in waters.[114]

It concluded that groundwater, like surface waters, is governed

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the public trust doctrine in *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004). The idea of inalienable public rights had some important adherents in the antebellum era. *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 531-32 (1848) (finding right of eminent domain inherent in contracts). Justice Daniel's rare majority opinion presents a particularly positivist view of property rights and the inalienable powers that are related to them:

> Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain.

Id. at 532-33.

[112] *See* Casey Jarman, *The Public Trust Doctrine in the Exclusive Economic Zone*, 65 OR. L. REV. 1 (1986).

[113] 9 P.3d 409 (Haw. 2000), *aff'd in part & vacated in part*, 93 P.3d 643 (Haw. 2004).

[114] *Id.* at 441.

by public trust rather than title to the surrounding land.[115]

Also, recently the Hawaii Supreme Court addressed the line where public beaches end and private property begins.[116] The court rejected a claim that landowners could plant vegetation below the natural line of vegetation and thus claim additional property.[117] This holding reaffirms the principle announced in the 1973 case *County of Hawaii v. Sotomura* that "[p]ublic policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[118]

B. Respect for Native Hawaiian Property: Limitations on Adverse Possession

Beyond the well-known cases that explicitly protect certain traditional rights to access property and harvest traditional crops, there are other cases on the periphery of aloha jurisprudence. Those cases cautiously protect the rights of Native Hawaiians by ensuring due process before they are deprived of their property rights by adverse possession. Two cases warrant particular attention here. The first is the Hawaii Intermediate Court of Appeals' opinion in *Makila Land Co. v. Kapu*, which took testimony on the Hawaiian language as part of its investigation of the property rights of a claimant's predecessors.[119] The second is *Pioneer Mill Co. v. Dow*, which established a high standard for adverse possession by cotenants and thus protected Native Hawaiians' property rights in co-owned property.[120]

Makila Land Company, which at the time of publication is on remand, dealt with a claim to land owned by a man named Apaa, who died in the late nineteenth century.[121] In 1872, Momano, who claimed to be Apaa's son, wrote a lease conveying the land to the West Maui Sugar Company. At issue was how to translate the word *makuakane*, which appeared in the lease: did it mean

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115 *Id.* at 447; *see also* Joseph L. Sax, *Environment and Its Mortal Enemy: The Rise and Decline of the Property Rights Movement*, 28 U. HAW. L. REV. 7 (2005). This expansion of public rights contradicted earlier explicit precedent such as *City Mill Co. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

116 Diamond v. State, 145 P.3d 704 (Haw. 2006).

117 *Id.* at 719.

118 *Id.* at 716 (quoting County of Hawaii v. Sotomura, 517 P.2d 57, 61-62 (Haw. 1973)).

119 No. 25875, 2006 WL 1118890, at *10-11 (Haw. Ct. App. Apr. 28, 2006).

120 978 P.2d 727 (Haw. 1999).

121 2006 WL 1118890, at *2.

"father" or "other male relative"?[122] If it was the former, then Momano was the sole intestate heir, and he had title to the land that he conveyed in 1893 to the sugar company, which was the predecessor to the Makila Land Company (MLC). The claimants, Apaa's heirs and descendants, presented advanced genealogical charts, which suggested that Momano was not Apaa's son but rather was at best a cotenant, not the sole owner of the property.[123]

The court overturned a summary judgment in favor of MLC and, thus, revived the case.[124] Nevertheless, the claimants have a long way to go. The court did not rule on whether the claim was barred by adverse possession. However, one likely defense against a claim of adverse possession by MLC will be that it is very hard to adversely possess against a cotenant. That argument would rely on *Pioneer Mill Co. v. Dow*.

Pioneer Mill Co. v. Dow, decided by the Hawaii Supreme Court in 1999, provides some hope for those who claim they inherited land even though the people they claim through have not occupied the land for decades.[125] *Pioneer Mill* involved a claim by the heirs of Kahoomaeha Phillips that they owned property occupied by Pioneer Mill.[126] The heirs claimed that at the time of Kahoomaeha's death in 1864, she was a cotenant with a fifty percent share of the estate that she inherited from her deceased husband, Thomas Phillips.[127] The other cotenant was John White, the brother of Thomas's first wife. In 1867, however, a probate court ruled that Kahoomaeha was the sole owner of the property.[128] But Kahoomaeha's heirs—her daughter and grandson had life estates and P. Nahaolelua held the remainder—seemed to have never occupied the property. Further, by 1878 John White leased the property before selling it in 1880.[129] Through a series of intermediate conveyances, it came into the hands of the Pioneer Mill in 1924.[130] Pioneer Mill defended against Kahoomaeha's heirs' claim to the property by countering

[122] *Id.* at *4-5.
[123] *Id.* at *5-7.
[124] *Id.* at *16.
[125] 978 P.2d at 738-39.
[126] *Id.* at 730.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*

that it had been in its exclusive possession since the 1920s and that none of the heirs had been on the property since the middle of the nineteenth century.[131] One might usually think that such long-term use was sufficient to establish a claim of adverse possession to the property. In fact, on the basis of adverse possession, the trial court did grant Pioneer Mill's motion for summary judgment, which argued that it had "openly, notoriously, continuously and exclusively used the land."[132]

Although the intermediate court of appeals accepted Pioneer Mill's argument, the Hawaii Supreme Court reversed because Pioneer Mill did not meet its high burden of showing by clear and positive proof that it adversely possessed the property.[133] Adverse possession against a cotenant is notoriously difficult to establish. Because each cotenant is entitled to occupy the property, courts typically say that there is ouster only when one cotenant seeks to be on the property and is excluded.[134] The court reached back to nineteenth-century precedent and more recent cases to hold that if the initial occupation is permissive, then there is a presumption of continued permissive occupation "until such time as the adverse claimant shows, by words or acts sufficient to give notice to the contrary to an ordinarily prudent and vigilant owner, that he, she, or it, the adverse claimant, had changed its character and was thereafter occupying adversely."[135]

The court held that because the original co-ownership was between family members, the alleged adverse possession by White and his successors, including Pioneer Mill, did not initially meet the requirement of hostile possession.[136] Pioneer Mill could still rebut that presumption, but it needed to show evidence other than long-term occupation to do so. Essentially, the court required some additional act or words by the adverse possessor (in this case Pioneer Mill) to make the possession hostile rather than

[131] *Id.* at 736.

[132] *Id.* at 730-31.

[133] *Id.* at 735-36.

[134] *See, e.g.*, *Ex parte* Walker, 739 So. 2d 3, 7 (Ala. 1999) (requiring evidence of actual ouster and actual notice of the ouster); City & County of Honolulu v. Bennett, 552 P.2d 1380, 1390 (Haw. 1976) (imposing "actual notice" standard on cotenant who sought to adversely possess land from a fellow cotenant).

[135] *Pioneer Mill*, 978 P.2d at 738. In this discussion, the court cited *Smith v. Hamakua Mill Co.*, 15 Haw. 648, 657 (1904); *Dowsett v. Maukeala*, 10 Haw. 166, 168 (1895); *Tindle v. Linville*, 512 P.2d 176, 178 (Okla. 1973); and *Johnson v. Szumowicz*, 179 P.2d 1012, 1017 (Wyo. 1947).

[136] *Pioneer Mill*, 978 P.2d at 731-32.

permissive.[137] This ruling looks like aloha spirit in action.[138]

Pioneer Mill builds on other adverse possession cases that impose a high standard for notice to cotenants. For example, the Hawaii Intermediate Court of Appeals in *Hustace v. Kapuni* required an adverse possessor to offer evidence of his or her diligence in attempting to notify absent cotenants.[139] The court suggested that it might require a claimant to visit the state archives to look for genealogical information on the identities of absent cotenants before it would allow notice by mere publication.[140] That position was reaffirmed in 1999 by the Hawaii Intermediate Court of Appeals in *Petran v. Allencastre*.[141]

Courts and litigants are thus increasingly scrutinizing transactions of long ago. The Hawaiian courts are revisiting what caused land loss, just as historians like Stuart Banner, Lilikalā Kame'eleihiwa, and Robert Stauffer are revisiting the process as well.[142] Aloha jurisprudence has a lot of possibilities, though as of yet it is underdeveloped.

C. Legislative Redistribution of Property

The aloha spirit is not confined to the courts. The Hawaii legislature's desire to provide land for a wider segment of the population was what led the Hawaii Housing Authority to enact the

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137 *Id.* at 737-38.

138 A number of jurisdictions, of course, protect rights of cotenants from adverse possession by cotenants. *See, e.g.*, *Ex parte Walker*, 739 So. 2d at 3; Helen Bishop Jenkins, *A Study of the Intersection of DNA Technology, Exhumation and Heirship Determination as It Relates to Modern-Day Descendants of Slaves in America*, 50 ALA. L. REV. 39 (1998).

139 718 P.2d 1109, 1116 (Haw. Ct. App. 1986).

140 *Id.* at 1115.

141 985 P.2d 1112, 1123 (Haw. Ct. App. 1999) (looking back to a record of an 1860 conveyance to thirteen cotenants to find a material question of fact as to whether a party claiming title by adverse possession has reason to "suspect the existence of a co-tenancy"). *Petran* was filed pro se.

The United States Supreme Court's five-four decision in *Jones v. Flowers* in the spring of 2006 raised again the problems of notice by publication. 126 S. Ct. 1708 (2006). In *Flowers*, the Court found notice by publication insufficient before the tax sale of property; however, the close vote as well as a strong dissent by Justice Clarence Thomas reminds us that many are willing to allow only minimal notice. *See id.* at 1723-27. Justice Thomas concluded, for instance, that "the methods of notice . . . were reasonably calculated to inform petitioner of proceedings affecting his property interest and thus satisfy the requirements of the Due Process Clause." *Id.* at 1722. Justice Thomas's calculation looked at the likely effect, rather than the end result, of the notification process.

142 *See* KAME'ELEIHIWA, *supra* note 55; STAUFFER, *supra* note 57; Banner, *supra* note 53.

Land Reform Act of 1967, which permitted tenants to petition to purchase the property they leased. Justice O'Connor's opinion in *Hawaii Housing Authority v. Midkiff* emphasizes the antifeudal, equalitarian nature of the Act. She adopts an understanding of history that in the years before outside contact, the natives had a feudal property system:

> The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific. These settlers developed an economy around a feudal land tenure system in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land.[143]

There was extraordinary concentration in landholding. For instance, on the most populous island, Oahu (where Honolulu is located), twenty-two owners "owned 72.5% of the fee simple titles."[144] The opposition to feudalism was an important (or at least rhetorical) basis for Justice O'Connor's support for the Act:

> The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.[145]

The legislature's action is subject to the criticism that it was providing additional rights to non-Native Hawaiians at the expense of trusts that own land and rent it out for the benefit of Native Hawaiians: that it was, in essence, effecting yet another transfer from the Native Hawaiians to others.[146] The Act ex-

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143 Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

144 *Id.*

145 *Id.* at 241-42. In a footnote, O'Connor continued: "After the American Revolution, the colonists in several States took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies. Courts have never doubted that such statutes served a public purpose." *Id.* at 241-42 n.5 (citations omitted).

146 *See* SAMUEL KING & RANDALL ROTH, BROKEN TRUST: GREED, MISMANAGEMENT AND POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST

presses the legislature's desire to provide additional rights to members of the community, though perhaps not the community members most in need. There are other protections for Native Hawaiian rights, such as the Department of Hawaii Home Lands—an agency which provides homestead rights to Native Hawaiians.[147]

One can also draw some inferences about the contours of aloha jurisprudence from the articles and comments that appear

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(2006). Paul Carrington asks critical questions about what he sees as the Bishop Trust's drift from the purposes established by Princess Pauahi's 1883 will. *See* Paul D. Carrington, *Testamentary Incorrectness: A Review Essay*, 54 BUFF. L. REV. 693, 712-15 (2006) (reviewing KING & ROTH, *supra*). Carrington highlights the integrationist impulses behind Princess Pauahi's will. *Id.* at 699 ("[Princess Pauahi] aimed . . . to facilitate integration of Hawaiians and other impoverished children into a peaceful, polychromatic, Protestant, industrious society."). He asks, in particular, questions about the Hawaii courts' treatment of trust law:

> Were the court and the trustees sufficiently faithful to Pauahi's will? . . . Perhaps the circumstances have changed sufficiently since 1884 to justify an application of the doctrine of cy pres allowing the trustees to depart from the testator's integrationist aims. Or might the equitable doctrine of deviation be appropriately applied to liberate benign trustees from the dead hand of a testatrix who did not foresee the conditions of the twenty-first century? Or should the Rule Against Perpetuities have some application to terminate the influence of the dead hand? Perhaps one or all of these principles might apply if the testator's aims were indeed politically incorrect, but they might be deemed to require an overt statement by the trustees explaining their departure and the reasons for it, and requiring conformity to her aims as near as may be consistent with the constitutional constraints.

Id. at 712-13 (footnotes omitted).

For a somewhat different interpretation of the Princess' will, see Judge Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 U. HAW. L. REV. 393 (1999).

The Ninth Circuit, sitting en banc, upheld the Kamehameha Schools' preference for Native Hawaiians. It relied in part on Congress' 1993 apology for the federal government's role in depriving Native Hawaiians of sovereignty. *See* Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estates, 470 F.3d 827, 845 (9th Cir. 2006) (citing Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510). This piece of aloha jurisprudence seeks to restore a piece of Native Hawaiian self-determination. *See generally* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998). The court's use of the apology is one practical effect of the growing apologies for past injustice. *See* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 500-01 (2003).

[147] *See* Shanda A.K. Liu, *Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders*, 25 U. HAW. L. REV. 85 (2002); Timothy Hurley, *Receiving Homestead 'Like Being in Las Vegas*,' HONOLULU ADVERTISER, June 7, 2005, at B1; Department of Hawaiian Homelands Page, http://www.hawaii.gov/dhhl.

in the *University of Hawaii Law Review*.[148] Those works, directed largely to the Hawaii legal community, provide more evidence of what lawyers in Hawaii believe the courts and legislature are doing and where aloha jurisprudence is headed.

Another way of understanding the contours of aloha jurisprudence is to look to critics of the Hawaii legislature. One critic charges that if the Hawaii legislature's "abuses and misinterpretations continue, the sticks in the 'bundle of rights' we presently know as private property may soon cease to exist."[149] There is, moreover, concern among opponents of *Pele Defense Fund v. Paty* that it will be read broadly and perhaps inconsistently with the United States Constitution's respect for property rights.[150]

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148 *See, e.g.*, Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331 (2005); Heidi Kai Guth, Comment, *Dividing the Catch: National Resource Reparations to Indigenous Peoples—Examining the Maori Fisheries Settlement*, 24 U. HAW. L. REV. 179 (2001); Robert Heckel, Recent Development, *The Manoa Valley Special District Ordinance: Community-Based Planning in the Post-*Lucas *Era*, 19 U. HAW. L. REV. 449 (1997); Ian H. Hlawati, Comment, Loko i'a: *A Legal Guide to the Restoration of Native Hawaiian Fishponds Within the Western Paradigm*, 24 U. HAW. L. REV. 657 (2002); Isaac Moriwake, Comment, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261 (1998); Daniel G. Mueller, Comment, *The Reassertion of Native Hawaiian Gathering Rights Within the Context of Hawai'i's Western System of Land Tenure*, 17 U. HAW. L. REV. 165 (1995); Damon Schmidt, Recent Development, *Wiping Out the Ban on Surfboards at Point Panic*, 27 U. HAW. L. REV. 303 (2004). Parts of aloha jurisprudence are also explored in other journals. *See, e.g.*, Jocelyn B. Garovoy, "Ua Koe ke Kuleana o na Kānaka" *(Reserving the Rights of Native Tenants): Integrating* Kuleana *Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523 (2005); Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848 (1975) (emphasizing a statutory solution to Native Hawaiian property claims); Kahikino Noa Dettweiler, Comment, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174 (2005), http://www.hawaii.edu/aplpj/pdfs/v6.01_Chaney.pdf.

149 Jennifer M. Young, Comment, *The Constitutionality of a Naked Transfer: Mandatory Lease-to-Fee Conversion's Failure to Satisfy a Requisite Public Purpose in Hawai'i Condominiums*, 25 U. HAW. L. REV. 561, 592 (2003).

150 *See, e.g.*, Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 117-22, 144-45 (1998) (focusing on the limitations of customary rights in light of *Oni v. Meek*, 2 Haw. 87 (1858)); Gina M. Watumull, Comment, Pele Defense Fund v. Paty*: Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights*, 16 U. HAW. L. REV. 207, 224, 255 (1994). Sullivan dates the emergence of what I call aloha jurisprudence to *Application of Ashford*, 440 P.2d 76 (Haw. 1968), which interpreted the Hawaiian word "ma ke kai" in a deed as meaning the vegetation line rather than the mean high tide line. Sullivan, *supra*, at 127. As a result waterfront property owners were deprived of a parcel of land they thought they had owned for fifty years, while the public's right in shores was ex-

There are yet other indicators of a political commitment to aloha jurisprudence including the Hawaiian sovereignty movement, which is interested in the preservation of Hawaiian culture and even the reclamation of Hawaiian sovereignty. While that movement has not always been successful, it is a reminder that rights are defined by people. Much as the abolitionist movement critiqued the legal system and sought to replace it with another jurisprudence based on sentiment, the Hawaiian rights movement seeks an alternative to western property holding.

The movement has had some victories, however, such as the recent decision of the University of Hawaii to convert patent rights in genetically modified taro, a staple of the Native Hawaiian diet, into common rights.[151] At other times, one can discern the contours of aloha jurisprudence from the writings of Hawaiian legal scholars such as Mari Matsuda,[152] Melody Kapilialoha MacKenzie,[153] Kaimipono Wenger,[154] and Eric Yamamoto.[155]

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panded. There are, of course, contrary opinions as well. *See, e.g.*, Sotomura v. County of Hawaii, 460 F. Supp. 473, 479-80 (D. Haw. 1978) (concluding that public use of beach had not ripened into customary right).

Sullivan concludes that "[t]he application of [Hawaii Revised Statute sections 5-7.5, the "aloha statute"] in future cases concerning real property rights will undoubtedly be watched with gleeful anticipation by legal scholars both in Hawai'i and in other common law jurisdictions, but must surely be a source of anxiety to developers, other property owners in Hawai'i and investors." Sullivan, *supra*, at 154 (footnote omitted).

151 *See, e.g.*, Press Release, Univ. of Haw., UH Files Terminal Disclaimer on Taro Patents (June 20, 2006), *available at* http://manoa.hawaii.edu/mco/pdf/taro_resolution_release.pdf.

The dispute is discussed in Paul Elias, *Who Owns Taro?*, HONOLULU STAR-BULLETIN, Jan. 21, 2006, at C2; Jan TenBruggencate, *UH Expected to Abandon Controversial Taro Patents*, HONOLULU ADVERTISER, June 20, 2006, at A1; Stewart Yerton, *Biotech Brouhaha: Some Native Hawaiian Leaders Harbor Concerns About Developing the State's Life Science Industries*, HONOLULU STAR-BULLETIN, July 24, 2005, at D1.

152 *See, e.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

153 *See, e.g.*, NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha MacKenzie ed., 1991). One might also think along these lines of Carl Christensen's work on Hawaiian legal history. *See, e.g.*, Posting of Carl C. Christensen to PropertyProf Blog, It's Not About the Fox; Sometimes, It's About the Whale, http://lawprofessors.typepad.com/property/2006/08/its_not_about_t.html (Aug. 28, 2006).

154 *See, e.g.*, Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279 (2006).

155 *See, e.g.,* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*,

Perhaps there are some opportunities for similar approaches in other jurisdictions, which might include an expanded public trust doctrine. Or maybe there are even some other implied rights of access to sacred places elsewhere in the Hawaiian islands, such as grave sites.[156]

D. *Injunctions and Property Rights: The Case of Covenants*

Even outside of the Native Hawaiian rights context, there is further evidence of deference to community rights over individual property rights. That conflict appears starkly when courts contemplate injunctions: should they protect a property right created by a covenant, easement, or fee simple through a grant of an injunction or only through a damages award? This is a difficult case, because invocations of what constitutes the benefit of the "community" are notoriously difficult to gauge and confine.

Guido Calabresi and Douglas Melamed's 1972 article, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, established the language for discussing the choice between an injunction and damages as the difference between property rules (the enforcement of a property interest through an injunction) and liability rules (the protection of the property right through damages).[157] Depending on the equities, the property rule may shift to a liability rule—what Abraham Bell and Gideon Parchomovsky call, rather creatively, a "pliability rule."[158]

What interests us here are the instances in which courts apply a liability rule rather than a property rule or when courts shift, to

95 MICH. L. REV. 821 (1997); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998).

156 For a consideration of the importance of sacred sites on Oahu, see PANA O'AHU: SACRED STONES, SACRED LAND (Jan Becket & Joseph Singer eds., 1999). Along these lines, one might consider the right of relatives of a person buried on private property to visit the grave. *See* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469.

157 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Among the extraordinary range of responses for Calabresi and Melamed, one might look to the recent literature, including Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004) and Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

158 Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 38 (2002) (exploring changing equities in *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970)).

borrow Bell and Parchomovsky's analysis, from property to liability rules. The way courts get to that decision is through application of a set of "equity rules." Courts decide between a property rule and a liability rule based on a balance of factors, including the culpability of the parties and the interests of third parties.[159]

Injunctions are often discussed in the context of nuisance. In nuisance cases, courts balance the equities of the harm to the tortfeasor with the benefit to those whose property is interfered with if the courts were to grant relief.[160] But courts typically deny injunctions only when there is an extraordinary imbalance between the harm to the tortfeasor's interest and the benefit to the people whose rights are infringed.[161]

The classic example of this is *Boomer v. Atlantic Cement Co.*,[162] which juxtaposes the rights of the community to employment at a cement plant against the rights of neighbors whose property was being polluted by the plant. Although the court said it was upholding the traditional New York doctrine that a party injured by nuisance is entitled to an injunction, it ultimately allowed the cement plant to pay the neighbors damages, because the court believed such a solution "seems to do justice between the contending parties."[163] The balancing process for injunctions is one of the mediating doctrines that allow courts to act in a fashion that protects the rights of the community against a holder of property rights.

There is no necessary class preference imbedded in these

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159 For one example of the balancing and considerations of culpability, one might compare *Boomer*, 257 N.E.2d at 870, with *Ariola v. Nigro*, 156 N.E.2d 536 (Ill. 1959) (requiring removal of a portion of a building that infringed on neighbor's property by a few inches), and *Van Wagner Advertising Corp. v. S & M Enterprises*, 492 N.E.2d 756 (N.Y. 1986) (denying request for specific performance of a contract in part because of the imposition of hardships that the contract would impose).

160 *See, e.g.*, *Boomer*, 257 N.E.2d at 873-75.

161 *See, e.g.*, Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217, 222 (Tex. Civ. App. 1973) (granting injunction even though the cost of the injunction to the defendants exceeded by several times the benefit of the injunction to plaintiffs). There is a rich history of injunctions and considerations of equity still waiting to be explored. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 74 (1977) (citing Lexington & Ohio R.R. Co. v. Applegate, 38 Ky. (8 Dana) 289 (1839) (denying a nuisance injunction based on the importance of a railroad)). Some pieces of the history appear in Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101 *passim* (1986).

162 *Boomer*, 257 N.E.2d 870.

163 *Id.* at 873.

choices, for the property owner whose rights are subordinated may be wealthy or poor. However, in some high-profile cases, the property owners who are left with only damages instead of injunctions were relatively poor.[164] Accordingly, we may be left with the sense that equitable balancing leaves neighboring (and often relatively poor) property owners with fewer rights than if they had received an injunction.[165] Nevertheless, courts turn to equity rules to decide whether to grant injunctive relief (a property right) or limit relief to money (a liability rule) as a way of apportioning rights between these competing considerations. In some cases beyond injunctions, courts turn to equitable considerations to begin the assignment of property rights through adverse possession or in deciding whether to grant a prescriptive easement.[166]

Most property courses fail to discuss the circumstances when the beneficiaries of covenants might not be entitled to enforce them through injunctions. Those issues are often reserved for remedies courses.[167] Property students do, however, often study equitable rights in regard to easements. Many study *Brown v. Voss*, a Washington Supreme Court case that denied the right of exclusion to a servient estate where the dominant estate holder was overusing the easement.[168] In *Brown*, the holders of the dominant estate crossed the servient estate to get to their prop-

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164 *See, e.g.*, Daniel A. Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 7, 8-12 (Peter Hay & Michael H. Hoeflich eds., 1988) (discussing *Boomer* litigation).

165 *See* Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149 app. at 2173 (1997) (summarizing remedies).

166 *See, e.g.*, R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331 (1983) (suggesting that courts turn to equitable principles, like innocence, when deciding whether to award property to an adverse possessor); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1985) (proposing a compromise that after the expiration of the statute of limitations, adverse possessors should be allowed to keep property but have to pay for it).

167 ROBERT N. LEAVELL ET AL., CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 748-51 (7th ed. 2005), for instance, includes *Turpin v. Watts*, 607 S.W.2d 895, 901 (Mo. Ct. App. 1980), which denied an injunction for violation of a restrictive covenant in part because "the relief sought is wholly disproportionate to the injury sustained." *See also* Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167 (1970).

168 715 P.2d 514 (Wash. 1986), *reprinted in* A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 939 (5th ed. 2004); JESSE DUKEMINIER ET AL., PROPERTY 716 (6th ed. 2006).

erty and other property beyond the dominant estate.[169] Yet, the trial court denied an injunction against the overuse.[170] It found, and the Washington Supreme Court affirmed, that: (1) the holders of the dominant estate acted reasonably in developing the property; (2) the holders of the servient estate were not harmed by the overuse, and there was no increase in traffic; (3) the servient estate owners had sat on their rights for a year while the dominant estate holders expended money; and (4) the servient estate sought the injunction for purposes of leveraging a settlement.[171] How many of those findings were necessary—or even important—for the denial of injunctive relief is an important question. Laches and the balancing of equities were undoubtedly important factors. What is somewhat more puzzling is the court's invocation of the finding that the injunction would be used as leverage in negotiations. That is, one suspects, precisely the point of many injunctions.[172]

A central factor in deciding whether to grant injunctions to preserve property rights is the balancing of equities, which includes the interests of the community.[173] In this analysis we look to several subfactors: (1) the culpability of the persons seeking an injunction, that is, whether they mislead the defendants into violating property rights;[174] (2) the culpability of the defendants, for example, whether the defendants knowingly violated the

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[169] 715 P.2d at 515-16.

[170] *Id.* at 518.

[171] *Id.*

[172] Another case sometimes studied in property courses is *Umphres v. J.R. Mayer Enterprises, Inc.*, 889 S.W.2d 86 (Mo. Ct. App. 1994) (denying relocation of easement because of inequity), *reprinted in* CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE 688-92 (4th ed. 1997). A case of increasing popularity with property professors, *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997), awarded only nominal damages for a one-time trespass but remanded for further consideration of exemplary damages. Exemplary damages offer a possible midpoint between injunctions and an award of only nominal damages.

[173] Eric Freyfogle has called these considerations issues of "context and accommodation." *See* Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530-31 (1989). Thus, Professor Freyfogle sees property as increasingly representing overlapping interests. He suggests that property may "increasingly exist as a collection of use-rights, rights defined in specific contexts and in terms of similar rights held by other people. Property use entitlements will be phrased in terms of responsibilities and accommodations rather than rights and autonomy." *Id.* at 1531.

[174] See *Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976), an equitable estoppel case, which illustrates one way that courts invoke equity to deny injunctive relief against a property owner.

plaintiffs' property rights or did so unknowingly;[175] (3) the balance of the hardships between the plaintiffs and defendants;[176] and (4) the community's interest in the continued violation, that is, whether there are jobs or other important interests at stake.[177]

Still, even with those equity rules, it is difficult to predict when a court will apply a strict property rule as opposed to a more lenient liability rule.[178] As Cornell Law Professor Emily Sherwin notes, "The absence of rules for judicial choice among remedies means that property rules and liability rules, as imposed by courts, have only a limited prospective role in law."[179]

The predictability of equity rules may be higher in Hawaii than in other jurisdictions. Or, put differently, the choice of liability rules seems to be governed by equitable principles that allow community members to have broad powers. The Hawaii Supreme Court faced these issues in the 1999 case *Pelosi v. Wailea Ranch Estates*.[180] Angelo Pelosi complained that a parcel adjoining his home was being used to provide access to another subdivision, even though the parcel was burdened with a restrictive covenant limiting its use to single-family residential purposes.[181] The Hawaii Supreme Court acknowledged that the lot was, indeed, used for a purpose prohibited under the covenant; however, the court balanced the interests at stake. It looked at the interests of the twenty families who purchased property in the subdivision without any knowledge of the covenant and whose only way into their homes was over the parcel.[182] The balancing—following what one might call equity rules—led to the court's invocation of a liability rule, rather than the assignment of an absolute right to enjoin offending use of the property.

Such complex balancing includes the right of the community.

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175 *See, e.g.*, Sandstrom v. Larsen, 583 P.2d 971 (Haw. 1978) (affirming an injunction for a violation of a restrictive covenant in light of the fact that the defendant proceeded despite knowledge that there might be a covenant violation).

176 *See, e.g.*, ELAINE W. SHOBEN ET AL., REMEDIES: CASES AND PROBLEMS 62 (3d ed. 2002).

177 *See, e.g.*, United States v. Rainbow Family, 695 F. Supp. 314 (E.D. Tex. 1988).

178 *See* Emily Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2082, 2086 (1997); *see also, e.g.*, Peters v. Archambault, 278 N.E.2d 729 (Mass. 1972) (ordering—without considering the balancing of interests—the removal of a building that encroached on a neighbor's property). I am indebted to Professor Charles Donahue for suggesting *Peters*.

179 Sherwin, *supra* note 178, at 2086.

180 985 P.2d 1045 (Haw. 1999).

181 *Id.* at 1049-50.

182 *Id.* at 1055-56.

While scholars rarely talk about it,[183] whether there is an injunction or not has important implications for protection of property. Richard Epstein phrases the central part of property as the right of ownership and exclusion. If a court can take something away by simply paying for it, it cannot be property. As Epstein says, "Property is something that is mine, and it cannot be mine if you can take it at your free will and pleasure."[184] Epstein also argues in favor of property rules even when bargaining is not feasible.[185] Accordingly, aloha jurisprudence seems to prefer fewer property rights and more community rights, which seems to be facilitated by the restriction of less costly liability rules.[186] As Lewinsohn-Zahmir states, "Liability rules . . . remove the owner's holdout power."[187] They dramatically decrease the entitlement of the

183 They are more concerned with the circumstances in which we should assign a property owner the right to an injunction.

184 Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2106 (1997).

185 *Id.* at 2094-95. *See also* Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219, 221 (2001).

186 But, as Carl Christensen has suggested, one might also see *Pelosi* as a betrayal of aloha. E-mail from Carl C. Christensen, Visiting Assistant Professor of Law, Univ. of Haw., to author (Aug. 17, 2006) (on file with author). As Christensen points out, the individual purchasers would have "their remedies in contract against Wailea Ranch Estates for failure to convey marketable title and against their title insurers, who should have been able to figure out these lots didn't have proper legal access." *Id.*

The definition of community is, of course, central to the considerations here. Christensen joins other commentators, like Morton Horwitz, in construing a utilitarian balancing (which permits those with more at stake economically to prevail) as representative of a legal system that prefers commerce over individuals. *See, e.g.*, HORWITZ, *supra* note 161, at 102. As Horwitz has stated:

> [I]n a second stage which crystalized by the middle of the nineteenth century, property law had come largely to be based on a set of reciprocal rights and duties whose enforcement required courts to perform the social engineering function of balancing the utility of economically productive activity against the harm that would accrue.

Id.

In fact, central to Horwitz's "transformation" is a remaking of property rights to protect those who will most promote the goals of economic growth. There continues, of course, to be strong strands of vested rights over "dynamic" (or use) rights. That conflict appears most clearly in *Charles River Bridge v. Warren Bridge*, 36 U.S. (1 Pet.) 420 (1837). *See* text accompanying *supra* notes 18-19. The utilitarian balancing illustrates how difficult it is to make assessments of the character of changes in legal thought. A decision like *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. (8 Dana) 289 (1839), which found no nuisance by a railroad running through Louisville, Kentucky, illustrates the balancing of collective property interests and corporate property interests that frequently takes place.

187 Lewinsohn-Zamir, *supra* note 185, at 226.

owner, and in some instances the damages are small.[188] Without an injunction—and without the holdout power—there may be little or no recovery by the owner.[189]

As we decrease the likelihood of injunctions, we decrease individuals' property rights. Courts and legislatures have, throughout our history, placed the fulcrum between liberal property rights and community rights at different places.[190] Of course, even so staunch a supporter of property rights as Richard Epstein argues that sometimes it is appropriate to deny an injunction: "[T]he appropriate solution is to allow injunctive relief when the relative balance of convenience is anything close to equal, but to deny it (in its entirety if necessary) when the balance of convenience runs strongly in favor of the defendant."[191]

Conclusion: Toward a Humanitarian Analysis of Property Law

The morality of figuring out the border between private and community property rights is difficult, to say the least. Those questions involve complex issues of deciding what is required by the Constitution and statutes, as well as common law principles like nuisance, trespass, and covenants. Common law analysis includes questions of how much we want to protect property and the expectations that arise around those protections in order to encourage further productive use of property. Moreover, the protection of expectations furthers the idea of the rule of law itself, as generations of defenders of property remind us.[192] In considering where to place the boundaries between community and property in takings analysis, Frank Michelman phrased the

188 For example, when an injunction was denied in *Brown* after the balancing of equities, the servient landowner was left with little recourse, because the trespass damages were nominal. 715 P.2d 514, 516 (Wash. 1986).

189 Damages judgments are still large in some cases. For instance, the damages awarded in *Boomer* were significantly larger than the damages that the New York Court of Appeals initially thought would be owed. *See* Farber, *supra* note 164, at 7, 12.

190 Gregory S. Alexander, Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970, at 1 (1997) (countering view that there is "a single tradition of property throughout American history").

191 Epstein, *supra* note 184, at 2102.

192 *See, e.g.*, Hon. Loren A. Smith, *Life, Liberty & Whose Property?: An Essay on Property Rights*, 30 U. Rich. L. Rev. 1055 (1996).

considerations as ones of utility and fairness.[193] More recently, Michael A. Heller and James E. Krier have agreed with that analysis, though they speak in terms of efficiency and justice.[194] However, considerations like humanitarianism and economic efficiency are notoriously difficult to judge.[195]

Recent discussion of cultural property has led to rich theorizing about the public's right to property and private claims on it. Sometimes that has led to some surprising results. John Merryman's analysis of which country has the better claim on the Elgin Marbles—the United Kingdom, where the marbles have been since the early nineteenth century, or Greece, where they were carved and had been for several millennia before Lord Elgin brought them to the United Kingdom—asks, in essence, where will the marbles do the most good.[196] He argues that the marbles have become the property of the world, and people will benefit most from keeping the marbles in the British Museum.[197] The benefit to humanity may, indeed, be maximized by keeping the marbles where they can be seen by the most people and where they can be seen in the context of other art. What is important and striking is that the good of the community is advanced as the primary basis for considering what to do with the marbles. That is, utility, rather than entitlement or justice based on past harm, is at the center point of the argument.[198]

Aloha jurisprudence is as yet rather vaguely defined, but there is a key aspect: concern for Native Hawaiians and other dispossessed groups in Hawaii. With time, as the jurisprudence develops and is articulated, we may yet be able to provide some meaningful content and some judicially recognizable standards,

193 Frank L. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1226 (1967).

194 Michael A. Heller & James E. Krier, Commentary, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-99 (1999).

195 Hon. J. Harvie Wilkinson III, *Why Conservative Jurisprudence Is Compassionate*, 89 VA. L. REV. 753, 767-70 (2003); *see also* Hon. J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1398 (2002) (concluding that there is a conservative jurisprudence).

196 John Henry Merryman, *Whither the Elgin Marbles?*, *in* IMPERIALISM, ART AND RESTITUTION 98, 106-08 (John Henry Merryman ed., 2006) (looking to nation-centered, world-centered, and object-centered analysis and concluding that each position favors keeping the marbles in the United Kingdom).

197 *Id.*

198 *See id.* at 98, 107-08; *cf.* William St. Clair, *Imperial Appropriations of the Parthenon*, *in* IMPERIALISM, ART AND RESTITUTION, *supra* note 196, at 65 (viewing the Parthenon's entire history as one of imperialism).

much as has happened with conservative constitutional thought in the past two decades.[199] Possibly there will soon be law review scholarship that constructs aloha jurisprudence.[200]

Perhaps in thinking about a humanitarian analysis of property law we should be looking at several features: first, the historical role that humanitarian considerations have played in judicial decision making about property;[201] second, the acknowledged role for equitable considerations; and third, the ways to quantify humanity, that is, the question of how much we protect, in some fairly direct form, the interests of the dispossessed. Of course, there ought to be some consideration of overall utility.[202] But we can still ask if we are making sure that our decisions preserve the dignity and humanity of people who are left in front of a judge.

We have known for a long time that judges' decisions have an important impact on the distribution of property. Common law decisions influence the distribution of wealth, as both law and economic scholars[203] and critical legal studies scholars have taught us.[204] We may also want to consider the impact of their decisions on considerations of humanity as well. This can come about in several ways. First, we can require that before property is lost—such as through adverse possession or tax sale—there is at least a strict compliance with common law requirements. Second, we can make sure that long-established rights, like the right of beach access, are respected. And third, we can invoke equity principles when apportioning rights to access or use property in cases of easements and covenants. The common law has developed a set of rules to apportion rights between sets of property owners (as in easement and covenant cases) and between prop-

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199 *See, e.g.*, Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002).

200 One might envision the development of a similar body of scholarship that defines the contours of aloha jurisprudence as there is, to take an example, around the movement known as LatCrit. *See, e.g.*, Steven W. Bender & Keith Aoki, *Seekin' the Cause: Social Justice Movements and LatCrit Community*, 81 OR. L. REV. 595 (2002); Ibrahim J. Gassama, *Confronting Globalization: Lessons from the Banana Wars and the Seattle Protests*, 81 OR. L. REV. 707 (2002).

201 *See* Brophy, *supra* note 25, at 1207-12 (discussing considerations of humanity and economy in antebellum jurisprudence).

202 As Judge Wilkinson has emphasized, there are important questions of whether by making decisions to help one person we work a greater injustice overall. *See* Wilkinson, *Why Conservative Jurisprudence Is Compassionate*, *supra* note 195, at 765-66.

203 Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

204 *See, e.g.*, HORWITZ, *supra* note 161, at 61-108.

erty owners and the community (as in nuisance cases). Those rules balance competing interests and look in particular to the interests of society in deciding whether to grant an injunction between competing users.

Those may be some guiding principles to think about when balancing the rights of the community with property owners.[205] And perhaps as courts search for reasonable accommodations, they will continue to consider the effects of their decisions on the delicate balance that must be struck between property and community rights and realize that too much infringement on either leads to inequitable results. Our Constitution, as Justice Hugo Black wrote in 1960, protects against forcing people "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[206] Out in the remote provinces, some judges are making sure that neither the community nor individuals are asked to give up rights that they have long held. Perhaps there will be a growing appreciation of those principles elsewhere as well.

Adherents of aloha jurisprudence may borrow the refrain from Ralph Ellison's *Invisible Man*, sung by a crowd in Harlem at the end of the "Battle Hymn of the Republic":

No more dispossesing of the dispossessed!

No more dispossesing of the dispossessed![207]

The difficulty, of course, is converting those ideas into legal doctrine.[208]

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[205] Among the recent literature, Eric T. Freyfogle's *The Land We Share: Private Property and Common Good* (2003), stands out as a particularly rich exploration of the competing considerations of public and private rights.

[206] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[207] RALPH ELLISON, INVISIBLE MAN 332 (Modern Library 1994) (1947).

[208] It becomes even more difficult when we consider that we must translate those sentiments in a way that ensures the maintenance of respect for property rights that have been so central to the advancement of society. *See, e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998); RICHARD PIPES, PROPERTY AND FREEDOM (1999) (asserting that private property is essential to liberty and democracy).