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Tribute

Articles

Notes

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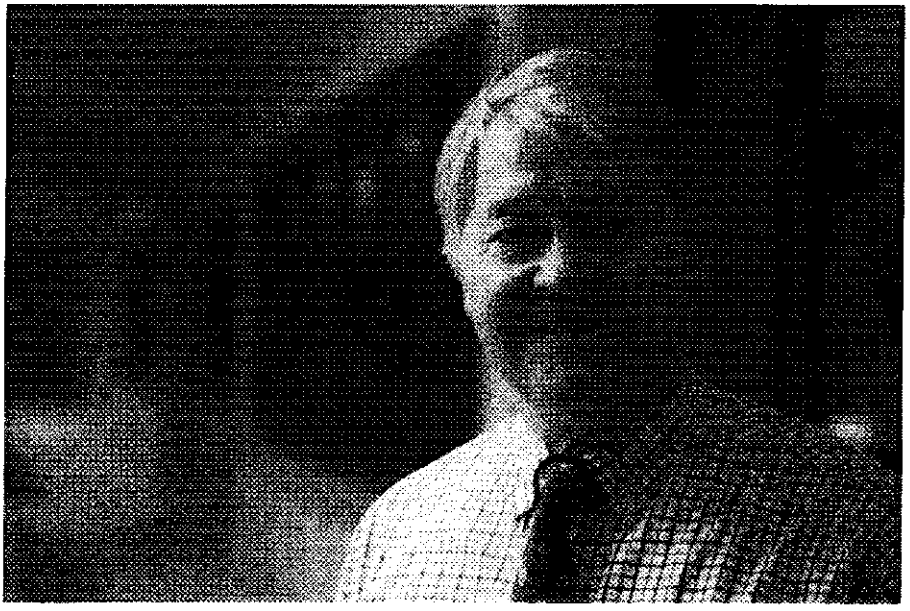

The Law Review dedicates this issue to the memory of Professor Jon Van Dyke: a prodigious scholar, formidable litigator, and unparalleled mentor and teacher. May his legacy live on through his students, colleagues, friends and family.

JVD

Aviam Soifer*

Jon Van Dyke is more irreplaceable than most of us and he is hugely missed. For the generation in which he and I came of age, a common saying—not to say cliché—advised: "Think globally, act locally." Few of us did either very well. Yet Jon embodied both sides of the equation, and he did both with extraordinary thoughtfulness and verve. He was an astute global thinker and a renowned local activist, and vice versa. He spoke, wrote, advised, and litigated internationally, and he managed to do the same locally with unmatched success. Both the world and Hawai'i were seamless to Jon. He was somehow able to defy the usual laws of time and space.

Jon's global thinking and acting took him around the world repeatedly. He constantly traveled to give lectures, to teach, to consult, to advise, and to advocate on behalf of human rights, international law, oceans and their denizens, islands and their implications for sovereignty. Marvelously, Professor Van Dyke simultaneously shared his expertise across a startlingly broad range of subjects as he taught more than a generation of students at our Law School. And he also apparently never said no when asked to teach high school students, or to participate on a panel about Native Hawaiian rights or any other constitutional or international law issue. Whatever the setting, Jon truly was a brilliant teacher—managing somehow, for example, to be our Law School's undisputed master of the PowerPoint while also conducting provocative, insightful class discussions in which he gently probed but never embarrassed his students. Jon was hardly a showman either inside or outside the classroom. Yet his quiet passion to think things through with care never triggered the common dangers of passivity or jadedness.

As an advocate, Jon remained carefully controlled and keenly analytic. In this role, too, he thought and fought for those most in need of legal help and he did so quietly, passionately, and very effectively. He believed strongly in legal rights. This deep conviction led Jon to write, teach, and stand up in court for an amazingly varied array of people who needed help in pursuing justice. He wrote, spoke up, and advocated on behalf of victims of the Marcos regime, for example, as well as for Hawaiians whose rights have been infringed repeatedly since the overthrow of the Queen in 1893.

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* Dean and Professor, William S. Richardson School of Law.

He also fought for public school students being denied their constitutional rights; for Micronesians battling the United States government over depredations they suffered through nuclear testing; and for human beings and sea creatures endangered by the careless exploitation of the oceans by institutions and short-sighted people around the globe who are heedless of the fragility of our seas and shorelines.[1]

Jon's relentless pursuit of justice is well known. Professor Chip Fletcher, who a few years ago published a substantial and important study about the worldwide impact of rising seas,[2] reported that upon his visit to an atoll that was as far away as any known to humankind, the chief welcomed him with a traditional ceremony and then asked, "Do you know Jon Van Dyke. He is my brother."

Even with the astonishing depth of Jon's engagement with the world, he somehow seemed always to have plenty of time to listen. In fact, he would patiently hear and explore whatever manner of bizarre ideas or challenges his students and colleagues wanted to share. He was quick to grasp the key elements in an argument, but he was noteworthy for how measured and gentle were his responses. Like so many, many others, I loved simply to talk with Jon, to pursue ideas and to spot weaknesses or implications with his help that otherwise I would have missed. I really counted on much more time to toss around constitutional law issues with Jon—and to share woes and joys about the Red Sox. His loss is devastating and immeasurable.

Jon also was a deeply committed family man, and he spent much time with and took great pride in each of his three children. He and his wife, Sherry Broder, constituted a rare partnership professionally as well as in deeply personal ways. They showed up more than other faculty members at Law School events and many other social occasions, and they hosted numerous parties and dinners for visiting dignitaries and for students and faculty members. Few of the other "grown-ups" would dare to do so, but Jon and Sherry always danced.

Jon Van Dyke worked diligently to repair the world. His loss tears all of us apart.

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[1] For a more detailed analysis of Jon's accomplishments and contributions discussed in this paragraph, *see generally* 35 U. HAW. L. REV. 385-1013 (2013).

[2] *See* CHARLES H. FLETCHER & BRUCE M. HAMMOND, EXECUTIVE SUMMARY: CLIMATE CHANGE IN THE FEDERATED STATES OF MICRONESIA: FOOD AND WATER SECURITY, CLIMATE RISK MANAGEMENT, AND ADAPTIVE STRATEGIES (2010), *available at* http://seagrant.soest.hawaii.edu/executive-summary-climate-change-federated-states-micronesia-food-and-water-security-climate-risk-ma.

A Tribute to Our Colleague Jon Van Dyke, An Intellectual Warrior

Casey Leigh* & Denise Antolini**

Our colleague, Jon Van Dyke, a person who possessed a keen intellect and undying curiosity, used his gifts over four decades to educate law students, policy makers, and citizens alike. An intellectual warrior, he fought injustice and worked for peaceful solutions to problems at the local, state, national and international levels. He wore so many hats: the sage counselor for students near and far, the kind uncle, the selfless friend, the prolific scholar, the world-renowned expert, the institutional memory of the Law School, the mentor for young and not-so-young colleagues in Hawai'i and around the world.

From its inception, Jon supported the William S. Richardson School of Law's Environmental Law Program (ELP), teaching key certificate courses in ocean law. He also brilliantly taught Constitutional Law, International Law, and International Human Rights. His reputation attracted many students to the ELP as well as the Law School in general. Because Constitutional Law is a required course, thousands of students enjoyed the opportunity to learn from this remarkable man. Upon graduation, they left knowing him as an excellent teacher who related to them so well that they fondly referred to him as "JVD."

Whenever we traveled across the country or around the world, virtually everyone asked, "Do you know Jon Van Dyke?" and we were proud to say, "Yes, he's my colleague." His work in founding and sustaining the Law of the Sea Institute reached all corners of the earth. He loved sharing his scholarship with others—and often our inboxes would contain a new article by Jon with a little note "thought you'd be interested." He wrote on an amazing array of topics from domestic and international environmental law and human rights to constitutional law and the jury system.[1] Most recently

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** Professor and Associate Dean, William S. Richardson School of Law.

[1] *See, e.g.*, Jon M. Van Dyke et al., *Self-determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. Haw. L. Rev. 623 (1996); Jon M. Van Dyke, *Sharing Ocean Resources - In a Time of Scarcity and Selfishness*, *in* LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES (Harry N. Scheiber ed., 2000); Jon M. Van Dyke, *The Privacy Rights of Public School Students*, 32 U. HAW. L. REV. 305 (2010); Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. Haw. L. Rev. 361 (2004); Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT'L L. & POL'Y 77 (2001); Jon M. Van Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its*

he was working with his wife, Sherry Broder, on the climate change issue regarding black carbon emissions from the international shipping industry and the dispute over the islands in the South China Sea.

He viewed scholarship as more than an intellectual exercise. He applied his research to furthering social and environmental justice in Hawai'i and beyond. His unflagging devotion to community service had a real world impact. He contributed his energies to issues as diverse as novel international environmental law claims and Hawaiian water rights on the island of Molokai.

He particularly enjoyed engaging with the students involved in moot court, coaching the law school's highly successful Jessup International Law Moot Court team up until his passing. He also gave generously of his time to ELP's National Environmental Law Moot Court Team and our International Environmental Law Moot Court Team. Often students would exclaim after starting their research on the briefs: "I read JVD's articles on this topic!" He served many years as advisor to the University of Hawai'i Law Review. Although shy by nature, he regularly attended functions put on by law student organizations, sometimes being the sole representative of the faculty. He had an open-door policy and would happily stop what he was working on to talk with whoever stopped by.

His office was a veritable treasure trove of writing projects with layers of legal history piled on his floor and filling his bookshelves. He could find any document in seconds, whether it was a law review article or an arcane document on the construction of the law buildings. He never hoarded his research or his scholarship, choosing instead to share widely his articles and works of others from his archives. In his unique style, Jon's sharing came from a genuine interest in engaging others in intellectual discourse, not from a need for self-promotion.

Jon approached issues, whether involving a judge's question in oral argument or a contentious faculty governance issue, with "polite persistence." He never lost his cool and never gave up—he kept asking questions and offered his opinion without bluster or volume. Rarely did he lose the argument. He had a phenomenal ability to multi-task; he never walked around with empty hands. Constantly reading or working on projects and class preparation, he often gave the appearance of an absent-minded professor. He would line edit articles during faculty meetings, yet always follow and participate in the discussions, serving as a font of institutional knowledge. He never wasted a minute of time. He was simply passionate about his work.

Maritime Boundary, 38 OCEAN DEV. & INT'L L. 157 (2007).

Jon exceeded all the expectations of a faculty member in scholarship, teaching, and community service. He brought a personal touch to his role as a senior faculty member. We fondly remember that he and his wife Sherry opened their beach home in Waimanalo for periodic gatherings to celebrate the opening of the school year and other special events. His caring for Hawai'i, its people and culture arose from his generous and remarkable spirit as well as his unparalleled intellect. We miss him greatly and will always treasure our memories of him as a colleague and friend.

Hali'a Aloha: A Tribute to Jon M. Van Dyke

Melody Kapilialoha MacKenzie*

I was very privileged to have known and worked with Jon M. Van Dyke for more than thirty-five years on many issues affecting the Hawaiian community. Jon stood so strongly for justice. He was not afraid to speak out and express his opinions, but always did so with respect and aloha for others. Soon after Jon came to Hawai'i in 1976, he began his work with the Hawaiian community, encouraging Native Hawaiians to become involved in the growing native rights movement nationally and to seek redress for their historical claims.

Jon was instrumental in the success of the Native Hawaiian Legal Corporation (NHLC),[1] a public interest law firm advancing the rights of the Hawaiian community, serving on its board during a crucial reorganization time in the late 1970s. It was his involvement, along with that of several Hawaiian leaders that led me to accept an offer to become a staff attorney at the organization in 1981. Over the years, Jon stayed involved in NHLC and he and I collaborated on several projects as a result. In 1982, the Office of Hawaiian Affairs (OHA) asked us to go to Washington, D.C., to sit in on the final decision-making meeting of the Native Hawaiians Study Commission, established to study and report on "the culture, needs, and concerns" of the Native Hawaiian community.[2] Jon and I published a commentary describing our experience, sitting through days of jockeying and maneuvering in which it became clear that the majority of the commissioners had no interest in the Native Hawaiian community, but instead sought to protect the United States from any possible liability for the U.S. role in the 1893 overthrow of the Hawaiian Kingdom.[3] Jon and I, along with OHA staff and other community members, drafted major sections of the Minority Report for the Native Hawaiian members of the commission.

In the late 1980s, Jon and I also worked together on the *OHA Draft Blueprint for Native Hawaiian Entitlements*,[4] a discussion paper that

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[1] For information on the Native Hawaiian Legal Corporation, *see* www.nhlchi.org/.

[2] Act of December 22, 1980, Pub. L. No. 96-565, § 303 (1980).

[3] For a version of the commentary, *see Native Hawaiians Study Commission: Hearings Before the S. Comm. on Energy and Natural Resources*, 98th Cong. 132-41 (1984) (statement of Jon Van Dyke, Prof. of Law, Univ. of Haw.).

[4] *See* discussion of the Draft Blueprint *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 91-2 (Melody Kapilialoha MacKenzie ed., 1991).

presented a plan for seeking return of native lands and recognition of self-governing rights. Jon was also the spark for the *Native Hawaiian Rights Handbook*,[5] an initiative that grew from the pleas of frustrated students at the Law School who wanted a text for their Native Hawaiian Rights class. The original idea was to gather the relevant laws and cases into one book. It was Jon, however, who told me that it was insufficient to just copy all of the relevant materials and that much more—context, history, and perspective—was necessary. As I remember, his exact words were, "You don't want to be just a copying service!" Of course, Jon was right and the resulting work product owed much to Jon's mentorship and advice.

Jon's research and scholarship on Native Hawaiian issues has been enormously influential. In 1995, Jon co-authored his first major article on Native Hawaiian sovereignty.[6] Three years later, Jon's seminal article on the political status of the Native Hawaiian community was published[7] and then cited by the U.S. Supreme Court in the 2000 *Rice v. Cayetano*[8] case. In the article, Jon set forth the historical relationship between the Native Hawaiian people and the federal government, arguing that the special relationship doctrine, which underpins the federal-tribal relationship, had already been applied to Native Hawaiians through numerous federal laws recognizing the unique status of both the native people and lands of Hawai'i.

Jon's 2008 book, *Who Owns the Crown Lands of Hawai'i?*,[9] brought together his more than thirty years of research and expertise on Hawaiian land issues. In this original work examining the complex history—from a legal and cultural perspective—of Hawai'i's Crown lands, Jon recognized that the unique status and responsibility of the ali'i in Hawaiian society should be a focal point in understanding the Crown lands. Jon argued that Government lands provided for the needs of the general citizenry of the Hawaiian Kingdom; in contrast, the Crown lands were the personal holdings of Kamehameha III. They supported the King who, according to the traditional Hawaiian world-view, had a responsibility and duty in turn to benefit the Hawaiian people. Thus, Jon reframed the discussion on the very nature of the Crown lands—the lands were not held "personally" by the reigning monarch in the Western fee simple sense, but were held in trust for the Hawaiian people. The status of the Crown lands is an issue of

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[5] *Id.*

[6] Noelle M. Kahanu and Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 7 U. HAW. L. REV. 427 (1995).

[7] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998).

[8] Rice v. Cayetano, 528 U.S. 495, 518 (2000).

[9] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008)

enormous significance to the Hawaiian community as it pursues self-determination and sovereignty and Jon's original research on the Crown lands and his detailed analysis of the seminal cases[10] involving the lands, provide a new perspective from which to discuss the "ownership" question.

I worked with Jon and his wife, Sherry Broder, on the landmark *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*[11] case in which the Hawai'i Supreme Court placed a moratorium of the sale of ceded lands—the Government and Crown lands of the Hawaiian Kingdom—until the unrelinquished claims of the Native Hawaiian people could be resolved. The U.S. Supreme Court eventually heard the case and, since I was not licensed to practice in the Court, Jon sponsored my admission. We lost the case in the U.S. Supreme Court.[12] The one fond memory I have of the experience, however, is Jon's voice addressing the Court, vouching for my character as he asked for my admission, faltering as he reached my Hawaiian middle name, and then saying it perfectly.

I am forever grateful for Jon's advocacy on behalf of Native Hawaiians and his willingness to engage with the community, to think through problems, and to believe that there were solutions. He believed in us as a people and he believed that we could resolve our differences, come together, and create a government that would serve our interests and needs—and that as a result, we would create a better Hawai'i for all of us.

I was honored to present an oli (chant) at Jon's memorial service. The oli I chose was *'Ike iā Kaukini he Lawai'a Manu,* which exhorts us to follow the example of the birdcatcher, Kaukini, of Waipi'o Valley on Hawai'i Island.[13] Kaukini and his wife, Pōkahi, were given the task of raising the sacred child Lauka'ie'ie. It was their responsibility to protect and care for her—and they did this with great devotion—nurturing her through childhood until she grew into an accomplished young woman. Their devotion to Lauka'ie'ie is symbolic of dedicated serve to a person or ideal of great value. Such service can be characterized as tiring, but it is "always inspired and rejuvenated by love, and it is always its own best reward."[14] The chant calls on us to follow Kaukini's lead by identifying and serving our own greatly valued person or ideal with the same "joyful

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[10] In re Kamehameha IV, 2 Haw. 715 (1864); Liliuokalani v. U.S., 45 Ct. Cl. 481 (1910).

[11] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 177 P.3d 884 (2008).

[12] Hawaii v. Office of Hawaiian Affairs, 566 U.S. 163 (2009).

[13] For a discussion of this chant, classified as a mele pai ali'i or a chant expressing admiration for a chief, *see* Kīhei de Silva, *An Essay on 'Ike iā Kaukini he Lawai'a Manu, available at* http://www.halaumohalailima.com/HMI/Ike_ia_Kaukini.html.

[14] *Id.*

sense of purpose."[15] Jon used his intelligence, insight, and wisdom in joyful service of justice, and for the good of our community and world. We could do no better than to follow his example.

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[15] *Id.*

Jon Van Dyke Was My Teacher

Mari J. Matsuda*

These words are printed as delivered at the memorial on the East-West Center lānai in hopes that all who were there will remember the amazing sight of Jon Van Dyke's students rising, one by one, in witness of his teaching. First one, then two, then a dozen, then well over a hundred people rose to their feet as they were called on to exemplify the panoply of ways in which Jon Van Dyke left a legacy as a teacher. It was a cool, sunny day, with a gentle breeze blowing down from the back of the valley, touching the faces of those who stood, who wept, who remembered.

Jon Van Dyke was my teacher. To the Van Dyke/Broder family, we bear witness to your deep, sharp grief for the loss of one who was Dad, husband, brother. What has surprised many of us is the shape of the grief one feels upon losing a teacher. Jon Van Dyke was the kind of teacher who becomes a part of other people's autobiographies. In losing him, we lose a chapter of our lives.

There are many people here today who would not be where they are if our Con Law professor had not pushed the fledgling out of the nest.

Could you please stand if you got your name in print because Jon Van Dyke included you as a co-author.[1]

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* The author thanks the Van Dyke/Broder family for the deep honor of sharing in the memorial service, and Fawn Jade Koopman, Kaleo Nacapoy, Daylin-Rose Gibson, and Tiffany Dare for their outstanding research assistance for this piece.

[1] It is not the normal practice in legal publications to credit research assistants with authorship status, even when their contributions are significant. Jon's ethic was of collaboration and recognition. Over fifty individuals were honored to share co-author status with Jon Van Dyke over the years. Of those individuals, at least twenty-five were Jon's students and alumni of the William S. Richardson School of Law. These former students include: Melody MacKenzie '76, Robert S.N. Young '78, Judge Riki Amano '79, Kenneth K. Takenaka '79, Nathan Aipa '80, Robert Brooks '80, Faye T. Kimura '80, Douglas Marsden '80, Susan L. Heftel-Liquido '81, David Teichman '82, Christopher J. Yuen '82, Kathy K. Higham '84, Jonathon Gurish '86, Ted N. Pettit '86, Jennifer L. Cook Clark '87, Carolyn E. Nicol '88, Dale L. Bennett '89, Carmen T. DiAmore-Siah '89, Gerald W. Berkley-Coats '91, Noelle M. Kahanu '92, Marilyn M.L. Chung '93, Teri Y. Kondo Ohta '93, David M. Forman '93, Emily A. Gardner '96, Maile Osika '12. Interview by Fawn Jade Koopman with Laurie Tochiki, Lecturer at Law, Director of Child Welfare Projects, William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, in Honolulu, Haw. (Apr. 11, 2012) (if anyone was inadvertently left off this list, the author welcomes your correction).

Could you please stand if you ever got a letter from Jon Van Dyke telling you that you did a good job in class and should keep your aspirations high.[2]

Could you please stand if Jon Van Dyke promoted you so you could get a job.[3]

Could you please stand if you ran for office at his urging.

Could you stand if you learned Constitutional Law in the quarry from Jon Van Dyke.

Could you stand if you learned after the quarry but before laptops.

And finally, the youngsters, will you stand if you learned from a legendary JVD PowerPoint.

Ladies and gentlemen, I present to you the history of this state as it passed before a great teacher's eyes.

If you learned Constitutional Law from Jon Van Dyke, you learned it well. The easiest thing for the professor to do with a simplistic or fuzzy answer in class is to fix it up and move on.

Not in JVD's class. A tension filled the room as he stayed with the student who gave an inadequate answer, gently asking yet another question, sending a message to every person present: you are a Richardson lawyer, and I expect an intelligent answer. This mattered because our students have

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[2] Jon Van Dyke is the only teacher I have ever had who wrote me a personal letter of congratulations when I did well on an exam in his class.

[3] William S. Richardson School of Law class of 1980. Professor Matsuda reports: My first job after graduation was clerking for Judge Herbert Choy of the Ninth Circuit United States Court of Appeals. At that time, Judge Choy had never hired a woman, never hired a Richardson graduate, never hired anyone "local," i.e. who had gone to high school in Hawai'i. His clerks, like most clerks in the federal courts, were typically "Harvard Men," with Ivy League law review pedigrees. Jon Van Dyke had attended the Ninth Circuit judicial conference at which Judge James Robert Browning announced that it was time for judges who had never hired women to consider it. At Jon's urging, I applied for the clerkship that everyone had assumed was out of reach for a Richardson graduate. He wrote a strong letter of recommendation, a copy of which I still have. He next inquired about my plans after the clerkship ended. My plan to practice labor law was not ambitious enough, in his view. The diversity movement taking form at law schools across the nation made it particularly important, he believed, that Hawai'i lead and not follow. The absence of women on the law school faculty was a problem, as was the predominantly *haole* character of the faculty in a racially diverse state. I had never thought of myself as a professor. I had never seen someone who looked like me in the front of a law school classroom. "Think about it," Jon said. "Do you have something you want to write about? Start writing." By the time my clerkship ended, I had a modest article on civil rights litigation accepted for publication, and had submitted my first application for a teaching position. When I was finally hired after obtaining an L.L.M., I was the only Asian American woman in a tenure track position at any U.S. law school. None of this would have happened if Jon had not pushed me. His ambitions for me were larger than my own. It is hard to know at twenty-three what one can accomplish. Without a teacher/champion, I would never have taken a chance on the dream job that I have held, and loved, for over thirty years.

faced skepticism about their talents. As the most diverse law school in the country, and the first to admit equal numbers of women right from its inception, our students have not always fit the traditional conception of what a lawyer looks like.[4] And our professors—including the longhaired, bearded young west coast *haole* who showed up to teach Constitutional Law—did not always fit the traditional conception either. When someone is waiting for you to prove your inadequacy, you cannot give a fuzzy answer. Professor Van Dyke sent students out prepared to meet and vanquish all doubters.

Others will speak today of his prodigious scholarship, his international reputation. I want to speak about specifics. About someone who was tortured and disappeared in the Philippines in a time when such victims were forgotten, and about how the Van Dyke and Broder team made it a permanent part of our legal system that we will not forget.[5] Even years

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[4] In 1976, full-time and part-time student enrollment in ABA-approved law schools numbered 29,343 women, 83,058 men, 112,401 total. Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 WOMEN LAW. J., no. 4, at 1, 3 (1981). In 1975, only 6.6% of all lawyers were women. *Id.* By 1979 this figure rose to 11%. *Id.* The gender ratio of the William S. Richardson School of Law entering class of 1977 was 47% women and 53% men. Interview by Fawn Jade Koopman with Laurie Tochiki, Lecturer at Law, Director of Child Welfare Projects, William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, in Honolulu, Haw. (Oct. 7, 2010). The entire student body included 232 students, 142 women and 90 men. *Id.* The three largest ethnic groups in that entering class of 1977 were Japanese (40%), Hawaiian (23%), and Caucasian (23%). There were also Chinese (8%), Filipino (7%), and Black (1%). *Id.* Other represented ethnic groups included non-Hawaiian Pacific Islanders and Koreans. *Id.* There was also a separate category in those days for Portuguese students. *Id.*

[5] Jon Van Dyke and Sherry Broder were co-counsel in "the biggest human-rights case ever certified in U.S. courts: the Estate of Ferdinand Marcos Human Rights Litigation." Ceil Sinnex, *Sherry P. Broder: Fighting for the Underdog*, MIDWEEK (Oct. 7, 1992), http://www.sherrybroder.com/fighting-for-the-underdog?PHPSESSID=8bdde5b64a268b17303dd9c451b7696f. Broder sued the Marcos estate "on behalf of 10,000 victims of alleged torture, summery execution, and disappearances. . . ." *Id.* Their work on the Marcos Human Rights Litigation began in 1986 when the former Philippine dictator, Ferdinand Marcos, fled from the Philippines to Hawai'i shortly after the Edsa Revolution. E-mail from Sherry P. Broder, Att'y, to Daylin-Rose Gibson (Apr. 4, 2013, 5:18pm) (on file with author). After 25 years of work on this single case, a $10 million settlement was reached and the money was distributed to the claimants, a "majority of whom live in poverty in the Philippines." Chris Fleck, *Sherry P. Broder, Old Friends*, MIDWEEK (Mar. 2, 2011), http://archives.midweek.com/content/columns/oldfriends_article/sherry_p._broder/. Broder stated, "It is very important to hold these dictators accountable. They use their positions not just for power, but also to be corrupt and to take money from a country that belongs to the people." *Id.* Broder has also "received numerous awards and accolades for work throughout her career. She is most proud of the Ved Nanda Center for International Law Human Rights Award," received in 2007. *Id.* This award was the first human rights award given by Nanda Center, and was given for her collective work on the Marcos case and other national social

later, the law will track down torturers and hidden assets and create justice. This week, as innocents are tortured and disappeared somewhere in Syria,[6] somewhere in Sudan,[7] those responsible act with the knowledge that the law will not forget.

I want to speak about a time when there were fewer Native Hawaiian lawyers than you can count on your fingers, when Jon pushed his students to run for the Constitutional Convention, and stayed up late into the night with them as they strategized about making Kanaka Maoli rights an integral part of state constitutional law.[8] This is a lasting legacy; it will be here after all of us are gone.[9]

These radical changes in what law was capable of were not the product of a radical. Jon once said to me with an apologetic smile, "I am a liberal." This was in the context of a theoretical discussion over the radical views of the Critical Legal Studies movement.[10] Students today are accustomed to the usage equating "liberal" with left wing radicals. Jon's was the 60's usage, when liberals, derided on the left, were associated with the political philosophy of liberalism, with moderate and pragmatic commitment to

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justice issues. *Id.*

[6] At the time of this address, reports of torture and disappearances in Syria were regularly in the news. *See* Kareem Fahim, *Hundreds Tortured in Syria, Human Rights Group Says*, NEW YORK TIMES (Jan. 5, 2012), http://www.nytimes.com/2012/01/06/world/middleeast/hundreds-tortured-in-syria-human-rights-group-says.html?scp=15&sq= syria&st=nyt&_r=0; Anthony Shadid, *As Syria Offers Amnesty, U.N. Urges End to Killing*, NEW YORK TIMES (Jan. 15, 2012), http://www.nytimes.com/2012/01/16/world/middleeast/syria-issues-amnesty-as-un-calls-for-end-to-violence.html.

[7] Reports on Human Rights violations in Sudan include: Int'l Comm'n of Inquiry on Darfur, *Report of the Int'l Comm'n of Inquiry on Darfur to the United Nations Secretary-General* (Jan. 25, 2005), *available at* http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

[8] According to Governor Waihee, the 1978 Constitutional Convention was an opportunity to further Native Hawaiian Rights. Jon Van Dyke was the lawyer for the entire movement and he supported the creation of the Native Hawaiian Legal Corporation. Through the Constitutional Convention, Van Dyke taught young Hawaiians how to use the Constitution to resolve pertinent Hawaiian Rights issues, such as gathering rights and Hawaiian homelands. There were not many Hawaiian lawyers at that time. These activists came from all different backgrounds but their central goal was to further Kanaka Maoli rights and to further the representation of those rights in the law. According to some, Van Dyke is the reason that the amendments that came out of the convention still stand today. Interview by Fawn Jade Koopman with Gov. Waihee (Apr. 14, 2012).

[9] HAW. CONST. art. XII, § 7. In addition to the constitution, Hawaii Revised Statutes (HRS) § 7-1 protects gathering rights, and for rights not specifically enumerated by HRS §7-1, there are the traditional gathering rights that are protected by HRS § 1-1.

[10] *See* DAVID KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (3d ed. 1998). This book is an introduction to the Critical Legal Studies worldview. Jon Van Dyke appreciated the value of a left critique of law as a tool of capitalism, but he held fast to his liberal view that law was a means of promoting an orderly, democratic society.

enlightenment values. When Jon self-identified as liberal, he meant a commitment to the rule of law, democracy, and the sometimes slow movements of the legal process. His study of the jury system,[11] his commitment to international law,[12] his unheralded work in the area of students' rights to freedom from unreasonable locker searches,[13] all came out of this liberal worldview. Jon held on to this view when it was hard. During the cold war, and post 9-11, we saw a hundred different ways to abandon the rule of law in the name of some greater good.[14] Jon taught by example, taking on public battles to uphold the constitution in the middle of the Vietnam era,[15] the war on drugs,[16] the war on terror[17]—the flashpoints of his lifetime.

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[11] E-mail from Sherry P. Broder, Att'y, to Kaleo Nacapoy (Apr. 5, 2012, 05:10 HST) (on file with author). *See also* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (Ballinger, 1977) (defending the role of the jury in American law). This book is an introduction to the protection of a jury's integrity in a judicial system that is slowly losing the respect of its citizens. The role of the jury system in America is analyzed and problems with this system are discussed to reorganize the view of the public at large to regain support for the once-respected system. Jon Van Dyke "documented with statistics collected from many states the racial, ethnic, economic and gender discrimination in American jury selection." E-mail from Sherry P. Broder, Att'y, to Kaleo Nacapoy (Apr. 5, 2012, 05:10 HST) (on file with author).

[12] Jon Van Dyke viewed "customary international law [a]s an essential part of the international legal system" and "U.S. courts have always utilized it as a source of law when applicable to the controversies presented to them." Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 361 (2004). Jon Van Dyke also supported the role customary international law played when relevant and appropriate in U.S. federal courts. *See id.* at 373-74, 384.

[13] Jon Van Dyke argued that Hawai'i's Board of Education should "change its new rule permitting unlimited searches of lockers without cause." Jon M. Van Dyke, *The Privacy Rights of Public School Students*, 32 U. HAW. L. REV. 306, 306 (2010). Jon Van Dyke viewed the adoption of this rule change as a "rejection of the values of individual freedom that citizens of the United States and of Hawai'i have fought and died for during previous generations, and sends a completely inappropriate message to our students, who will soon become active members of our political community." *Id.* at 322.

[14] *See generally* ANTHONY ROMERO, IN DEFENSE OF OUR AMERICA: THE FIGHT FOR CIVIL LIBERTIES IN THE AGE OF TERROR (2007).

[15] *See, e.g.*, JON M. VAN DYKE, NORTH VIETNAM STRATEGY FOR SURVIVAL (1972). This book is the clearest picture the general public has "of the effect of the bombing on North Vietnam and the Vietnamese response to it." E-mail from Sherry P. Broder, Att'y, to Kaleo Nacapoy (Apr. 5, 2012, 05:10 HST) (on file with author). The book is a contribution to the "current reassessment of American policies in East Asia, which in turn will do so much to determine the future not only of that part of the world but most of the United States itself." *Id.* One of the most important factors into the reassessment of Asian policies is "the failure of the United States to achieve its objectives in the bombing of North Vietnam between 1965 and 1968, particularly its objective of forcing Hanoi to the conference table on American terms." *Id.*

If we exalt today, it is for a lawyer's life well lived, and the thought that we, his students, might follow this example. If we mourn, it is for the loss of a friend. Who among us does not remember that quiet, thoughtful, humble demeanor? Yes, so quiet, that some fell asleep in class. That a fierce fighter for human rights came in such a modest, soft-spoken package is yet another teaching. Speak quietly, litigate boldly, love deeply. Our teacher, who, after that barefoot hippie beach wedding, stayed happily married in a fully equal feminist marriage, who raised three beautiful children who walk with his same humility, taught us something about the private side of life as well. Thank you Jon, I am a professor because you pushed me, we are better lawyers because you demanded it, we grieve that you are gone too soon. You were our teacher, and you are teaching us still.

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[16] *See* Jon M. Van Dyke, *The Privacy Rights of Public School Students*, 32 U. HAW. L. REV. 306 (2010) (arguing that the need to keep drugs out of schools, while important, does not invalidate the right to privacy).

[17] *See* Jon M. Van Dyke, *Dark Days for the Constitution,* HONOLULU ADVERTISER (Sept. 9, 2007), http://the.honoluluadvertiser.com/article/2007/Sep/09/op/Hawaii 709090341.html (arguing that the government's reactions during the war on terror "restrict[ed] our constitutional rights" and "ignor[ed] the principles established by international law").

Ā Mau Loa:[1] A Tribute to Jon Markham Van Dyke

D. Kapua'ala Sproat*

In 1995, my husband Kahikūkalā Hoe helped compose Oli Kuamo'o, a traditional Hawaiian chant to honor the voyaging canoe Hōkūle'a as it returned home to Hakipu'u after traveling the Pacific. This oli is a call to action. It describes the past, present, and future, and explains that although our stories will always be intertwined, the times are changing. It came to mind immediately when pondering how one could even begin to honor a man like Jon Markham Van Dyke.

Iwi o ku'u iwi	Bones of my bones
Eō!	Here I am!
Koko o ku'u koko	Blood of my blood
Eō!	Here I am!
Pili ka mo'o	Our stories are one
Ā mau loa!	Forever and ever!
Kū ka manawa hakipu'u	Times are changing
Kū![2]	Rise up!

JVD, as most of us called him, was larger than life. A Professor at the William S. Richardson School of Law since 1976, and legal scholar and litigator on everything from Constitutional Law and Native Hawaiian Rights to the Law of the Sea, he touched countless lives. Given all that he stood for and accomplished, the two years that I spent working with him as a Research Assistant (RA) and the five or so years that we toiled side-by-side on impact litigation to restore stream flow to communities in Nā Wai 'Ehā, Maui, seems trivial. Upon reflection, I am deeply grateful that our mutual commitment to seeking justice for underserved communities, and Kānaka Maoli[3] in particular, allowed me to share in a small part of his impressive story.

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[1] "Ā mau loa" is a line from Oli Kuamo'o, which means "forever and ever." Oli Kuamo'o, Hakipu'u 'Ohana (1995) (on file with author; translation by Kahikūkalā Hoe).

* Assistant Professor, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law. Mahalo piha to Kahikūkalā Hoe for his enduring support and aloha, as well as assistance with translations and research.

[2] Oli Kuamo'o, *supra*, note 1. Oli Kuamo'o is usually recited as a group with an alaka'i (leader) calling out the initial lines of the chant and the collective responding.

[3] Kānaka Maoli refers to the Indigenous population inhabiting Hawai'i at the time of

Our paths first intersected in the Spring of 1996, when a small type-written notice was posted on the Law School bulletin board seeking RAs to help research and draft what would become *Who Owns The Crown Lands of Hawai'i*.[4] I couldn't believe it. That was precisely why I had come to Law School: to learn about and help craft legal redress for my people while also framing these issues from a Kanaka Maoli perspective.

Rhoda Kealoha Spencer and I worked with JVD through the summer researching and drafting one chapter each week. It was a blistering pace, but we were up for it. When school resumed, I continued working with JVD on the book until I graduated. Although I learned a ton about the history of our Crown Lands and legal research and scholarship in general, what stands out most relates less to legal issues and more to personal ones.

JVD truly valued our mana'o[5]—both as law students and as Kānaka Maoli—and considered and incorporated our suggestions about the historical, cultural, and legal context and analysis. He invited us to participate in strategy meetings with the project's funder, Dwayne Steele, so that we could collectively craft issues and perspectives. He was also extremely generous. When the project began, JVD committed to having Rhoda and me co-author the book. And although it was in production for over a decade, he was determined to list us as co-authors. I declined because although I had invested years of work and drafted various sections, JVD had invested much more. He contacted me several times and attempted to convince me to put my name back on—especially because I was transitioning to the Law School and co-authoring a book was helpful for an academic career. That's just the kind of person that he was: a mentor; a respectful colleague; and magnanimous with his work. And that's just one example.

In 2004, while I was working full-time at Earthjustice, we filed a petition with the State Commission on Water Resource Management (Water Commission) on behalf of a coalition of grassroots groups to restore continuous mauka to makai flow (from the mountains into the ocean) to communities whose streams were drained dry to subsidize sugar cultivation on Maui's central plain.[6] The case raised issues of environmental justice,

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Western contact in the late 1700s without reference to blood quantum. *See* MARY KAWENA PUKU'I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (1986) [hereinafter HAWAIIAN DICTIONARY] (noting that Kānaka Maoli historically referred to a "full-blooded Hawaiian person").

[4] *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008).

[5] HAWAIIAN DICTIONARY, *supra* note 3, at 236 (mana'o means "thought, idea, belief, opinion, [or] theory[.]").

[6] For more on Nā Wai 'Ehā see D. Kapua'ala Sproat, *Wai Through Kānāwai: Water*

cultural sovereignty, and the public trust, and will both shape the future of water law in Hawai'i and decide the fate of Central Maui communities, including whether Waihe'e, Waiehu, 'Īao, and Waikapū Streams will be restored to support public trust and other community uses or will continue to be hoarded by two privately-held companies. The Water Commission's 2010 decision, which was highly contentious and politicized, was reversed by the Hawai'i Supreme Court in 2012 and is still on remand.[7]

In 2007, an extensive administrative trial began, and JVD was appointed Special Deputy Corporation Counsel for Maui County. Pamela Bunn, the attorney for the Office of Hawaiian Affairs in the proceeding, reflected:

> The opportunity to work alongside JVD on the Nā Wai 'Ehā litigation was a rare gift. It goes without saying that JVD's exceptional legal scholarship in the areas of water law and Native Hawaiian rights, and his decades of litigation experience, were huge assets on our side of the case. What was more remarkable to me and his other former students in the lawsuit was his generous spirit and infectious confidence. Despite his world-renowned expertise, JVD treated us as respected colleagues and genuinely meant it. He never doubted that we were up to the task, or that we would ultimately prevail. It was his unshakable confidence in us, even more than his sage legal and practical advice, that made us better lawyers.[8]

Jane Lovell, former Maui County Deputy Corporation Counsel, shared:

> [A]s time passes, it will not be Jon's prodigious professional accomplishments or scholarship that I will remember most. Instead, my lasting memories will be of Jon's kind and generous heart, and his wry sense of humor. I was honored to be Jon's co-counsel in the Nā Wai 'Ehā litigation, but was even more fortunate to be Jon's student, colleague, and friend.[9]

I'll always remember JVD walking into the hearing room with bottles of orange juice or soda in his pants' pockets and a kapa portfolio from the South Pacific. Always unassuming and smiling, with a kind word or compliment about how you handled a witness or issue – no matter what time of the day it was; or, whether it was the first week or tenth month of

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for Hawai'i's Streams and Justice for Hawaiian Communities, 95 MARQ. LAW REV. 127 (2011).

[7] *See* In re 'Īao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu, 'Īao, and Waikapū Streams Contested Case Hearing, 128 Hawai'i 228, 287 P.3d 129 (2012).

[8] E-mail from Pamela Bunn, Attorney, Alston Hunt Floyd & Ing, to author (Apr. 26, 2012, 7:40 HST) (on file with author).

[9] E-mail from Jane Lovell, Deputy Corporation Counsel, County of Maui, to author (Apr. 20, 2012, 15:32 HST) (on file with author).

trial. He brought a higher level of civility and aloha and could extract concessions in his own unique way because of his deep respect, style, and grace.

Both in Nā Wai 'Ehā and beyond, as a Kanaka Maoli, I am deeply grateful for JVD's work on behalf of our natural and cultural resources, not to mention our inherent rights and sovereignty. Though we now have academic centers dedicated to Native Hawaiian Law and attorneys and scholars specializing in these issues, as Former Governor John Waihe'e III pointed out during his December 2011 eulogy, JVD brought legitimacy to our issues when few were willing to stand up on our behalf.

Now that JVD has left us, we must continue to stand up on behalf of Hawai'i's Indigenous People and resources and the things that make these islands truly special. In much of the same way that Oli Kuamo'o is a call to action, inviting supporters to rise up, my tribute to JVD will not be in my memories of time spent working with him on projects or litigating cases. My tribute to JVD will be in my work and scholarship on justice issues ā mau loa, forever and ever. Although he leaves rubber slippers that are impossible for any one person to fill, collectively, all of us who have had the great privilege of sharing his story and benefitting from his generosity and investment in us must carry on this work and legacy ā mau loa. Kū ka manawa hakipu'u; Kū![10]

[10] "Kū ka manawa hakipu'u; Kū" is from Oli Kuamo'o, and means "times are changing; rise up." Oli Kuamo'o, *supra*, note 1.

A Pacific Man

Judge Richard Clifton*

Webster's Third New International Dictionary defines "pacific" with the synonyms "conciliatory," "peaceful," "calm," "tranquil," and "peaceable."[1] All of those descriptions applied to Jon Van Dyke. So did "Pacific," in its capitalized form.[2]

Most of Jon's professional career was spent in the Pacific. After five years at Hastings College of Law in San Francisco, on the edge of the Pacific Ocean, he moved to Honolulu and the University of Hawai'i in 1976, and Hawai'i remained his home for the rest of his life.

Jon developed a deep interest in the Pacific region, and he pursued that interest in many ways. He helped develop and disseminate a Model Human Rights Charter for the Pacific Islands region. He taught at educational programs for judges in Micronesia. He worked to prohibit the dumping of radioactive waste in the South Pacific. He wrote about and participated in many conferences regarding the Law of the Sea Convention. He worked with the East-West Center and the Center for Pacific Island Studies at the University of Hawai'i and served on the Editorial Board of the Pacific Islands Monograph Series published by the University of Hawai'i Press.

I met Jon when I started teaching at the University of Hawai'i School of Law as an adjunct professor in 1979, and it did not take long to appreciate the reasons he was so respected by students and faculty colleagues alike. I got to know him on a more personal level some years later, though the Pacific Judicial Conference.

The conference first met as the South Pacific Judicial Conference in 1972, at a time when many Pacific states were becoming independent. It has, every two or three years since then, gathered chief justices and other judges from nations and states across the Pacific to discuss subjects of common concern. Those subjects have included the challenges of melding native values with Western legal concepts and doing so through court structures mostly inherited from colonial nations, of operating judicial systems in Pacific states with few law-trained judges and lawyers and with limited financial resources, and of maintaining judicial independence.

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* Richard Clifton is a U.S. Circuit Judge, serving on the U.S. Court of Appeals for the Ninth Circuit. He is a member of the Ninth Circuit Pacific Islands Committee, a delegate to the Pacific Judicial Conference, and has twice served as an acting associate justice of the High Court of American Samoa, Appellate Division.

[1] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1616 (1981).

[2] *See id.* (defined as "of, relating to, bordering on, or near the Pacific Ocean.")

A few years ago, the Ninth Circuit Pacific Islands Committee, of which I am a member, decided that it would be useful to record a history of the conference, before the memories of another generation of participants were lost to time. Jon volunteered to take on the project. He reviewed the records of past conferences, interviewed many who had attended as delegates, and attended three conferences himself, speaking with many participants at each of them.

The history he produced was published and has been distributed to courts and law libraries across the Pacific.[3] It will be of great value for years to come. It provides a narrative history of the conference and its first eighteen sessions, from 1972 through 2009. It describes judges responsible for developing and strengthening independent judiciaries in their home states, whose stories can serve as models for their successors and for others elsewhere in the Pacific. And, perhaps most importantly, it identifies common concerns discussed repeatedly over the years, such as how to maintain judicial independence, train lay judges, and integrate indigenous and Western concepts. On each of those subjects and more, it collects observations made by various participants at many different conferences, distilling and recording wisdom for the use of future generations.

I was a delegate to the conferences Jon attended. In addition to attending the formal conference sessions, along with other conference delegates and Jon's wife, Sherry Broder, we explored the islands where the conference met and regularly dined together. He was a great traveling companion.

More importantly, I was struck by the high regard in which Jon was held by the judges of other Pacific Island states. He was already known by many of them through his previous work, and others came to know him better from his participation at the biennial sessions of the conference. They appreciated him not only as a generous and thoughtful scholar and a delightful dinner companion, but also as someone who worked to appreciate their perspectives. Jon understood that the Pacific Islands had their own values and customs, and that, to be successful, their legal systems had to come from within, incorporating traditional values and customs under the leadership of Pacific Islanders themselves. He contributed his wisdom and energy to assisting those efforts.

Jon Van Dyke will be greatly missed, but his legacy–a legacy that extends across the Pacific–will endure.

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[3] *See* Jon M. Van Dyke, *The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific*, 22 WESTERN LEGAL HISTORY 127 (2009).

Jon Van Dyke: An Officer of the Court

Judge David Alan Ezra*

I met Jon Van Dyke in 1978, the first year I began teaching at the University of Hawai'i William S. Richardson School of Law. After we were introduced to each other, I asked him for advice about teaching my remedies class. He invited me to his office, where he provided me with invaluable advice on how to teach a law school class. That began a wonderful friendship and was the first of innumerable conversations that we shared over the next nearly thirty-four years.

Although Jon was a beloved and incredibly brilliant law professor, he was also an excellent, accomplished litigator who held a deep concern for the rights of those less fortunate who might not otherwise receive representation. He and his wife, Sherry Broder—who in her own right is a superb litigator—made an incomparable team. Individually and together, Jon and Sherry made a profound impact on the legal landscape in Hawai'i and beyond.

I served as the presiding judge over some of Jon's most important cases, which held significant implications in areas such as Native Hawaiian rights, environmental law, and the First Amendment.[1] He was a pleasure to watch in the courtroom. Jon possessed a low-key, quiet demeanor, but he also had a real command of the courtroom. Although much hung in the balance in his cases, it was clear that Jon was not intimidated by the process. It was also equally clear that he respected the process. He represented his clients with great zeal but never resorted to hyperbole or exaggeration.

There was no question that Jon took his work as a lawyer very seriously. Jon never relied on his reputation or his previous accomplishments—or his friendship with a judge—to carry his cases. Each time he stepped into my courtroom he was well-prepared; his words were deliberate and persuasive, his arguments solidly grounded in the law. The Court could count on Jon to be upfront about cases adverse to his client's position, as lawyers are required to do. Indeed, Jon was truly an officer of our federal court in the best sense of that commission and a man of impeccable integrity.

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* United States District Judge for the District of Hawai'i, Chief Judge Emeritus; University of Hawai'i at Mānoa, William S. Richardson School of Law Adjunct Professor.

[1] *See, e.g.*, Rice v. Cayetano, 941 F. Supp. 1529 (D. Haw. 1996); Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu, 345 F. Supp. 2d 1123 (D. Haw. 2004), *aff'd*, 448 F.3d 1101 (9th Cir. 2006), *opinion amended and superseded on denial of reh'g*, 455 F.3d 910 (9th Cir. 2006).

Above all, Jon was a genuinely decent person and a true gentleman. He treated others with great kindness. Jon was never one to play favorites and believed in treating people fairly. In a profession typically known for great egos, Jon—despite his tremendous brilliance and achievements—remained sincere, generous, and humble.

I often think of Jon, particularly when I'm working on a case that poses an interesting constitutional law question. I sometimes wonder what he would think, and I miss our pleasant conversations.

Jon worked tirelessly to improve the world for those around him, and he did it with grace, humility and respect. I am honored and grateful to have known him, professionally and personally, and I deeply appreciate—as do so many—his work as a true officer of the court.

Jon Van Dyke: Professor, Colleague, Attorney, Friend

Associate Justice Sabrina S. McKenna*

Jon Van Dyke will undoubtedly be remembered for his role in shaping Hawaii's history—a history he embraced and protected through his work and personal passion.

I had the privilege of knowing Jon Van Dyke as professor, colleague, attorney, and friend.

Professor Van Dyke taught the required Constitutional Law I course during the fall semester of my second year of law school. Even before the days of his legendary organized Power Point presentations, Professor Van Dyke had a way of captivating us with his gentle but logical, orderly, and piercing questioning of our statements and assumptions. I looked forward to each class with the anticipation of not knowing what his next question would be or where his inquiries would lead. I made sure I was well prepared just in case I was the student that he would call upon with the mystery question. It was his questions that made me realize how much our perspectives were deeply rooted and formed by our own backgrounds and experiences. His non-judgmental and quiet acceptance of our varying viewpoints, however, simply amazed me. While my classmates and I may have been a bit judgmental of each other's comments, he would observe and listen with that quiet smile, then ask yet another question that had no right or wrong answer.

After that first required course, I wanted to learn as much as I could from this legal scholar. So, I took his other courses: Constitutional Law II and Public International Law.

As a law student, I also had the fortune of working with Professor Van Dyke on publishing some of his scholarly writing. Not only did his intellect, attention to detail, and writing ability amaze, but I was astounded to realize that his scholarship encompassed so many areas of the law. The breadth and depth of his scholarship is simply unparalleled. Titles of the books he authored include: *North Vietnam's Strategy For Survival*,[1] *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*,[2] *Sharing the Resources of the South China Sea* (co-authored),[3] *Who*

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* Associate Justice, Supreme Court of Hawai'i.

[1] JON M. VAN DYKE, NORTH VIETNAM'S STRATEGY FOR SURVIVAL (1972).

[2] JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977).

[3] MARK J. VALENCIA, JON M. VAN DYKE & NOEL A. LUDWIG, SHARING THE RESOURCES

Owns the Crown Lands of Hawai'i?,[4] *International Law and Litigation in the U.S.* (co-authored),[5] and *Checklists for Searches and Seizures in Public Schools* (co-authored, updated annually).[6] He also wrote or edited hundreds of additional books and articles on many different areas of the law, including the Law of the Sea. He was a prolific and internationally respected scholar.

From my infancy in the legal profession, Professor Van Dyke taught me so much about various attributes of legal professionalism: preparation, critical thinking, open-mindedness, attention to detail without losing sight of the big picture, the importance of seeing various dimensions of an issue, civility, kindness, and finally, that it was our duty and obligation as Richardson lawyers[7] to do what we can to make the world just a little bit better for those powerless to speak. When it came down to it, Professor Van Dyke made me really think about what I could do to make the world just a little more fair, more just, more *pono*.[8]

I next came to know Jon Van Dyke as a colleague, when I joined the faculty of the law school in 1991. At that level, I witnessed how he championed diversity in the faculty, how important he thought it was for students to be exposed to faculty with differing viewpoints and backgrounds, just as he had taught us as law students the importance of respecting differing viewpoints. I remember how nervous I felt when he came to evaluate my teaching, and how much relief I felt when he took the time to come speak to me afterwards, with that kind, gentle smile, to tell me that he thought I had done well. As a senior colleague, Jon Van Dyke taught me the importance of mentoring those who come after you, of encouraging openness in discourse, of the sheer power of kindness.

After I became a judge, I came to know Jon Van Dyke, esquire, the outstanding attorney. His knowledge of constitutional law, Native Hawaiian law, and human rights law, as well as the Law of the Sea, was unparalleled. His advice and advocacy on legal issues was legendary. Most importantly, through his advocacy, he showed me the importance and

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OF THE SOUTH CHINA SEA (1997).

[4] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008).

[5] JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. (3rd ed. 2009).

[6] JON M. VAN DYKE & MELVIN M. SAKURAI, CHECKLISTS FOR SEARCHES AND SEIZURES IN PUBLIC SCHOOLS (Thomson/West 2004).

[7] An affectionate and locally used term for graduates of the William S. Richardson School of Law, at University of Hawai'i at Manoa.

[8] A Hawaiian word defined as goodness, uprightness, morality, moral qualities, excellence, well-being, and prosperity, among others. MARY K. PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (rev. ed. 1986).

value of taking on cases and causes that seemed almost impossible at first blush, that an attorney's sheer tenacity, belief in the justness of a cause, knowledge, and willingness to work hard can overcome odds that appear insurmountable, and that an attorney's advocacy can actually effectuate positive legal and social change. He was the consummate counselor and advocate.

But through it all, what I will miss the most is Jon Van Dyke, my friend. Jon was always there when I needed him, with his gentle smile, his kind words, and his caring and non-judgmental manner. Even if he didn't agree with everything I did, he was supportive, and was there when I needed an ear or a hand; he was a true friend, and I miss him so much. The tears still flow.

> With every friend I love
> who has been taken into the brown bosom of the earth
> a part of me has been buried there;
> but their contribution to my being
> of happiness, strength and understanding
> remains to sustain me
> in an altered world.[9]

Jon, you sustain and live on through all of us who had the honor and privilege of knowing you, for you were a true friend to all of us. We will never forget you. *Mahalo nui loa.*

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[9] HELEN KELLER, THE OPEN DOOR 14 (1957).

The Palau Judiciary Remembers Professor Van Dyke

Chief Justice Arthur Ngiraklsong* & Associate Justice Lourdes Materne**

In December of 2006, we at the Palau Judiciary celebrated our twenty-fifth anniversary under the Constitution. As we were preparing for our silver anniversary, we knew we wanted to organize a first-rate legal education program. The choice of who were to become our main presenters was easy.

Professor Jon Van Dyke was well known the world over and especially in Micronesia. He had done serious legal work in the Republic of the Marshall Islands, the Federated States of Micronesia, and in the Republic of Palau. He was incredibly well-informed of the development of various judiciaries in Micronesia and in the Pacific. We also knew about his wife, Sherry P. Broder, and her extensive litigation on behalf of the indigenous peoples of the Pacific.

The Palau Judiciary, like many judiciaries, has limited funding. The Chief Justice faced a challenge: how could we get these two world-class professionals to participate in the silver anniversary of the Palau Judiciary without having to pay them? The Chief Justice felt that the only way to know would be to ask Jon and Sherry if they would share their expertise with us on our twenty-fifth anniversary without compensation.

They both readily agreed. We were extremely touched by their kind generosity.

Jon's hour-long presentation was on the development of the jurisprudence of the Palau Judiciary.

Although we judges know the development of certain issues in our cases, Jon skillfully painted a complete picture of how our jurisprudence has developed. He pointed out the achievements and challenges of our jurisprudence and left us inspired to do better.

During the presentation, Jon's humanity came across clearly. He did not discuss legal issues as merely written decisions, but he knew the parties, their supporters and the circumstances surrounding the litigation. For a non-Palauan and non-resident to have this kind of intimate and complete knowledge on developing legal issues was—and is—impressive.

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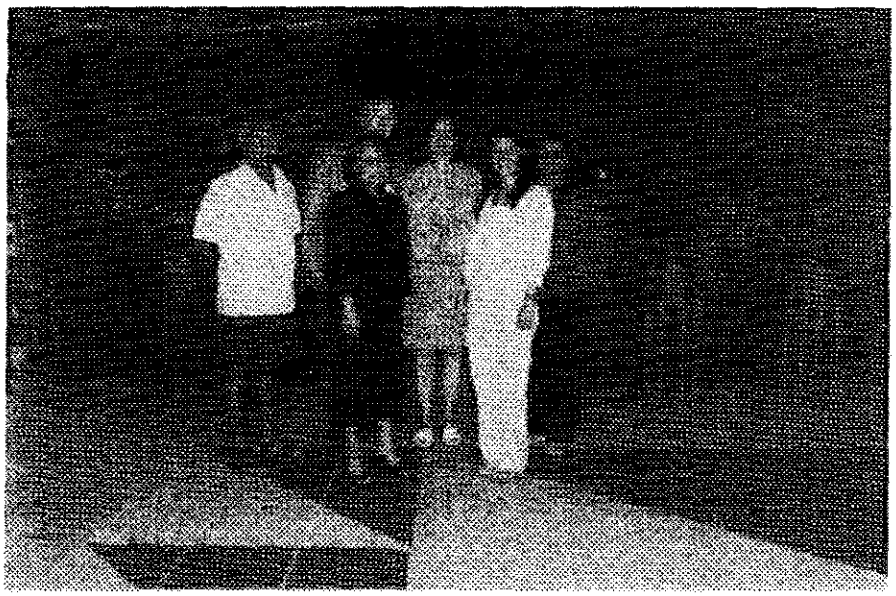
* Chief Justice, Supreme Court, Republic of Palau.

** Associate Justice, Supreme Court, Republic of Palau and a 1995 graduate of the William S. Richardson School of Law.

Sherry's presentation on the protection of the rights of the indigenous peoples in the Pacific touched closer to home. The drafters of Palau's Constitution were aware of the displacement of the indigenous peoples in other Pacific Islands and countries. Therefore, the drafters included provisions to protect Palauan citizens and their customs and traditions. Sherry's passion for fairness and justice revealed one of the reasons she has become a premier litigator nationwide. Protection of indigenous rights is important to us.

We are grateful that Jon and Sherry graced our silver anniversary. We were shocked and saddened with the news of Jon's passing. We are comforted that we still have Sherry. We shall always remember Jon's generosity, humanity, and his willingness to share his vast experiences in various legal fields. We in Palau shall miss a good friend.



University of Hawai'i graduates who practice before the Palau Bar. Koror, Palau, 2006.

From left to right, Oldiais Ngiraikelau (Class of 1983), Professor Jon Van Dyke, Associate Justice Lourdes Materne (Class of 1995), Sherry Broder, Senior Judge Honora Remengesau Rudimch (Class of 2000), and J. Uduch Senior (Class of 1993).

Remembering Jon Van Dyke

David D. Caron & Harry N. Scheiber

The Law of the Sea Institute and the entire community of legal scholars globally have lost a colleague of great distinction in our field with Jon Van Dyke's death. As so many colleagues and the wider audiences for his work have attested, Jon's writings, engagement in public discourse, and litigation efforts have been of far-ranging influence across a remarkable range of fields. His scholarly writing has made enduring contributions on the subjects of indigenous rights, the imperatives of multiculturalism, United States constitutional law, and international human rights. He also established himself in recent years as a major authority on Hawai'i history. His pro bono litigation, in collaboration with his wife Sherry Broder, an eminent graduate of the University of California, Berkeley, School of Law and former president of the Hawai'i State Bar, has been of great importance in the pursuit of restitution for victims of human rights violations in the Philippines and in litigation on environmental issues in the Islands and on behalf of Native Hawaiian claims.[1]

It is with regard to his great contributions to the field of ocean law and policy, however, that we are mainly concerned with in this tribute and memorial. Put simply, Jon was a giant in the field. The Law of the Sea Institute ("LOSI"), since 2002 based at UC Berkeley Law, was for many years one of the gems in the crown of the University of Hawai'i; and no one was more deeply invested personally or more influential than Jon in the important activities of LOSI at the East-West Center and the university at large. In those days, LOSI held international conferences both in Honolulu and at locations around the globe that were of a scope and magnitude that required heroic organization efforts. Jon was unstinting in his devotion to these conferences (also taking the lead in bringing papers from those conferences to publication as books). He was also dedicated to keeping the focus of conference panels, which regularly involved the most eminent diplomats and scholars in the field, upon the need for the global community's success in hammering out agreement on the Law of the Sea Convention—a treaty that was nearly a quarter century in the making, finally signed in 1982 and now in force as the basic framework of global ocean ordering.[2]

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[1] For a detailed analysis and an appreciation of Professor Van Dyke's career, *see* Harry N. Scheiber, *A Jurisprudence of 'Pragmatic Altruism': Jon Van Dyke's Legacy to Legal Scholarship*, 35 U. OF HAW. L. REV. 385 (2013).

[2] United Nations Convention on Law of the Sea, Dec. 10, 1982, U.N. Doc.

The influence of this LOSI series of scholarly and policy meetings (building on earlier efforts out of the University of Rhode Island) was truly substantial. With determined guidance from Jon and others who shaped the programs, these LOSI meetings were acknowledged then, and are recognized retrospectively, as the richest contemporary source of thoughtful, authoritative analyses of ocean law from a broad spectrum of policy perspectives. In his own various writings and commentaries at those conferences, Jon, as always, wore lightly but to great effect his depth of knowledge and profundity of analysis in his determined quest to overcome the constraints that emanated from self-interested nationalism, particularism, and Cold War divisions—and, as time went on, from the conflicts of interest between the industrialized North and the developing South. In those debates, as in controversies in other realms of law and policy, Jon's writings eloquently expressed his consistent vision of a global commons, an international order respectful of human rights, and global stake in advancing environmental and resource conservation in the name of future generations. Always at the edge of innovation, Jon was among the first scholars to focus on the importance of the precautionary principle for international environmental law in general and for ocean law in particular. His advocacy for that concept must receive much credit for attainment of the now-conventional acceptance of a precautionary approach embodied in adjudicatory decisions and ocean resource treaties of recent years.

In the last decade, since LOSI became based at UC Berkeley Law, we as its Co-Directors have come to owe an enormous debt to Jon for his invaluable intellectual contributions, his always-steady and reliable counsel, and his continued devotion to advancing the ocean law field. Not least, he has made distinguished individual contributions to our annual conferences and publications both as author and as book editor. He was consistently generous with his time, energy, and wise counsel. He gave presentations of his recent research at the LOSI cosponsored conference in Istanbul in September 2011 and as co-speaker with ourselves on behalf of LOSI at two international conferences held in Seoul, Korea in June 2011.

A special gift of Jon to UC Berkeley School of Law was his presence in the spring semester of 2011 as a visiting professor, teaching both international law and U.S. constitutional law. Typical of him, he was present and deeply engage during his time in residence at more than a dozen special seminars and conferences on the campus; and despite an unreasonably heavy schedule he prepared a paper for an international conference at the School on the subject of Japanese law that offered a

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A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982).

brilliant interpretation of Japan's adoption and adaptation of Western concepts of international law.

Even at the moment of his passing, he was working for and with LOSI in his continuing quest for international comity and forward progress in ocean law: for this tragic loss to us all occurred while Jon was participating prominently in the LOSI conference co-organized by Berkeley, Korean, Australian, and U.S. colleagues and being held in Wollongong, Australia.

Jon's death is an enormous loss not only to Sherry and their children, to whom he was so devoted, but also to his friends and colleagues. We two ourselves cherish personally the memories of so many weeks spent with him over more than twenty-five years in the pursuit of a common scholarly cause. We treasure the many experiences of visits together to other countries and cultures, and the sharing of times when his love of life, of intellect, and of nature's bountiful gifts of environment were either complements to our academic activity or a light-hearted respite from them.

In celebrating the joyful legacies that Jon Van Dyke has left us, we join the many men and women whose lives he enriched by dint of his very special gift as a teacher and of his unfailing kindness, respectfulness of others, and deep devotion to scholarship.

A Loss to the Nation and the World

Jerome A. Cohen*

Professor Jon Van Dyke's sudden and untimely passing was a shock and a grievous loss, not only for his family and friends but also for his law school, university and state. Subsequent memorials have confirmed how deeply the many aspects of Jon's life and work affected a broad range of groups and individuals within Hawai'i. From here in New York, rather than Honolulu, however, what strikes me even more is the impact of Jon's death on important national and international interests.

Perhaps foremost among the many complex foreign policy challenges confronting the United States is how to cope with a "rising China." In recent years it has become increasingly apparent that the most dangerous emerging flashpoint in Sino-American relations stems from conflicting views concerning China's maritime jurisdiction and associated territorial claims. Gradually improving contacts between Mainland China and Taiwan have reduced the immediate threat of a violent incident in the Taiwan Strait that might engulf our country in war with China. Korea problems, with their on-again, off-again multilateral security negotiations, remain full of bluster, frustration and risk, but by now seem more familiar and involve a somewhat less direct clash of Sino-American interests than those we have come to face in the South China Sea and the East China Sea.

The delineation of maritime boundaries in East Asia, the determination of sovereignty claims concerning relevant islands and the articulation of agreed "rules of the road" regarding permissible foreign activities within a coastal state's exclusive economic zone are formidable problems whose solution has thus far escaped China, its neighbors and the United States. Yet the risks of failure to resolve these problems grow daily. As the United Nations celebrates the thirtieth anniversary of the signing of its 1982 Convention on the Law of the Sea, never has that topic seemed so important to American-East Asian relations.

Regrettably, at this time of growing urgency, the United States finds itself with relatively few scholar-experts in this vital legal area, and most of those who immediately come to mind are already quite senior. The Government and a few American law firms do have some able specialists, but they are devoted, of course, to representing their clients' interests. We lack a sufficient number of independent, impartial and productive

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academics who can not only enhance our understanding of the thorny factual and political-legal issues of East Asian law of the sea disputes, but who can also contribute positive and imaginative proposals for satisfactorily addressing them. In these circumstances, Jon Van Dyke's premature departure is a serious blow.

Jon did it all. His scholarly work was well-known and highly-appreciated in both his own country and abroad. Although often focused on East Asia, his impressive books and articles also analyzed developments elsewhere and explained their relevance to the resolution of Asian disputes. Jon was a keen student of international law generally and the rich intellectual resources its diverse experiences offer for creative and previously unperceived solutions to new problems.

Jon was also a splendid teacher and speaker. Making good use of colorful maps, he could, in short compass, give even an audience of the uninitiated an accurate and interesting introduction to the most arcane topics of maritime law. Jon did not resort to bombast in his presentations, but relied on evidently comprehensive and balanced eloquence to engage and inform his listeners.

Having had the privilege of being one of Jon's teachers at Harvard Law School, I can attest that those qualities were already evident during his student days. In his rather quiet way, during his second year, Jon took an active part in the first seminar I ever taught about China and international law. I remember his intense preoccupation with the subject and his carefully considered comments in class. In my mind's eye, I can still see his final examination bluebook - in those days students still wrote exams by hand. Like the publications that would soon follow, Jon's exam told me everything I wanted to know about the questions under discussion and in a handwriting that was just as meticulously clear as his analysis.

During the past few years, as East Asian law of the sea issues became increasingly prominent, I began to seek Jon out for more than the pleasant chats we shared at occasional conferences and visits. We started to exchange ideas and hopes that, by working together, we might stimulate greater efforts to reduce international misunderstanding and the likelihood of serious conflict among the United States, China and others over law of the sea issues. Jon, in his customarily modest and respectful way, became my mentor. He patiently answered my endless questions and suggested possible approaches to furthering our cooperation.

In late 2010, Jon and I published a series of four "op-eds" in Hong Kong's *South China Morning Post* and, in Chinese, in Taiwan's *China Times*, setting forth the major legal issues involving China and the sea.[1]

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[1] For English versions, *see* Jerome A. Cohen & Jon M. Van Dyke, *High Stakes*, SOUTH

Just before his death, we expanded those pieces into an essay for a forthcoming volume on the law of the sea. We were planning to build upon this effort, and Jon was scheduled to come to New York this past February to lead a discussion at the Council on Foreign Relations and to teach some classes in my current seminar on Chinese attitudes towards international law. His 2010 presentation at a symposium on China, sponsored by New York University School of Law's U.S.-Asia Law Institute, had left a strong impression.

Jon was an excellent organizer as well as scholar and teacher. I had an opportunity to witness and benefit from that skill when we joined with the Mike Mansfield Foundation to hold an international conference in Hong Kong concerning China and the law of the sea in May 2011. Jon knew everyone in this field, quickly identified the key potential participants and persuaded many of them to take part in what proved to be a very rewarding exercise, one that we hoped would launch continuing exchanges with experts in the region.

That conference, like our other cooperation, amply demonstrated personal qualities that admirably equipped Jon for his role in fostering better relations with East Asia. His objectivity shone through every session, and his remarks always struck a nice balance between the demands of modesty and those of thorough discussion. The responses of the conferees–from China, Taiwan and other jurisdictions in the region–made clear both their respect and affection for him. This was the accumulation of the many previous meetings that they had shared as well as Jon's scholarly achievements. Jon was a tireless believer in exchanging views with fellow specialists, and it was characteristic that he spent his last days taking part in a law of the sea conference in Australia.

To say that Jon will be missed is a gross understatement. He was a model for the new generation that we need to train to succeed him. Fortunately, his beloved wife, Sherry Broder, herself a distinguished lawyer who closely cooperated with Jon in research, writing and professional pursuits, will continue his invaluable work in collaboration with other colleagues in Hawai'i and elsewhere. That will be the most fitting tribute we can pay this remarkable, gentle person.

CHINA MORNING POST, Nov. 24, 2010, *available at* http://www.cfr.org/china/high-stakes/p23594; Jerome A. Cohen & Jon M. Van Dyke, *Limits of Tolerance*, SOUTH CHINA MORNING POST, Dec. 7, 2010, *available at* http://www.cfr.org/china/limits-tolerance/p23593; Jerome A. Cohen & Jon M. Van Dyke, *Lines of Latitude*, SOUTH CHINA MORNING POST, Nov. 10, 2010, *available at* http://www.cfr.org/japan/lines-latitude/p23364; Jerome A. Cohen & Jon M. Van Dyke, *Finding Its Sea Legs*, SOUTH CHINA MORNING POST, Oct. 26, 2010, *available at* http://www.scmp.com/article/728520/finding-its-sea-legs.

Jon: A Visionary and a Mentor

Duncan E.J. Currie*

My earliest professional memories of Jon Van Dyke step back to a seminar jointly organized with Greenpeace, Freedom for the Seas in the 21st century in 1990. I was the head of the Greenpeace International legal department, and we jointly organized the seminar to re-position international thinking on the law of the sea. This was a typical forward thinking initiative of Jon's, involving luminaries such as Arvid Pardo and Elisabeth Mann Borgese, and its theme was a quarter century ahead of its time. Now, in 2012, the world is getting ready to negotiate an implementing agreement. With other scholars, we have again been exploring reforming high seas governance; in particular the concepts of freedom for the seas instead of freedom of the seas, stewardship of the oceans instead of the right to exploit them, and how to protect marine biodiversity in the face of new and unrelenting threats to the oceans. Jon is sorely missed in all of these endeavors, and the most recent publication we have dedicated to Jon.

Jon was always rigorous in his analysis, advanced in his thinking and prompt with his advice. I can think of no other law professor or legal practitioner who has made such a mark on international oceans law. Jon was tireless in his defense of the oceans, and never missed an opportunity to weigh in on a case or conference that could advance ocean conservation. For over twenty years, Jon advised Greenpeace and other environmental organizations and governments, particularly Pacific Island States, on protecting the seas, on issues from nuclear dumping, whales, fisheries, toxic shipments and nuclear transports, to climate change.

Most memorable to me was a tour he and I undertook of the Pacific Islands, briefing governments on their legal options in response to a threat of shipments of radioactive material through their waters. We had a punishing schedule with long delays and longer meetings, but Jon always found the time to use the snorkel and mask that he always packed to investigate the oceans he spent his life defending.

Jon and I worked together at conferences and advising and cajoling governments from Mauritius to Vanuatu, and most recently from Paris to New York. He shared the podium in a panel in Paris with the President of Kiribati, President Anote Tong, and with his wife, Sherry Broder, which ensured that the panel was a success. Recently, Jon and I participated in a brainstorming session in New York on climate change and the oceans. I

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* LL.B. (Hons) LL.M.

last saw Jon when in Honolulu at a fisheries meeting, and in typical fashion, he and Sherry invited me and other delegates to his home and we spent the evening discussing recent developments and initiatives. Little did I know that it was the last time I would see Jon. Jon's dedication, intellectual rigor, legal acumen, and helpful, generous personality will always be an inspiration to me. More than a mentor and trusted counselor, Jon's legacy will live on, in the oceans and in the islands, as well as in our hearts.

Professor Jon M. Van Dyke: Simply a Giant

Seokwoo Lee*

On November 7, 2011, Prof. Van Dyke wrote an e-mail to me with the following:

> Hi, Seokwoo -- I wanted to give you an update on our various projects. My father had a stroke ten days ago, and so I went to Florida to be with him -- he never regained consciousness and passed away on Monday -- that has been a deeply emotional situation for me -- he was 96, but we were close, and I will miss him a lot. My brother and sister and one son were together in Florida for the passing, which made it a little easier to deal with this difficult situation. After he died, I came back to Honolulu to teach a class and then went on to Vietnam for a meeting on the South China Sea. This morning I will fly from Hanoi to Shanghai and then drive to Hangzhou for a meeting on the extended continental shelf. Back to Honolulu on Thursday. Anyway, progress is being made on the Honolulu proceedings, but more slowly than hoped. Realistically, I will probably have to wait until after the semester classes are over (at the end of November) before I can make sure all the papers under my responsibility are properly ready for publication, which means going into December. But they are coming along and should be fine. How are yours coming along, and what is your timetable looking like? When that project is done, I will work on the long-delayed single-unit paper. I have only one class to teach in the spring semester, so I should have time to make progress on my writings. Also, has any progress been made on the planning for the Yeosu conference -- are the dates firm on that? Any progress on Yellow Sea papers? I hope you and Yoon are doing well, and I will look forward to seeing you in Australia. Aloha, Jón[1]

This e-mail indicates who Professor Jon Van Dyke was, and the kind of relationship I have had with him. He was a man who was always traveling all over the world for conferences, research projects, and teaching engagements, but most of all, he put his family first.

The day he passed away in Australia, we spent the entire day together from breakfast to dinner until he said "good night, see you tomorrow" before we parted ways for the evening. As always, he smiled to me as he touched me on the shoulder when we exchanged our good night greetings. That was the last moment I had with him. He looked a little bit tired, but I did not detect anything unusual.

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* Professor of International Law, Inha University, Korea.

[1] E-mail from Jon Van Dyke to author (Nov. 7, 2011) (on file with author).

At a separate lunch meeting with him that same day, we discussed many issues, including a couple of research projects and conferences we were both involved in. That was a very pleasant meeting, indeed.

As usual, we started to talk about our families. He asked me about my wife and dog. He then told me about the recent death of his father as he mentioned in his email to me, and his wife and three children. There were lots of smiles and laughs in that conversation.

We then talked about our research projects and conferences. One of the conferences we discussed was the workshop to celebrate his 70th birthday in April next year. He was a bit reluctant to put together that conference, as he believed he was still young. It seems to me that the fact that his father passed away at the age of 96 gave him a certain confidence for his own longevity. When we discussed finalizing the schedule for the 2012 Law of the Sea Conference in May in Seoul, he made clear to me that he had to manage his schedule because he very much wanted to participate in his daughter's graduation ceremony in New York which was supposed to be held around the same time.

During the last ten years, I have had the privilege to work with Professor Van Dyke. Not only on territorial and boundary issues in international law and the law of the sea which I have a special interest in, but also various issues which we both share which I have benefited greatly from his guidance and wisdom. Last year we met five times in five different places around the world: Hong Kong in May (Mansfield Foundation); Taipei, Taiwan in May (International Law Association Asia-Pacific Regional Conference); Seoul, Korea in June and July (The SLOC Study Group-Korea's 30th Anniversary International Conference, and The 2011 Korean Society of International Law's International Conference); Istanbul, Turkey in September (Center for Marine Law and Research, Istanbul Bilgi University); and Wollongong, Australia (Law of the Sea Institute Conference). This is about the average number of meetings we have had together each year.

However, I must admit that I am not the only one in this regards. Almost, without exception, all of the international law scholars in Korea have met with him at one time or another. Many in the Korean academy have conveyed their deepest condolences to his family members through me after hearing the news of Professor Van Dyke's unexpected passing.

He was an academic icon of his generation and to us, as a very courageous scholar fighting constantly for people who suffered from colonialism, dictatorships, and climate change. He will be remembered as a voice for the voiceless. We will miss him very much.

"Here is a first cut at a table of contents for our book. Your suggestions for improvement would be welcome. Jon" This is the last e-mail

communication I had with him, which was sent to me at the conference venue after our lunch meeting of November 29, the last day he was with us. His uncompleted book project is being undertaken by his wife, Ms. Sherry Broder.

A Tribute to My Dear Friend Jon Van Dyke

Ved P. Nanda*

On the telephone was Dean Avi Soifer and I could not fathom the gist of what he was saying. Jon Van Dyke, he said, had passed away. It was hard for me to believe, as it must have been for all those who knew Jon, a man full of energy and tireless in the pursuit of good causes. He seemed in such good health as I saw him last summer when we co-taught international human rights law in Europe. My wife, Katharine, daughter, and I, along with Jon and his wife, Sherry Broder, were together in Paris for three fabulous days of sightseeing, sumptuous dining—the whole Paris experience—and catching up on our friendship.

I had just returned from Singapore when Dean Soifer called. I was testifying there in a class action lawsuit that Sherry and Jon had initiated in Hawaii against Ferdinand Marcos (and later his estate), on behalf of 10,000 human rights victims of the martial law period.[1] The Singapore National Bank had several million dollars of Marcos estate assets that Jon, Sherry, and Robert Swift, their co-counsel, were attempting to collect in execution of their $2 billion judgment awarded by a Honolulu jury in 1994-95.[2]

I have known Jon for more than four decades, since 1971 when he was working as a visiting fellow at the Center for the Study of Democratic Institutions in Santa Barbara. He was a shining star even then, at such a young age, for his work on constitutional issues. Subsequently, as he and Sherry moved to Hawai'i, we were constantly in touch, mostly by phone. Our common interest in international law and the Law of the Sea[3] were professional links, but a more important link was our unqualified passion for human rights and my admiration for his selfless service to victims of human rights abuses. At Jon's insistence I decided to accept Hawai'i's invitation to teach at the Richardson School of Law as a distinguished visiting scholar for a year. That year was magical. Jon was actively involved with the Spark S. Matsunaga Institute for Peace, East-West

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[1] *See* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

[2] *See In re* Estate of Marcos, 88 Haw. 148, 963 P.2d 1124 (1998). The Supreme Court of Hawai'i ultimately affirmed the circuit court's prior dismissal of the case for lack of jurisdiction. *Id.* at 158, 963 P.2d at 1134.

[3] United Nations Convention on Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982).

Center, and the Law of the Sea Institute at the University. And he introduced me to all these institutions, in whose activities and events I participated and enjoyed immensely.

Jon and I planned the trajectory of our work: conferences, writing, and teaching together. He was then working on a Charter on Human Rights for the Pacific Region. We had extensive discussions, often late into the evening, on the scope of such a charter and how it would complement other similar regional instruments. When Jon and Sherry were working on the *Marcos* case, we had several conversations on the act of state doctrine, sovereign immunity and head of state immunity, and the arguments they would use in court.

Among memorable conferences where we both spoke, frequently organized by one or the other of us, I vividly recall those on ocean law and indigenous rights in Hawai'i, on international law in India and Denver, and on international nuclear law in Austria. For several summers, we taught a course in international human rights law together in Hawai'i and were joined by Sherry Broder in 2010, which was the last year we taught in Hawai'i. We also taught international human rights law together in a course for Penn State University Law School in Europe 2011, and in 2009 we were in India, co-teaching international environmental law.

Among other projects that we worked on, Jon and I co-edited a special issue of the *Denver Journal of International Law & Policy* in 2006 on nuclear activities, with each of us contributing an article as well.[4] Jon delivered the Myres S. McDougal Distinguished Lecture in International Law at my University of Denver Sturm College of Law and we were also privileged to have him speak at several other conferences. Although we had discussed the possibility of collaborating on a book, we could not find the time to bring our plans to fruition.

Jon was so passionately involved with issues of Hawaiian rights. I assisted him and Sherry on a case they were litigating in Hawai'i with a deposition on indigenous rights issues via video conference from Denver. I also spoke at a conference organized by Jon in Honolulu on special conflict resolution approaches of indigenous communities around the world. It was a privilege to support their efforts in these causes. Jon's award-winning 2008 book, *Who Owns the Crown Lands of Hawai'i?*,[5] exemplifies his deep commitment.

Jon had such a wide range of special interests—constitutional law, international law, environmental law, human rights, and ocean law—and he

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[4] Ved P. Nanda & Jon M. Van Dyke, *International Nuclear Law: An Introduction*, 35 DENV. J. INT'L L. & POL'Y 1 (2006).

[5] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008).

was able to attend to them all, skillfully and efficiently, often at the cost of taking adequate care of himself. His publications—books, scholarly articles and chapters—attest to the depth and breadth of his scholarship. However, to single out one special area of his expertise, his scholarly writings on ocean law stand out as among the most valuable contributions to the literature. The Jon Van Dyke Institute of International Law and Justice, which Sherry is building and nurturing with exemplary energy and skill, is a fitting tribute to Jon.

Jon will be ever remembered for his intellect, his dry wit and humor, his smile, and his generosity. As a revered teacher, as an award-winning scholar, and as a consummate advocate, he had few equals. He has inspired so many students who consider him their mentor, and touched so many lives. For me, he embodies the best human qualities and I am honored to have had him as a dear friend.

I will always miss him.

Jon Van Dyke: A Personal Reflection from Turkey

Nilufer Oral*

I first met Jon in 2001 during a symposium in Istanbul on regional seas. Among the many participants at the meeting Jon left a special impression on me, one that was more than an intellectual admiration. Jon had a sincere modesty and friendliness that was only accentuated by his trademark Hawaiian print shirt. I had no idea then that ten years later the last time we would meet would be at another symposium in Istanbul.

I knew Jon through the prism of the blue seas and oceans. He was well known in Turkey for his work on maritime delimitation issues, of particular importance because of the Turkish-Greek dispute in the Aegean Sea. I later learned that his link to Turkey began when he was a child and lived in Ankara during the period his father was working for USAID. Jon took particular pride in knowing that his father's work had contributed to Turkey's development. Like his father Jon would also contribute to Turkey, albeit in a different capacity. And it would be one of my great privileges to work with him.

On May 31, 2010, in the early hours of dawn, six vessels carrying hundreds of volunteers from different countries and transporting humanitarian aid to the Palestinians in Gaza were attacked by the Israeli Defense Forces while in the high seas of the Mediterranean Sea. Eight Turkish nationals and one U.S. citizen of Turkish descent on board the *Mavi Marmara* passenger ship were killed. The incident, which came to be known as the *Gaza Flotilla Incident*, created the greatest diplomatic crisis ever between Israel and Turkey. In response, U.N. Secretary General Ban Ki Moon established a special Gaza Flotilla Inquiry Panel on what was an extremely sensitive political issue, one which raised critical questions of humanitarian law, human rights law and international law of the sea. For Turkey, the case became a national priority because of the loss of Turkish lives and also because of the potential repercussions on the once close political and military relations between Turkey and Israel.

Jon was one of the international law experts invited to provide the Turkish National Commission of Inquiry his expertise on international law. I was greatly fortunate to have been included in the Turkish team of legal advisors. On a personal level, the *Gaza Flotilla* case was an important

* Member of the Faculty of Law at Istanbul Bilgi University and Deputy Director of the Istanbul Bilgi Marine Research Center for the Law of the Sea.

project for several reasons, one of which was it provided me with the opportunity to work closely with Jon, someone whom I had admired professionally for years.

Jon's legal contribution to the *Gaza Flotilla* case was critical. As so many of his friends, students, colleagues and acquaintances know, he was simply brilliant. But what made Jon special was that, beyond his brilliance, he cared deeply for the issues he embraced. And the *Gaza Flotilla* case involved more than analyzing questions of international law; it touched upon the lives of some 1.5 million Palestinians living in the chokehold of a naval and land blockade that arbitrarily deprived people of basic food stuffs and daily essentials. Jon's legal analysis was able to bring clarity to complexity, maintain objectivity without losing purpose, and demonstrate convincingly the unlawfulness belying the blockade and the attack on May 31. During the year we collaborated on the *Gaza Flotilla* case, what I came to appreciate in Jon was his complete lack of personal ego, his openness and easygoing nature. But most of all, I valued his sincere dedication to the issue. He deeply felt the injustice that had been done to the victims of the attack on May 31, 2010, and grasped the deep-seated underlying political problems that prevented peace in the Middle East. He was not, however, in any way biased, and this was one of the strengths he brought in his legal analysis. He always remained even-handed, objective and thorough.

Also working with Jon on the *Gaza Flotilla* case was his dynamic partner in life and causes–Sherry Broder. I first met Sherry in Paris at the Fifth Global Oceans Forum conference in February 2010. Jon and Sherry, beyond being married for many years, were a real team. Like Jon, Sherry is also a brilliant and successful lawyer with impressive accomplishments in human rights law, having successfully litigated major cases before U.S. courts. Jon and Sherry both shared the same interest and passion for their work, which I came to learn ranged from protection of the marine environment, climate change, Native Hawaiian Rights, Straits, maritime delimitation, human rights and more.[1]

Without question, working with Jon on such a politically and legally complex case was and will be one of the highpoints of my legal career.

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[1] For cases in which Jon and Sherry worked together, *see, e.g.*, in the area of international human rights, In re Estate of Ferdinand G. Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992); for Native Hawaiian rights, *see* Hawai'i v. Office of Hawaiian Affairs, 556 U.S. 163 (2009); for Jon's works on maritime delimitation, *see* Jon M. Van Dyke, *Regionalism, Fisheries, and Environmental Challenges in the Pacific*, 6 SAN DIEGO INT'L L.J. 143 (2004); for the marine environment, *see* Jon Van Dyke, *The impact of inter-agency coordination on business and industry: a case study involving aquaculture*, *in* OCEAN GOVERNANCE FOR HAWAI'I 5-17 (1995).

The last time I saw Jon was in Istanbul in September 2011 when he and Sherry came for a symposium on the international law of straits, one of the many subjects on which Jon had written and provided important legal insight. When I first suggested the possibility of organizing a symposium on straits in Istanbul, Jon was immediately onboard. He was extremely enthusiastic and supportive and was actively involved in its planning. I also later learned that for years he had wanted to take Sherry to Turkey and visit Istanbul. We spent three days immersed in the law of the sea and straits as well as in exploring parts of Istanbul. It is a bitter-sweet privilege in having hosted what turned out to be the last international conference that Jon and Sherry attended together.

When Harry Scheiber sent me the terrible news of Jon's passing, like for so many who knew him, the news of Jon's unexpected passing came as a great shock followed by a profound sense of loss. Some people are simply irreplaceable, and Jon is one of them. What I came to realize after reading all the messages, tributes and news about him, is the indelible impact he, with Sherry, have had on the lives of so many people and on so many vital issues.

The one solace, perhaps, in Jon's sudden passing can be found in the words of Solon, a famed Athenian traveler, who said that the person "who unites the greatest number of advantages, and retaining them to the day of his death, then dies peaceably, that man alone . . . is . . . entitled to bear the name of 'happy.'"

Jon was indeed a "happy" person who united many advantages until the day of his peaceable passing on November 29, 2011.

Jon Van Dyke

Jin-Hyun Paik*

The first time I met Professor Jon Van Dyke was twenty years ago in 1992, when I organized an international conference on maritime cooperation in Northeast Asia in Seoul under the auspice of Sea Lanes of Communication (SLOC) Study Group Korea. The SLOC Study Group Korea, a private, non-profit organization composed of scholars and experts with an objective of enhancing maritime security in East Asia, was interested in exploring the possibility of maritime cooperation in that region. At that time, East Asia was still dominated by division and confrontation as a result of the legacy of the Cold War, which lasted for more than four decades. As a result, regional cooperation of any kind was a rarity, and ocean affairs were no exception. This was particularly problematic in East Asia because countries in few other regions were so heavily dependent on the sea for their national development and economic viability. With the profound changes under way in the world and regional politics in the early 1990s, however, we thought that the time was ripe for experts in the region to get together and discuss the possibility and prospects for maritime cooperation in East Asia. I remember that Jon gave a paper that assessed comprehensively the possible areas for cooperation, including living and non-living resources, pollution, military activities, artificial islands, and so on.[1] Several of his suggestions have later materialized one way or another.

Of course, I had known Jon's name even before then. When I prepared for my Ph.D. dissertation on the law of the sea in the 1980s, I often came across the articles Jon wrote about various subjects of the law of the sea. I was particularly impressed by his scholarship on the legal regime of islands in the U.N. Convention on the Law of the Sea.[2] Since our first meeting in 1992, we have seen each other in various places around the world, usually at the conferences or seminars on the international law and the law of the sea. Over the years, Jon left a strong impression on me in several aspects.

Jon was a serious, productive scholar of international law. He wrote several seminal books and articles on international law of the sea, international environmental law and international human rights law. For

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[1] David M. Forman, M. Casey Jarman & Jon M. Van Dyke, *Filling In A Jurisdictional Void: The New U.S. Territorial Sea*, 2 TERR. SEA J. 1 (1992).

[2] *See* United Nations Convention on Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982).

example, his works on the transport of ultra-hazardous radioactive wastes,[3] military activities in the Exclusive Economic Zone (EEZ),[4] and the legal regime of islands[5] became standard works that have been cited over and again in subsequent studies. Many of us who have attended the conferences together with Jon can remember his brilliant presentations on any number of given subjects with hundreds of fascinating PowerPoint materials that he meticulously organized. I know that he was a respected and caring teacher as well. I once happened to travel with him on the same flight and saw him grading a huge stack of exam papers on board. While engaging in so many works around the globe, he never failed in commitments to all of his students.

Jon was an international lawyer with a global perspective and commitment. His priority was to protect the global commons, the fragile ecosystems, endangered species and the common heritage of mankind. His primary concern was to help preserve the diversity of our environment and to pass it on to the next generation. He tried to safeguard international legal principles and rules against any attempt of infringement by particular jurisdictions, including his own. He emphasized the equitable use of resources in the *res communis*, such as the high seas and "public trust" interests, in this regard. He also stressed the obligation of due regard to the interests of other countries and jurisdictions. Jon was an advocate of international community as a whole and a defender of the global rules and norms.

Jon was a scholar with a strong sense of compassion and justice. He deeply cared about the hardship of those peoples or jurisdictions with disadvantaged or relatively weaker positions, and tried to do what he could to help them. Naturally, he worked on many humanitarian causes, including claims and rights of indigenous people. He represented people of small Pacific Island States in various litigations, and served as counsel for Greenpeace International and the World Wildlife Fund in advisory proceedings before the International Tribunal for the Law of the Sea

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[3] *See, e.g.*, Jon M. Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 33 OCEAN DEV. & INT'L L. 77 (2002); Jon M. Van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, 24 OCEAN DEV. & INT'L L. 399 (1993); Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT'L L. 379 (1996); Duncan E.J. Currie & Jon M. Van Dyke, *The Shipment of Ultrahazardous Nuclear Materials in International Law*, 8 RECIEL 113 (1999).

[4] *See* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992).

[5] *See id.*

(ITLOS).[6] He was also deeply involved in issues related to the past history and reconciliation in Northeast Asia. He wrote many articles on the reconciliation between Korea and Japan, and the territorial disputes in East Asia whose origins had closely been related to the past colonialism and aggression in that part of the world.[7] Jon was never hesitant to take a stand on those sensitive issues. However, his position was firmly based on a solid legal analysis of relevant facts.

Jon was above all a decent human being. With his characteristic gentle smile and soft voice, Jon always tried to listen to others, cared about those in need, and stood up for what he believed was right and just. Over the past two decades, I have developed a friendship with Jon. We often talked, not only about our mutual professional interests, but also about other personal matters. I respected his expertise and shared much of his convictions. Especially in the past three years, I had the pleasure of working closely with him over several matters, including organizing the Law of the Sea Institute (LOSI) Conference in Hamburg at the site of the ITLOS in 2010 and co-editing the Proceedings of the 2009 LOSI Conference. Indeed, Jon and I collaborated again to organize the LOSI Conference in Wollongong last year, which I was unable to attend at the last moment due to my responsibility at the Tribunal. Jon was a tireless advocate of international law, a strong supporter of my Tribunal, and a trusted friend of mine. His untimely passing in Wollongong was a devastating loss to all of us who knew and loved Jon.

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[6] *See e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Republic of Philippines v. Pimentel, 553 U.S. 851 (2008); Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990).

[7] *See* Jon M. Van Dyke, *Reconciliation Between Korea and Japan*, 5 CHINESE J. INT'L L. 215 (2006); Jon M. Van Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary*, 38 OCEAN DEV. & INT'L L. 157 (2007).

Jon M. Van Dyke

Edward J. Shultz*

International engagement was at the very heart of Jon Van Dyke's life. From his early youth to the time of his death, Jon was engaged constantly in the world community. His parents instilled a love for adventure and appreciation of the nations beyond the borders of the United States. His maternal grandparents happened to be in Bulgaria when his mother was born, and his father served in the diplomatic corps. With his parents Jon began a life of travels, living in Ankara, Turkey, and Beirut, Lebanon. While attending high school at the American Community School in Beirut, Jon also took courses at the American University of Beirut. His father's assignments also placed the Van Dyke family in Rio De Janeiro, Brazil, and Paris, France. How could such formative experiences in his youth not set him on a course that would take him to the many corners of our globe?

Jon spent many hours on planes traveling to conference sites and offering papers that almost always found a receptive audience. Beyond short trips, Jon spent longer periods of time in teaching positions that took him to Strasbourg, France, the Shanghai Maritime Institute in China, Meijo University in Nagoya, Japan, Inha University in Incheon, Korea, and Tiuro Law School in Shimla, India. While teaching such subjects as International Human Rights, Ocean Law, and International Environmental Law, Jon also took time to understand more fully the host cultures and the issues that confronted the people of these lands.

Jon and I started working closely on international issues towards the end of the 1990s. Koreans were looking into their troubled past with Japanese colonialism and, in particular, Japan's occupation of Korea from 1910 to 1945. Jon felt that tragic part of East Asian history had not been thoroughly studied, especially from a legal perspective. In preparation for a major conference the University of Hawaii's Center for Korean Studies was hosting on the Japanese annexation of Korea, Jon agreed to examine the legal ramifications of this occupation. Over the next twelve years, Jon and I attended a number of other conferences studying various aspects of the Japanese seizure. At many of these sessions, citing international legal precedents, Jon questioned the legal premises Japan used to seize and then continue to occupy Korea.

Thorny issues have plagued Korea's twentieth-century history. One particular point of contention was the status of a small cluster of islets in

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Korea's East Sea (also known as the Sea of Japan).[1] For centuries these small parcels of land had been considered part of the Korean kingdom, and so when Japan took over Korea in 1910, these islets fell under Japanese jurisdiction.[2]

At the conclusion of World War II, Japanese-occupied territory reverted to Korea, but somehow the issue of these islets named Dokdo (also known in Japanese as Takeshima) was not addressed in the 1951 San Francisco Treaty that formally ended the war.[3] Even though the South Korean military currently occupies these parcels, Japan claims Dokdo as its territory. Although few people outside Korea realize this, Jon has written extensively on this topic, articulately arguing for the Korean position.[4]

Another important Korea-related issue is the maritime border separating North and South Korea. Through his own research, Jon concluded that to help defuse a potential threat of conflict between the two Koreas, the current boundary needs to be redrawn to reflect international precedents.[5]

One of my most memorable excursions with Jon was at the conclusion of a conference in Japan that focused on the Japanese seizure of Korea. Because of flight schedules, we had some time in Tokyo, so I took him to the Yasukuni shrine and the accompanying museum. This particular site is well known as a memorial to Japan's war dead, and the museum portrayed Japan's foray into World War II in very nationalistic tones. Both Jon and I were sobered by this reconfiguration of the "facts" of war and took this particular presentation as an important lesson on issues dividing the nations of the world.

Although the work Jon has carried out on Korea remains largely outside the eyes of most Western legal scholars, it complements many of his studies that focus on other areas, and particularly on law in Asia and the Pacific. Early in his career, Jon laid the foundation for a fuller understanding of international law. His early edited works, such as *Consensus and Confrontation: The United States and the Law of the Sea Convention* in 1985,[6] helped scholars understand the nuances of international navigation

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[1] *See* Kasuke Takahashi, *Japan-South Korea ties hit turbulence*, ONLINE ASIA TIMES, July 16, 2011, http://www.atimes.com/atimes/Japan/MG16Dh01.html.

[2] *See* Seokwoo Lee & Jon M. Van Dyke, *The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo*, 9 CHINESE J. INT'L L. 741 (2010).

[3] *Id.*

[4] *Id.*

[5] Jon M. Van Dyke, Mark J. Valencia & Jenny Miller Garmendia, *The North/South Korea Boundary Dispute in the Yellow (West) Sea*, 27 MARINE POL'Y 143 (2003).

[6] CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION: A WORKSHOP OF THE LAW OF THE SEA INSTITUTE, JAN. 9-13, 1984, HONOLULU, HAWAII (Jon M. Van Dyke ed. 1985).

and law of the sea literature. This also contributed to many of his subsequent studies that focused on international nuclear law and the particularly thorny issues of the South China Sea. In an attempt to bring the many interested parties to some sort of understanding, Jon hosted conferences inviting scholars and military officers to study and discuss solutions to contested sovereignties such as those south of China.

Scholars in the Pacific took keen interest in Jon's research and writing. One such work was the re-publication of his article, *Allocating Fish Across Jurisdictions*.[7] Although few of us think of Jon as being an avid angler, this analysis serves as an important study for future conservation and consumption of fish stocks. An earlier study in 2001 likewise added a deeper understanding of the largely overlooked South Pacific.

Beyond producing fundamental research that scholars and students have been able to build upon, Jon used his legal background to represent organizations and even governments. Jon served as a legal counsel to Greenpeace and the World Wildlife Fund. He also served as counsel for the senate of Palau and remained vital to the functioning of many other international organizations.

Service to the international community remained an important part of Jon's life. And in a pattern we have seen in so many of his endeavors, he was particularly happy to speak for those whose voice had often been crowded out, whether it be individuals or state governments. In all that he did, Jon carried a fundamental respect for all, certain that people, regardless of background or standing, had unique contributions to make. His work in the field of international law and its many components will remain a beacon to aspiring students, scholars, and laymen seeking to make a more peaceful inclusive world.

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[7] Jon M. Van Dyke, *Allocating Fish Across Jurisdictions*, *in* LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 821 (Tafsir Malick Ndiaye & Rudiger Wolfrum eds., 2007).

Report on the Success of the Maui/Molokai Adult Drug Court: Proven Successful, the New Paradigm for our Criminal Justice System?

Shackley F. Raffetto*

I. INTRODUCTION

Our courts have struggled for years now to find an effective way to meet the challenge of drug-addicted offenders who commit crimes and victimize our communities and our society.[1]

Our Maui Drug Court has been very successful in rehabilitating drug-addicted criminal offenders for over a decade. The author believes that we can utilize the central operative features of the Maui Drug Court that have made this success possible in order to reconfigure our criminal justice system in Hawai'i to succeed in its mission of rehabilitating and restoring our criminal offenders to society. Accordingly, this Report will begin with a brief survey of the central features of our Hawai'i criminal justice system, before describing the Maui/Molokai Adult Drug Court program of the Second Circuit Court (Maui Drug Court). It will address both the need to significantly redesign our criminal justice system and the manner in which that might be accomplished in order to create a new paradigm for our Hawai'i criminal justice system for the 21st century.

Until now, one could not prove that it was possible to rehabilitate these drug-addicted offenders (not traditional criminals in the Author's opinion),

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[1] Methamphetamine (meth) addiction is continuing to cause enormous social problems and harm in Hawai'i. As a recent example, the press reported that Quest Diagnostics Employer Solutions, a mainland organization that surveys employees in the workplace, found as follows: "In millions of test samples analyzed in 2010, Hawai'i had a dramatic lead—*410 percent greater than* the national average—in tests coming up positive for [methamphetamine]." Jennifer Sinco Kelleher, *Hawaii No. 1 in meth use in workplace*, THE MAUI NEWS, Sept. 2, 2011, http://www.mauinews.com/page/content.detail/id/553033/Hawaii-No--1-in-meth-use-in-workplace.html?nav=5031. Possession of meth, a powerful and highly addictive illegal drug, is a felony crime in Hawai'i (HAW. REV. STAT. § 712-1242 (2004), § 712-1240 (2004), and § 329-16(e)(2) (2010)); therefore, these workers who tested positive for meth use are at high risk to be arrested and enter the criminal justice system within the foreseeable future. If they lose their jobs, who will care for and provide financial support for their families and nurture their children? Our criminal justice system is already full of people like these.

and an effective model with which to address this challenge, and criminality in general for that matter, has eluded us. Because of this failure, society turned to mandatory sentencing schemes, which very rapidly filled our prisons. These mandatory sentencing schemes, even if they may have caused some decrease in criminality in the short run, did not solve the problem of continued illegal drug use and related crime.

A. In the Beginning

At the time we began our Maui Drug Court, I had served as a trial judge in the Second Circuit for about four years. It is painful now for me to remember this; but, at that time, my fellow judges and I were required by law to sentence what were mostly young adult offenders who were caught with small amounts of meth to five years in prison. These essentially minor offenders would certainly be made worse, not better, by sending them to prison to be incarcerated with our serious offender population. A sentence to probation, which could have provided for a condition of drug treatment, was not permitted by the law. At about the same time, I learned that a drug court had recently been created in the First Circuit. Therefore, my fellow judges in the First Circuit had discretion in cases like these to refer these minor meth offenders to apply for treatment in the drug court, notwithstanding the mandatory sentencing statute. If those offenders successfully graduated from the First Circuit Drug Court, the drug court judge would then dismiss their felony charges or terminate their probation early, depending on their particular situation. Unfortunately, there was no plan at that time to expand the drug court to the neighbor islands.

This was especially unfortunate because, even at that time, Maui was suffering from a severe, illegal drug problem. Maui County had been designated as a high impact, meth trafficking jurisdiction by the United States Department of Justice.[2] The use of meth was overtaking other illegal drugs as the drug of choice in Maui County. Meth was easily available, and it was devastating our community and flooding our courts with new criminal cases.

About that time, then Maui Police Chief Howard Tagamori called a meeting of Maui community leaders and advised us that police resources alone would not be able to stop or solve the problem of meth addiction that was beginning to inundate Maui County.

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[2] *See* U.S. DEP'T. OF JUSTICE, NAT'L DRUG INTELLIGENCE CTR., HAWAII HIGH INTENSITY DRUG TRAFFICKING AREA DRUG MARKET ANALYSIS (2010), http://www.justice.gov/archive/ndic/dmas/Hawaii_DMA-2011%28U%29.pdf.

Based upon the obvious need to address this meth problem and with knowledge of how judicial resources had been creatively used in the First Circuit to develop a drug court, I determined to develop a drug court in the Second Circuit. A drug court in the Second Circuit would allow citizens the opportunity to apply for treatment in a drug court and enjoy the same treatment exception from the mandatory sentencing law as those citizens residing in First Circuit. Creating and perfecting our Drug Court in the Second Circuit has been a passion of mine ever since.[3]

I am proud to say that, with the collaboration and support of the many outstanding judiciary staff and colleagues in the Second Circuit, including my fellow judges, we were able to plan, create, and start operation of our Second Circuit Adult Drug court within one year. Within one year after opening our Maui Drug Court, we were already treating sixty offenders.

The Federal funding that we obtained in order to plan and create our Drug Court required that I, as the drug court judge, together with our new Maui Drug Court Administrator, Ms. Lillian Koller, Esq., attend the national convention of the National Association of Drug Court Professionals (NADCP)[4] in order to receive information and training and learn about resources for drug courts in the United States.[5]

I was surprised and delighted when I arrived at the convention to find in attendance more than 3,000 people from all across the nation who represented judiciaries, police departments, prosecutors, defense attorneys, public defenders, probation officers, drug court treatment programs and others, all motivated to collaborate together and interested in learning about the effectiveness of drug courts. The convention was permeated with a wonderful, tangible atmosphere of positive affirmation and mutual support and cooperation, directed at finding ways to make drug courts live up to the promise of providing the solution that we all desperately felt was needed to make the rehabilitation of drug-related offenders truly effective in the United States. These law professionals, who traditionally interact with each

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[3] Fortunately, our judiciary in the Second Circuit include many very talented and dedicated people without whom our drug court could never have been created in such a short time, nor could it have been as successful. Fortunately, too, the mandatory sentencing scheme here in Hawai'i that initially motivated the creation of our drug court has since gone by the wayside. The legal framework in Hawai'i is much more supportive of a rehabilitative approach for drug-addicted criminal offenders in our criminal justice system than it was back in 1999-2000. *See* HAW. REV. STAT. § 706-622.5.

[4] For more information, the NADCP website is http://www.nadcp.org/nadcp-home/.

[5] The NADCP provides excellent training programs for all of the stakeholders in the drug court paradigm, including the drug court judge, program administrator, case manager, prosecutor, public defender/defense counsel, police and sheriff, treatment providers, and others. Both Judge Joseph Cardoza of the Second Circuit and the Author attended the judges' training program.

other in an adversarial manner, put aside their traditional roles and the rivalries inherent in the criminal justice system in order to work together to support and rehabilitate offenders from drug-addicted criminality.[6]

As I began to learn more about drug courts through the lectures and breakout training sessions at the convention, I decided to try to discover what the leaders of this movement believed are the reasons why drug courts actually work after the unsuccessful efforts and failures of the past. Seeking answers, I sought out the President of the NADCP, the Honorable Jeffrey Tauber, Ret., and asked him: "Why have these new drug courts proven to be so successful in stopping addiction and the criminality of drug offenders?" Unfortunately, he answered my question with a question (he is a lawyer and retired trial judge, after all!)—He said, "Why do ***you*** think drug courts work?" This, of course, was not an answer to my question.

Since that day, however, the more I have thought about this question, and I have thought about it a great deal over the intervening eleven years,[7] I believe that it is the synergy created by the combination of the authoritative presence and prestige of the judge, the drama and majesty of the court and the judicial process, coupled together with the offender's lengthy cognitive behavioral treatment and expectation of benefit for successfully graduating from treatment, including the favorable disposition of an offender's case, that provides the enormous motivating power that causes offenders to change their thinking and behaviors and successfully rehabilitate. This combination of the authority figure, incentives and substantial benefits promoting success, sanctions and potential penalties for failure, and other factors inherent in the judicial process, together with a highly effective, long-term treatment regime, generates motivation and success that is simply not possible with other paradigms, institutions or programs.

B. The Destructive and Unusual "Crime" of Drug Addiction

Illegal drug addiction presents unique challenges to criminal justice. Addiction to meth, by itself, is not a crime. The possession or selling of illegal drugs constitutes the actual crime (and including all of the other crimes an addict may commit while using or seeking drugs), but it is addiction that is the driving force of the crime.

Meth-addicted offenders do not steal the property of others or break and enter their cars or homes in order to make a payment on their BMW; they

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[6] The author feels certain that the NADCP will be interested in our Pilot Project, *infra*, which seeks to expand the use of drug court operative principles, and will help us to be successful if we wish technical assistance.

[7] The author is the longest serving drug court judge in Hawai'i.

commit these crimes in order to obtain illegal drugs with the money they obtain as a result of the theft. The criminal behavior of an addict is far different from that of a disgruntled offender who harms another or their property because of a perceived wrong or act of disrespect, or to get even; hence, it is very unlike the actions of a typical, common criminal, who is not driven by addictive compulsion.

For illegal meth users, the addiction is a profound craving for an altered state of consciousness. The use of this drug results in the numbing of an offender's moral and spiritual perception of reality to such an extent that he or she will engage in behavior that is life-threatening to themselves and to others. The offender's most basic and fundamental human instincts and perceptions are so grossly distorted that they will do literally anything to obtain the drug. This incredibly strong compulsion to feel good or feel ok is a profound statement of how badly and dysfunctional he or she must actually think or feel or believe about themselves when they are sober. Even though the offender may have a cognitive or existential understanding of the wrongfulness and danger of their conduct and the harm he or she is causing to others, they nevertheless continue to take these incredible health risks and commit the crimes that harm others. They apparently do not experience feelings of guilt nor does shame or sanction deter them. Because the offender's behavior is driven by strong, compulsive addiction, the offender will continue his or her desperate, destructive behavior until they either die or fall into the criminal justice system.[8]

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[8] To give the reader some understanding of the challenge meth offenders present, consider two cases involving defendant Marcus Ruggiero, a laid-off Maui roofer. In his first case State v. Ruggiero, Cr. No. 09-1-0382 (Haw. 2d Cir. 2009) the defendant was observed driving a vehicle in the opposing lane and nearly colliding head-on with oncoming traffic. He refused to stop after the police turned on their overhead blue lights and continued to drive into oncoming traffic while being pursued by two police cars. After finally pulling over, Ruggiero refused to comply with police demands to turn off his vehicle and exit. He ultimately complied and was observed to be impaired and "tweaking." He admitted he had smoked "ice" earlier in the day "because football players smoke ice." A search of his car revealed a glass bulbous pipe containing crystal methamphetamine residue, a partially filled bottle of vodka and $1,582 in cash. In State v. Ruggiero, Cr. No. 09-1-0370 (Haw. 2d Cir. 2009), just two days later, a traffic stop was conducted by police on Ruggiero's car after he was reported to be "driving all over the roadway." The police observed the defendant to be impaired and behaving strangely. He also began visibly shaking and sweating profusely. The officer tazered Ruggiero to stop him from fleeing. Ruggiero continued to resist the police despite being tazered. He ran towards the nearby bushes but was later apprehended. He had in his possession a bulbous pipe with meth residue. A search revealed additional marijuana, meth and $1,044 in cash. Ruggiero was sentenced to five years in prison, but he already had substantial credit for time served and will be back on the streets again soon. For a graphic and truly horrific example of just how dysfunctional and antisocial meth can cause a person to be, consider the case of the man who, in 2011, while intoxicated on meth, threw

C. Drug Addiction: a "Crime" and a "Disease"

Illegal drug addiction is commonly described as an illness or disease; a brain disease. It is unclear as of now whether an offender addicted to illegal drugs carries a genetic predisposition to addiction that is triggered by drug use or whether use of the drug triggers changes in the brain that result in an addictive compulsion. Whatever the cause of illegal drug addiction may be, certainly it is a unique "crime" that presents challenging problems, and many questions, that have confounded us. But, what is clear is that, whatever the cause and effect of illegal drug addiction may be, if we can successfully address the addiction and cure the disease (or if not cure it then manage the disease in remission), then we can prevent the possession or selling of illegal drugs and attendant other crimes, and, in turn, significantly reduce community harm. However, though we name addiction as a disease, a medical solution has not proven to be helpful.

Although we may use a "medical" model to describe and try to understand drug addiction and its drug-related crimes, the treatment that has proven to be successful has evolved from our legal institutions in the form of a psychological/educational or therapeutic jurisprudence treatment model, which is leveraged by bringing to bear the authority and power of the judicial system by the drug court judge in a drug court.[9] By the time an offender has completed drug court treatment, he or she has learned to think effectively and successfully, initiate and sustain relationships, make life decisions in an effective and successful manner, and is imbued, often for

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a baby to his death off a highway overpass in Honolulu. He was found guilty of second degree murder and sentenced to life in prison; therefore, two lives were effectively destroyed by this toxic drug. Nelson Daranciang, *Higa describes hazy state during baby's fatal tossing*, THE HONOLULU STAR-ADVERTISER (Sept. 19, 2011), http://www.staradvertiser.com /news/20100713_Higa_describes_hazy_state_during_babys_fatal_tossing.html.

[9] "Treatment" of offenders in the drug court is comprised principally of activities such as education and essay writing, supervision, roll playing, cognitive behavioral therapies such as neuro-linguistic programming, testing of reasoning and perceptions, education about drugs and their effects, education about drug abuse and principles of cause and effect, training in understanding human and offender behavior, group and individual counseling sessions that address perceptions, life traumas and experience, working through the "12 Steps" derived from Alcoholics/Narcotics Anonymous with "sponsor" assistance, all supported by appropriate individual referrals for physiological and psychological medical treatment where necessary, including medications, and the like. Drug court treatment programs vary in emphasis and specific content, but generally are based upon cognitive behavioral treatment, not "treatment" in the traditional, medical sense. The general theme of treatment is to attempt to help bring meaning back to the chaotic life experience of the addict/offender, a deeper understanding of their own behaviors, and to assist them in adjusting their thinking and self-destructive behaviors to begin to live a normal life.

the first time, with a feeling and belief in their own success, ability, and self, and to have confidence in their future.

The drug treatment knowledge, expertise and techniques are much more sophisticated than it has ever been in the past. However, these alone would not be successful if, for instance, the programs were run out of a community medical clinic and supervised by a medical doctor and staff, as opposed to in a court and by a judge. It is the power and gravity of the judge operating in the context of the drug court to leverage and control the offender and encourage and enable the changes that the offender must make in their thinking and behavior that makes the difference.

II. THE MOVING PARTS OF THE HAWAI'I CRIMINAL JUSTICE "SYSTEM"

In order to understand how drug courts fit within our Hawai'i criminal justice system, this section provides a brief overview of our criminal justice system, identifies some of its institutions and, generally, describes the manner of its operation with respect to illegal drug offenders.

A. Entities of the Criminal Justice System

The criminal justice system in Hawai'i is made up of government institutions and entities, including the Hawai'i judiciary (which includes the Adult Client Services/probation officers–traditional "probation" department), the prosecutor, defense attorneys/public defenders, the Department of Public Safety (PSD),[10] county police departments, and the Department of Health (mental hospitals). These government organizations are supported by the work of other subordinate entities and organizations, such as treatment and care providers that supply services, training, guidance and planning, like the Interagency Council on Intermediate Sanctions (ICIS), which will be described later. All of these various entities work together to help address the problems of and manage the supervision and recovery of the offenders who are convicted of causing harm in our State.

The Hawai'i judiciary is comprised of all of Hawai'i's courts and their supporting functions. This includes our trial courts, family courts, Intermediate Court of Appeals and the Supreme Court. The trial courts are the district courts, family courts and the circuit courts.

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[10] PSD is comprised of a number of entities that interface with criminal offenders, such as the Hawai'i Paroling Authority (Parole Board), Hawai'i prisons and jails, parole officers, adult corrections officers, and Hawai'i sheriffs (who provide security for the Hawai'i judiciary, including Hawai'i's courthouses).

The district courts are courts of limited jurisdiction. With regard to their criminal jurisdiction, these courts handle primarily misdemeanor crimes—crimes for which the potential penalty can be up to one year in jail and a $2,000 fine.[11] Civil cases limited by size and type, as well as traffic-related offenses are also handled in district courts.[12]

Family courts handle juvenile criminal offenders, divorces, adoptions and related legal matters involving the family, as well as juvenile and family drug courts that now operate in each circuit.[13]

Circuit courts are courts of *unlimited* jurisdiction. All matters that cannot be brought in the district courts or family courts can be brought before and decided by the circuit courts. All jury trials occur in the circuit courts.[14] When an offender demands trial by jury in the district court, his or her case is transferred to the circuit courts for processing. Finally, circuit courts handle all felony cases and operate adult drug courts in each circuit.[15]

A felony crime is generally described as a crime for which the maximum penalty is over one year in prison and a fine in an amount that depends upon the class of felony. Felonies are divided into class "A", class "B" and class "C" felonies, depending upon their seriousness.[16] Class "A" felonies are the most serious crimes and carry a mandatory term of twenty years in prison or life in prison, with or without the possibility of parole, depending on the crime.[17] Class "B" felonies provide for a potential of a ten-year prison term and up to a $25,000 fine or up to eighteen months in jail and five years of probation and a fine.[18] Class "C" felonies carry the potential of a five-year prison term and a $10,000 fine or up to one year in jail and five years of probation and a fine.[19]

A term of probation is possible if an offender is sentenced to a class "B" or class "C" felony. And, the term of probation may be conditioned on a jail term, as mentioned above, and any other condition that the judge determines will be helpful and appropriate in assisting in the rehabilitation of the offender and in keeping the community safe, such as drug treatment, community service, anger-management alternatives to violence treatment, sex offender treatment, mental health treatment, etc.[20] For example, if an

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[11] HAW. REV. STAT. § 604-8 (2001).
[12] HAW. REV. STAT. § 291D-4 (1993).
[13] HAW. REV. STAT. § 571-11(2010).
[14] HAW. REV. STAT. § 603-21.5(2008).
[15] HAW. REV. STAT. § 603-21.5(2008).
[16] HAW. REV. STAT. § 706-610(1987).
[17] HAW. REV. STAT. § 706-659(1994).
[18] HAW. REV. STAT. § 706-660(1)(2013).
[19] HAW. REV. STAT. § 706-660(2)(1986).
[20] *See* HAW. REV. STAT. § 706-624 (2006).

offender is sentenced for a class "C" felony, he or she may be sentenced to one year in jail and five years of probation. The offender who receives this sentence will go to jail, serve the one year, and then be released into the community to serve the remainder of his or her five-year term of probation ordered by the court at the sentencing and perform any conditions of probation ordered by the judge.

B. The "Process" of the Criminal Justice System

A person who is charged with having committed a crime is first brought before the court to enter a plea.[21] If the plea is "not guilty" and the offender is charged with a felony, the case usually will go before a jury. If the offender is found guilty, he or she will appear before a judge to receive a sentence. Most often, however, the sentence is ordered as a result of a plea agreement between the offender and the State prosecutor. In either case, the judge then imposes a sentence. A sentence in Hawai'i may be directly to prison or the offender may be placed on a term of probation subject to conditions, one of which may be to serve a period in jail as provided by law.[22]

C. The Factors in Determining a Sentence

The judge will consider various factors set forth in the law in deciding an appropriate sentence for an offender; however, if there has been a plea agreement, the judge may impose a sentence that is provided for in the plea agreement between the offender and the prosecutor. We do not have a sentence or penalty of death in Hawai'i. When a judge imposes a sentence upon a criminal offender, the judge must consider all of the factors set forth in Hawai'i Revised Statutes § 706-606.[23] In Hawai'i, our trial judges have

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[21] *See* Haw. R. Penal P. 10, 11.

[22] *See generally*, HAW. REV. STAT. § 706.

[23] Generally, the judge must consider the following factors in imposing a sentence:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed:

(a) To reflect the seriousness of the offense, to promote respect for law, and provide just punishment for the offense;

(b) To afford adequate deterrence to criminal conduct;

(c) To protect the public from future crimes of the defendant; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) The kinds of sentences available; and

a great deal of discretion in fashioning a criminal sentence which will, hopefully, result in the offender becoming a law-abiding citizen in the future as a result of his or her sentence. Finally, a very important goal of our criminal justice system and the sentence of the judge is to reduce and prevent recidivism by criminal offenders in order to stop the offender from committing more crimes in the future.[24]

As a part of any sentence imposed upon an offender, and in addition to any jail, prison term or term of probation, an offender may also be ordered to pay a crime victim compensation fee, certain fees for genetic identification and restitution to the victim, as well as a fine and/or other financial payments, depending upon the particular crime.

D. The Probation Option

Probation in Hawai'i is a function of and part of the Hawai'i judiciary. In some states, probation is a function of and located within the executive branch of government. Traditionally, probation meant community supervision of an offender by an assigned probation officer who tracked the whereabouts and activities of the offender to ensure he or she stayed out of trouble for the duration of their period of probation. In more modern times, offender supervision has been expanded to include testing for illegal drug use, testing and evaluation of the criminal risks and treatment needs of offenders, as well as referrals to various kinds of treatment or training programs aimed at improving an offender's likelihood of staying crime-free, and returning the offender to society to be a good citizen. Treatment is usually accomplished through referrals of offenders to specialized programs that the judiciary pays for under contract. Typically, probation officers do not engage in what would be understood to be "treatment." Probation officers carry very large caseloads and must focus first upon monitoring offenders for public safety.

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(4) The need to avoid unwarranted sentence disparities among offenders with similar records who have been found guilty of similar conduct.

Haw. Rev. Stat. § 706-606 (West 2014).

The judge must determine in each case the weight to be given to each of these factors to impose the most appropriate sentence for a particular offender under the circumstances of the case. If the offender is sentenced for more than one crime or case the judge may order that the prison terms ordered will be served either concurrently (the sentences run at the same time) or consecutively (the sentences run one after the other) depending upon the circumstances.

[24] "Recidivism" is a legal term of art that means "[a] tendency to relapse into a habit of criminal activity or behavior." BLACK'S LAW DICTIONARY (9th ed. 2009). *Reducing* recidivism is the goal towards which our criminal justice system and our treatment programs are focused.

If a judge sentences an offender to probation, typically five years, supervision of that offender remains with the judiciary and is provided by the Adult Client Services ("Probation") Department. A probation officer, who is an officer of the court with powers of arrest, is assigned to work with and keep track of the offender. The purpose and goal of probation is for the community supervision of those offenders who are convicted of less serious crimes or first time offenders. These offenders will remain, while being supervised by their probation officer, subject to the jurisdiction and authority of the sentencing judge.

If an offender inexcusably fails to perform a substantial term or condition of his or her probation order, then, after being afforded an opportunity for a hearing by the court, his or her probation may be modified or revoked.[25] In the event that the offender's probation is revoked, the judge may re-sentence the offender to the same sentence, including a prison term, as could have been originally ordered by the court at sentencing as provided by law.[26] Typically, an offender may be given a second opportunity to serve his or her sentence on probation; however, the offender who continues to inexcusably fail to meet the terms and conditions of his or her probation order may eventually be sentenced to a term of prison and no further probation. This may be surprising to learn for one who is not part of the criminal justice system, but failure of offenders to perform their court-ordered conditions of probation is a common occurrence.

E. The Treatment Option

As our prisons began to fill up with criminal drug offenders, it became apparent that simply placing such offenders into prison does not, *ipso facto,* cure their addiction or prevent the offender from committing another crime after the offender leaves prison.[27]

Various treatment and training programs have developed over the years to assist in the rehabilitation of these offenders during a term of probation. Usually, the sentencing judge will set forth in the offender's sentencing order a list of conditions, including treatment of various types or training programs that are designed to assist the offender to succeed on probation.

Included among these programs are drug treatment programs. If ordered by the judge, a probation officer may direct an offender to a drug treatment program in order to help the offender overcome his or her addiction

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[25] HAW. REV. STAT. § 706-625 (2004).

[26] HAW. REV. STAT. § 706-625(5) (2004).

[27] *See* NADCP, THE FACTS ON DRUGS AND CRIME IN AMERICA (Sept. 9, 2011), http://nadcp.org/sites/default/files/nadcp/Facts%20on%20Drug%20Courts%20.pdf.

problems. However, with a few exceptions, these programs are of relatively short duration when compared to drug court programs, and have not been proven to be particularly successful in preventing illegal drug use or crime, especially after the offender's term of probation has finished. Programs vary in length, but traditionally an outpatient program might run for thirty to sixty days. By contrast, our drug court requires at least one year of participation and most offenders take two or more years to complete treatment. In fact, there is no data to show that any of these programs, with the exception of drug courts, has been successful in reducing offender recidivism.

F. The Combination Sentence of Prison & Parole

On the other hand, if an offender is sentenced directly to prison without a term of probation, which is highly likely for the more serious crimes or for offenders with substantial prior criminal records or for offenders who are determined to be dangerous to the community, then jurisdiction over that offender transfers to the Department of Public Safety.

In certain situations, usually where the offender has prior criminal convictions, the law requires the judge to impose a sentence to prison; a sentence to probation is prohibited by law. Then, it is the Parole Board that will determine the length of time the offender must serve incarcerated, before being eligible to be released on parole.

The Parole Board decides when an offender is to be released from prison on parole. While on parole, the offender is supervised in the community by an assigned parole officer, who is an employee of the Hawai'i Department of Public Safety. Parole is supervision of an offender in a manner similar to probation, including possible referrals to various treatment programs.

The sentencing judge does not reacquire jurisdiction over the offender when he or she is granted parole by the Parole Board. However, the judge will acquire jurisdiction over the offender if he or she commits any new crimes. Furthermore, if the offender fails to abide by any conditions placed upon his or her parole, the Parole Board may revoke the offender's parole and order that the offender return to prison to continue to serve the sentence originally imposed by the sentencing judge.

It should also be noted that before an offender is paroled into the community, the Department of Public Safety requires the offender to successfully participate in and complete any treatment programs it decides are appropriate, including an excellent in-custody drug treatment program named "Kash Box," as well as successfully complete the Public Safety Department "work furlough" program in which the offender is allowed to

seek and then perform a job in the community while still residing at the local jail.

G. The "Revolving Door" of Our Criminal Justice "System"—Recidivism of over 50%

Unfortunately, even with all of the available programs and efforts at rehabilitation offered by and through the Hawai'i judiciary, the Hawai'i Department of Public Safety, and other entities, the recidivism rate for all of our criminal offenders in Hawai'i has historically been over 50% for those offenders sentenced to both probation and/or parole.[28] This means that more than half of all offenders commit additional crimes and return to jail/probation or prison. And, obviously, this means that these offenders are not being successfully rehabilitated. Truly a "revolving door" of criminal justice!

Because of our historic failure, despite some good efforts, to successfully rehabilitate most criminal offenders, the drug epidemic of meth addiction, which is flooding our criminal justice system, has created a crisis in our criminal justice system. This crisis calls for us to review the manner in which we have been operating our criminal justice system and to determine whether we can craft a much more effective system to meet the challenges of the meth epidemic. I am certain that we can do a better job of rehabilitating our drug offenders and reducing and preventing their recidivism.

It will be helpful to the reader, then, at this point, to describe some of the recent developments in our Hawai'i criminal justice system that have begun to make a difference and helped us to be more effective in addressing the challenges of the meth epidemic.

III. CJ MOON'S VISION OF THE HAWAI'I JUDICIARY COMMITTEE ON INTERMEDIATE SANCTIONS AND THE INTERAGENCY COUNCIL ON INTERMEDIATE SANCTIONS

In the fall of 2000, then-Chief Justice Ronald T.Y. Moon of the Hawai'i Supreme Court established the Hawai'i Judiciary Committee on Intermediate Sanctions (Committee) and charged it to study and recommend the best methods to rehabilitate criminal offenders and reduce recidivism in Hawai'i through the use of so-called "intermediate sanctions."

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[28] TIMOTHY WONG, INTERAGENCY COUNCIL ON INTERMEDIATE SANCTIONS 2010 RECIDIVISM UPDATE (2011), http://icis.Hawaii.gov/wp-content/uploads/2013/07/Recidivism-Update-2010.pdf.

"Intermediate sanctions" refers to sanctions (punishments or interventions), including treatment programs, that a court may order for a criminal offender that are "intermediate" between the commission of the crime and the sentence of the offender to prison. An example might be an order that an offender successfully complete the drug court treatment program as a condition of the offender's sentence to probation. The goal of intermediate sanctions is to rehabilitate criminal offenders and to reduce harm in the community without sentencing the offender to prison. It was also hoped that the use of intermediate sanctions would result in cost-savings. Chief Justice Moon also directed the Committee to work to expand drug courts to all Circuits in our State.[29] During its deliberations the Committee called for an aspirational goal of reducing recidivism by 30% within five years.

The Committee issued its report in July 2001, which set forth a number of initiatives and recommendations[30] and called upon other agencies in the Hawai'i criminal justice system to join together with the Judiciary to establish a council to undertake this work.

As a result of this initiative, and in order to fulfill the recommendations and intent of its report, in April 2002 the Interagency Council on Intermediate Sanctions (Council) was created by the constituents of the Hawai'i criminal justice system. The Council includes as its members the Hawai'i Judiciary, the Department of the Attorney General, the Department of Public Safety, the Department of Health, the Office of the Public Defender, the Hawai'i Paroling Authority, the Department of the Prosecuting Attorney (City & County of Honolulu), and the Honolulu Police Department. The mission and goal of the Council is to advance a shared vision for reducing adult offender recidivism, to expand the use of drug courts, and to implement a plan for enhancing intermediate sanctions throughout the Hawai'i adult criminal justice system.

The Council recognized that before an intermediate sanction can be effectively ordered for an offender, it must first be determined which

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[29] Happily, this goal has now been accomplished!

[30] The key conclusions and recommendations of the Committee were: 1) establishing the reduction of recidivism and victimization as a vision and goal of the Judiciary; 2) implementing intermediate sanctions, defined as the combination of court supervision in the community and the application of treatment and other resources, and recognizing the Hawai'i drug courts as an important example; 3) calling for expansion of all Hawai'i drug courts and creation of drug courts in all Circuits; and 4) instituting a number of similar initiatives, including inviting key criminal justice and community stakeholders to participate with the Judiciary in an Interagency Council to be chaired by the Judiciary and designed to create a collaborative vision, and a working group to guide its members in creating, perfecting and deploying for use intermediate sanctions in Hawai'i to reduce criminal recidivism and harm in Hawai'i. *See* HAW. JUDICIARY INTERMEDIATE SANCTIONS STEERING COMM., ENHANCING THE USE OF INTERMEDIATE SANCTIONS IN HAWAII (2001).

treatment or intermediate sanction should be prescribed for a particular offender, so that the intermediate sanction will be appropriate in assisting in his or her rehabilitation. This determination should be accomplished by assessing the offender's history, personality, intelligence, and considering other information about the offender, including all factors that affect the offender's life and may reasonably be thought to bear upon his or her criminal behavior. An assessment may be accomplished by using an "assessment instrument" to gather this information. An assessment instrument is basically a questionnaire.

At that time in Hawai'i, the various agencies working in the criminal justice system were employing assessment instruments in order to assist them in their work with offenders. The agencies, however, were each utilizing different assessment instruments. While these instruments provided some useful information, the differences in the instruments obstructed the meaningful sharing of useful information about offenders or the useful measuring of an offender's progress in rehabilitation.

In addition, none of the agencies were utilizing a "third generation" instrument. Experts retained to assist the Council explained that a "first generation" assessment simply consists of the judge using his or her intuition as to what treatment an offender needs ("I know your kind and what you need, etc.").[31] "Second generation" assessments are formal questionnaires that record only "non-dynamic" criminal risk factors, such as the offender's number of arrests or age at first arrest. Although useful, second general assessments do not provide information about "dynamic" risk factors, which are aspects about the offender that are thought to contribute to his or her criminality and, in addition, can be changed with treatment. A "third generation" instrument was desirable because it provides information about these "dynamic" criminal risk factors, including drug addiction.

The first order of business for the Council, therefore, was to identify and agree upon for use a third generation assessment instrument that would be used by all State agencies that interact with offenders in the criminal justice system. A "criminal risk factor" is a term of art used in criminal justice to refer to the factors and conditions in an offender's life which are thought to contribute to the offender's criminal behavior, both past and present. The theory is that once an offender's criminal risk factors are identified, if they are subject to change with treatment, then those risk factors can be targeted with appropriate treatment in order to reduce their negative influence upon

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[31] The author has been a member of the Council since its inception and was present at the meetings during which the Council discussed the need for and selection of "third" generation assessments.

the offender. As a result, hopefully, the offender will be less likely to commit another crime. And, very importantly, the offender can be re-assessed over time and the results compared to determine if there has been any change. If an offender scores differently upon re-assessment, these results could indicate that the offender is progressing or regressing, or that the treatment provider's program has changed or is need of reevaluation for effectiveness. Therefore, a careful, accurate assessment is essential.

A. How We Assess Criminal Risk—The "Level of Services Inventory-Revised"

After a great deal of investigation and discussion, and with the help of expert technical guidance, the Council adopted an assessment instrument known as the "LSI-R" for use in Hawai'i. "LSI-R" means "Level of Services Inventory-Revised" (LSI-R). The LSI-R is an elaborate questionnaire that is administered to an offender by an interviewer. The results of the interview are then tabulated, revealing the weighted "criminal risk factors" for that offender.

The reader may be thinking that if the LSI-R is simply a questionnaire, how is it possible to be certain that the answers given by offenders are true and accurate; not simply misleading information an offender desires us to think is the truth. This concern is effectively addressed by requiring that the interviewer be trained and certified as qualified to administer the LSI-R using an interview technique named "Motivational Interviewing." "Motivational Interviewing" is a very helpful and sophisticated method of asking questions in order to obtain truthful and accurate answers. The LSI-R and this method of administering the questionnaire to an offender have been verified as reliable for this purpose in the United States, Canada, and elsewhere. We on the Council were very concerned that the LSI-R be accurate, as well as appropriate for use with Hawai'i's diverse and unique criminal justice population. After very careful evaluation, all of the Council members and the institutions they represented were convinced that the Council and the Hawai'i criminal justice system should adopt the LSI-R.

A unique, very useful, and very interesting aspect of the LSI-R test results for an offender is the identification and rating of "criminal risk factors" for an offender that are "dynamic," in addition to his or her non-dynamic risk factors. Non-dynamic criminal risk factors, such as the number of an offender's past convictions or an offender's age at first conviction, may be reliable predictors of future criminal behavior and thus helpful and predictive, but unfortunately they cannot be altered by treatment. In contrast, dynamic criminal risk factors are aspects of the

offender's life that can be changed with appropriate treatment.[32] These dynamic risk factors are, therefore, very important. They may be targeted with appropriate treatment as part of an offender's program of rehabilitation.

An example of a dynamic risk factor is drug addiction. We know that if an offender is addicted to illegal drugs his or her risk of committing another crime is high. We also know we can help that offender with his or her addiction by providing them with treatment and thereby reduce that risk factor as a causative factor in future criminal behavior. Being able to identify an offender's dynamic risk factors represents a tremendous step forward in quantifying issues that can be addressed in rehabilitating an offender and reducing crime in our State.

The fact that now all of the institutions in the Hawai'i criminal justice system will be using the LSI-R also should be helpful to treatment providers in evaluating and developing their programs to help us improve the dynamic risk factors of offenders in support of the offender's rehabilitation. And of course, it will help us to evaluate whether a treatment provider is, in fact, providing responsive and effective treatment, and how that treatment may be improved. This will be very important in ensuring that we purchase, with taxpayer dollars, only cost-effective treatment, which has not always been possible.[33]

Now that all institutions in Hawai'i that have contact with criminal offenders are using the same assessment instrument, we are at least on the "same page." This means that we will be able to speak with the same terms of reference in addressing issues surrounding a criminal offender and his or her progress towards rehabilitation.

Finally, as we build our experience with the LSI-R it is hoped that our assessments will become more accurate and reliable, and that the treatment we refer our offenders to will become increasingly more sophisticated and effective. Perfecting this system will obviously take some time, but in the long run it is reasonable to expect that the adoption of the LSI-R alone will be a significant factor in helping to reduce recidivism of offenders in

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[32] Other dynamic criminal risk factors include Education/Employment, Financial, Family/Marital/Companions, Alcohol/Drugs, Emotional/Personal, Attitudes/Orientation, and Leisure/Recreation.

[33] In the past, treatment programs for offenders were often considered a success if the offender merely *completed* the treatment program; data about the offender's recidivism (whether they went out and committed another crime) was not, *nor is it today,* tracked at all! This meant that monies were spent on treatment that we only hoped or thought might be effective, but for which we had no proof of success. As we gain access to these more effective assessment tools and methods and build our experience, this will no longer be the case and our use of taxpayer dollars will be much more effective.

Hawai'i. It will allow us to be much more accurate and effective in matching the needs of an offender with appropriate treatment and in accurately evaluating the offender's progress towards rehabilitation over time. The work of the Council, then, represents a very substantial improvement in the manner in which we in Hawai'i address the criminality of our offenders. In the long run we should be able to make our criminal justice system much more effective in reducing harm in our communities.

B. HOPE & SSU Probation Provide Some Help

Other interesting recent developments in our Hawai'i criminal justice system have included the creation of HOPE Probation (Hawai'i's Opportunity Probation with Enforcement) in the First Circuit, the Special Services Unit (SSU) in the Second Circuit, and similar probation enhancement programs in the Third and Fifth Circuits.

HOPE Probation was created by Judge Steven Alm of the First Circuit in October 2004. HOPE is a program in which certain offenders who are currently on probation in the First Circuit are selected to receive true, random drug testing.[34] If these offenders test positive for illegal drugs or

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[34] Random testing for illegal drug use is *not* a traditional feature of probation in Hawai'i. Random drug testing is costly and time-consuming. Additionally, we have not always had the severe, destructive illegal drug problem we are suffering from today. On the other hand, random drug testing *is* a standard feature of drug courts.

The First Circuit received a grant from the Hawai'i Legislature to hire additional staff in order to initiate true, random drug testing for the offenders participating in the HOPE program. Comprehensive drug testing is essential for an effective drug treatment program, or for that matter, any modern program seeking to monitor the criminality of offenders. But the cost is high, requiring a greater portion of a limited budget. The author believes, and has advocated for, the Judiciary's drug testing to be random, strictly monitored and of the highest possible quality and reliability in every criminal justice program, because of the clear significance of illegal drug use in crime.

Furthermore, accurate and reliable drug testing is so important that it should be conducted by an independent provider under contract with the Judiciary. This latter proposal would remove the testing function from the responsibility of probation, drug courts, and in particular, from our treatment providers. Drug testing is not a job people particularly desire to do and it is counter-intuitive to expect strict adherence to random, accurate drug testing standards by the same people who are also charged with producing successful drug treatment. Treatment providers are interested in, devoted to and mostly justly proud of the ability of their treatment programs to stop illegal drug use and criminality. They believe that their treatments will produce successful results; not cause their clients to cheat on tests or use drugs. Having the treatment provider perform the drug testing in order to determine if its own treatment is succeeding is a bit like putting the wolf in charge of the hen house. Even with the best of intentions, things happen. It is better to have an independent provider, who would likely be more aggressive in catching malingering and who would have no other function than to ensure that the drug tests are accurate and reliable, conduct the drug testing.

fail to report for a meeting with their probation officer, they are taken immediately into custody, taken as soon as possible before the judge and sentenced to jail.

HOPE has been in operation for several years now and has proven very effective in reducing positive illegal drug tests of participants and encouraging prompt appearances at probation officer appointments. In the author's view HOPE has caused probation to be more effective, especially with respect to instituting more timely consequences for failure to abide by conditions of probation and offender compliance.

A special probation supervision unit similar to HOPE Probation has now been established in the other Circuits; however, none of the other Circuits have been able to implement true, random drug testing, which is an important feature of HOPE Probation.

In the Second Circuit, our SSU does not provide random drug testing. However, we added required sessions of cognitive behavioral treatment as a condition of probation in order to address the thinking errors of our offenders.[35] This approach borrows from our Drug Court model, which is heavily based on cognitive treatment.

In our SSU we admit only high risk offenders–those who score higher than a given standard on the LSI-R (another example of how the LSI-R is helping us), drug offenders, and sex offenders. These offenders are provided with a higher level of supervision, including more drug tests, more meetings with their probation officers and, similar to HOPE, immediate sanctions by the judge if they fail to follow through in performing the conditions of their probation order. However, unlike HOPE, offenders are not immediately taken into custody and sentenced to jail; any sanction depends upon the circumstances, but the sanction will be swift. Our results, like those of HOPE, have shown substantial improvements in timeliness of offenders in meeting with their probation officers and also a substantial reduction in positive tests for illegal drug use by offenders.

One can see, then, that while the programs are not identical, the immediacy of sanctions is an important element of both HOPE and our SSU. Providing immediate sanctions for offender failures is also an important feature of drug courts.

Finally, in our experience with our Drug Court we have learned that offenders will go to great lengths in order to cheat on their drug tests, even if an "observed" urinalysis is provided. A quick perusal of the website "High Times" or other drug user publications will give the reader an idea of the extent to which cheaters will go to avoid detection.

[35] Furthermore, we felt, in any case, that we would not be successful in seeking the substantial additional funding from the Legislature which would have been necessary to pursue true, random testing. Hopefully, we can improve the effectiveness of our testing in the future.

Both HOPE and SSU provide negative sanctions; a sentence to jail. Studies in criminal justice show that positive reinforcement is much more effective in producing change in offender behavior than is negative reinforcement. It would be worth considering how positive reinforcements might be incorporated into these probation enhancement programs, in addition to a strong component of cognitive behavioral treatment. Drug courts make a great effort to emphasize positive reinforcement to encourage changes in the thinking and behavior of the offender.[36]

Increasing the frequency of drug tests and probation officer meetings, enforced with immediate sanctions by the judge, however, does not necessarily equate to reduced offender recidivism in the future. Certainly, the offender can be expected to be more attentive while on probation and immediately subject to this greater scrutiny by the judge. The problem, however, is and always has been, what happens *after* offenders have finished their term of probation.[37] This is the reason why we in the Second Circuit included a cognitive behavioral treatment element in our SSU; we have learned from our drug court experience that if we expect an offender to change his or her behavior (stop using drugs and committing crimes), we must teach him or her to change the manner in which they process information in their minds. This is a technique sometimes referred to by offenders as "using the CBT Map"—change an offender's thinking and he or she will change their behavior. If negative reinforcement was effective in causing this change, offenders would not be re-offending after having served their sentences.

In the author's view, then, neither HOPE nor SSU, or the other probation enhancement programs will be likely to have much, if any effect on long term, post-probation recidivism of the offender (even if supported by increased drug testing and visits to the probation officer and reinforced with immediate negative enforcement). At least for now, there is no valid data to suggest that these probation enhancement programs will result in reduced recidivism post-probation. Because our SSU includes a component of cognitive behavioral treatment, perhaps there will be some modest reduction in recidivism, based on our drug court experience with this type of treatment. Therefore, the author expects offenders participating in

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[36] *See* C. WEST HUDDLESTON III, BUREAU OF JUSTICE ASSISTANCE, DRUG COURTS: AN EFFECTIVE STRATEGY FOR COMMUNITIES FACING METHAMPHETAMINE (May 2005), https://www.ncjrs.gov/pdffiles1/bja/209549.pdf.

[37] Hoping that enforcing drug testing and other conditions of probation for five years will result in significant reductions in offender recidivism *after* probation has ended is wishful thinking. If that approach worked, then sentencing offenders to prison should reduce recidivism, and we know that recidivism has consistently been in excess of 50% for offenders who have served terms of prison, probation and/or parole.

HOPE and SSU will still have a greater than 50% likelihood of re-offending in the future.[38]

It should be noted here that the Hawai'i Department of the Attorney General is currently compiling post-probation recidivism data for these programs and is expected to announce the results early in 2012. The post-probation data will not cover a lengthy period time, because the programs are still new, but nevertheless it will be interesting to see this data. At least three years is usually preferred to postulate any real change in recidivism. Substantially reduced recidivism at *five* years post-probation would be significant. By way of contrast, our Drug Court has for over a decade demonstrated consistent post-graduation recidivism rates of less than 16% (success rate of over 84%).

While HOPE and our SSU have made contributions, this is an evolutionary process, and I believe that in order to achieve the reductions in recidivism and crime we as a State need, our future criminal justice system programs must emphasize a strong cognitive behavioral treatment component, strong, positive reinforcement methods and direct judge intervention and leadership. In short, we would be well-advised to seek improvement by adapting program components from our Hawai'i drug courts.[39]

IV. CRIME IN THE SECOND CIRCUIT (MAUI COUNTY)

Next, this Report will provide some perspective on the magnitude of the problem of illegal drug use and crime in our tri-island community of Maui County.

Each year about 800 new felony criminal cases are filed in the Second Circuit Court (Maui County). Felony criminal cases represent serious

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[38] *See supra* note 37. Even in cases where an offender is identified as in need of drug treatment while on probation and is sent to a program, out-patient or residential, there is no data to inform us of whether the treatment has resulted in reduced recidivism post-probation. The only criminal justice system treatment programs in Hawai'i that provide recidivism data are drug courts.

[39] HOPE Probation participants are transferred to the same courtroom and supervised by the same judge. In the Second Circuit all Class "B" and class "C" offenders, all offenders serving a term of probation who are facing revocation or modification of their probation (almost always for illegal drug use), all probationers in our SSU probation program, together with all offenders participating in our Maui Drug Court, are transferred to the same courtroom where their cases are supervised by the same judge-the Author's courtroom. This concentration of offenders with drug issues whose cases are "divertible" or subject to the application of intermediate sanctions greatly facilitates consistent and efficient treatment of offenders with illegal drug-related cases and issues.

crimes against our citizens and their property and, collectively, represent substantial harm to the well-being of our community.

As a trial judge with over twenty-four years of first-hand experience in the Hawai'i criminal justice system, I estimate that at least 95% of these felonies are crimes for possession of, or for stealing of property to possess, illegal drugs. The drug involved is almost always meth, though there are other illegal drugs involved as well. The "starter" drug is almost always marijuana, which in my experience is a "gateway" drug that causes an offender to progress to meth use and serious criminal addiction.[40]

Each felony criminal case usually includes multiple "counts" of individual crimes charged.[41] Typically, an offender is charged with at least two or three of these counts in each criminal "case." Sometimes there are as many as ten or even more crimes charged (credit card theft, forged checks, car and home break-ins, etc.) in each new case. These individual counts charged are gathered together under one criminal number as a "case," and then "charged" against the offender through a filing in court. If an offender speaks about "my case," he or she may actually be referring to ten individual crimes being charged against them as their "case." Therefore, when I estimate that 800 new criminal cases are filed each year, these cases may include several thousand individual crimes charged against offenders, which must be processed by the Second Circuit.

It is very important to understand that these figures for cases filed in the Second Circuit represent only a small fraction of the crimes that an offender has actually committed, which have harmed our community, but with which he or she has *not* been charged. Some experts estimate that a typical defendant has committed at least ten crimes for every crime for which he or she is actually arrested and charged.[42] When we are speaking of meth addicts, who are not employed and who are driven by their compulsive addiction to constantly replenish their drug supply, day after day, he or she has likely committed many more than merely ten crimes for each one eventually charged against them. This cumulative harm to persons and property, to the future of our young people and to our families, is enormous and ongoing. The impact upon our community of this harm is impossible to quantify accurately, but without doubt, its impact is highly destructive and corrosive to our lives and to our society.

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[40] Almost every offender who has applied to the Maui Drug Court began their drug abuse by smoking marijuana, then progressed eventually to using meth.

[41] A felony crime may be "charged" or brought against a person in Hawai'i by the government by any of three methods: 1) indictment, 2) information charging, or 3) complaint. *See* HAW. REV. STAT. § 806-6.

[42] BOYD D. SHARP, CHANGING CRIMINAL THINKING: A TREATMENT PROGRAM 17 (2d ed. 2006).

Additionally, and very importantly, we must keep in mind when considering our criminal justice population that our citizens who come into our criminal justice system as offenders charged with having committed crimes are first and foremost, members of our community. By this I mean to emphasize the fact that even if an offender in Hawai'i is sentenced by a judge to a long prison term, he or she will eventually serve their term, be released and return to their home, in Hawai'i.[43] Very few, if any, of these offenders will leave our State after being released from prison. Therefore if these offenders have not been successfully rehabilitated they are highly likely to again lapse into using illegal drugs and then commit additional crimes (recidivate), causing additional harm. They will continue to offend and pass through the "revolving door" of our criminal justice system, harming our fellow citizens and their property, until they are sent back to prison or die.

We must recognize, then, that these offenders in our community who are addicted to illegal drugs are a community problem, an epidemic, for all of us to be concerned about. They are not going to conveniently go away or stop committing crimes unless they are successfully rehabilitated. Therefore, it is absolutely essential that we as a community come to terms with this truth, and together, reevaluate our methods and recommit ourselves to take effective action to rehabilitate our criminal drug offenders, in the interest of ourselves, our families, and for our mutual public safety and survival.

A. Increase in Women Drug Offenders

In my experience, more women are coming into our criminal justice system because of meth addiction, with obvious and serious negative consequences for the children of our community.[44] Women offenders present unique and specific issues for treatment and require additional support for child care planning, sexual abuse and exploitation and other issues that do not exist for male offenders. Women offenders represent 25% (31/125) of our Maui Drug Court population.

Until we were swamped with drug offenders, male offenders made up the vast majority of our criminal offenders. Illegal drugs have changed the

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[43] The reader should know that many of the offenders in our criminal justice system are repeat offenders who have committed crime after crime over the course of their lives. The author expects the number of so called "frequent flyers" in our criminal justice system to increase because of the power of meth addiction, which compels their compulsive behavior to commit the crimes necessary to obtain the money to buy drugs.

[44] *See generally* the Uniform Crime Reports published annually by the State of Hawai'i Department of the Attorney General, *available at* http://ag.Hawaii.gov/cpja/rs/cih/.

gender mix of our criminal justice system, presenting new issues for which we must find solutions.

Our Maui Drug Court has been able to address (or at least to begin to address) the special needs of women offenders by establishing our Dorm V treatment dorm at the Maui Community Correctional Center (MCCC). Dorm V provides gender-specific treatment and is devoted exclusively to treating women offenders in custody. Dorm V houses up to twelve women offenders, who are separated from the general population of offenders. Women offenders who would otherwise be sent to prison because of their criminal records may have an opportunity to enter our Drug Court because we can treat them initially in our Dorm V. We can control their behavior in Dorm V until they have received enough treatment that we can trust they will not re-offend when we release them from custody to continue their treatment in out-patient programs. As a result, we can keep and treat these women offenders here in Maui, where their children are located, and help them with parenting classes, childcare planning, and other resources, in order that they may be reunited with their children and care for them while they continue to their Drug Court treatment. Child Protective Services is more likely to reunite children with mothers who are successfully participating in or have graduated from our Drug Court. This is certainly a better result for their children! None of this would be possible if our women offenders were sentenced to prison and then transported off to the mainland prisons where we house offenders because of prison overcrowding in Hawai'i. Therefore, while women offenders present new challenges, Dorm V is an example of how we are able to successfully provide women offenders with treatment.

Finally and tragically, in my experience almost all of these women offenders have children, often from different partners. These facts raise serious questions about the impact that this instability and exposure to an illegal drug lifestyle will have on these children, and who will be left to parent them. It cannot be good; and these young people are beginning to represent a substantial segment of our community. Simple math tells us that this is a very serious problem for our State and that something must be done.

B. Addiction Begins Early and Progresses Swiftly; Marijuana is the "Gateway"

Typically, the offenders we see in our Drug Court are, within six months of beginning to use meth or at the latest just a few years, homeless and jobless, and they will do *anything* to get meth! A major precipitating event in the alienation of these offenders, and their experimentation with illegal

drugs, is often the loss of or divorce of their parents (that is, if they had an intact family in the first place, which many did not). I have read more than 800 "trigger letters," which applicants to the Maui Drug Court are required to write when they are admitted into our Drug Court, describing their family and drug use history. The story is almost always the same: a twelve or thirteen-year-old adolescent begins experimenting with changing their consciousness by taking illegal drugs, smoking marijuana and drinking beer, which are often made available to him or her by their peers or, alas, often by their own parents or family members. We must be clear about the fact that the permissive attitude in Hawai'i about marijuana use encourages this behavior, in spite of the fact that marijuana is illegal and a crime to possess, grow or sell. Later on, these young people almost always advance to experimenting with cocaine and other drugs. Eventually, they try meth, which is easily available, low in cost, highly addictive and very powerful. And then they are literally *lost,* and their life is spiraling out of control.

Tragically, these young people addicted to meth become essentially amoral and without shame in their behavior in order to obtain the drugs. They steal from their parents and relatives; they prostitute themselves and allow themselves to be used and abused. They change physically as well; it is common for a Meth addicted person to lose their teeth. We see 22 year olds with no teeth except rotting stumps and gums. They never smile. They lose significant weight, their nutrition falls to almost nothing and they develop scabs and sallow skin coloration on their bodies. We have also noticed a high number of these addicts have mental disorders such as bipolar disorder and severe depression, which may have been caused by the meth use, or perhaps was latent and triggered by the use of this powerful, illegal drug.

As a result of their new, amoral behavior, these offenders are often rejected and disowned by their families. Usually, these offenders have committed crimes and serious breaches of trust. These crimes cause them be expelled from their families. It is very common for these offenders to be homeless and living on the streets or on the beach. Few of the offenders coming into our Drug Court had a home, car and job when they were arrested. All of this is a tragic and common consequence of addiction to meth; and there are many additional negative consequences of this drug. Because of the consequences of their addiction to meth, these offenders land in jail, all within six months or at the latest a few years.[45]

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[45] A "trigger letter" is a no more than a three-page letter from the offender to the Drug Court judge in which the offender tells the judge about who he or she is, what their family was like and, in detail, how he or she started using illegal drugs, followed by a plan of how the offender will "deal with" their "triggers" to drug use, and a description of their plans for their new future life.

If the offender is a young woman and she has children, imagine the effect on those impressionable children whose development requires nurturing and attention. Most likely we will begin to see the real societal consequences of meth use by the mothers of these children over the next decade or so. These consequences are bound to be severe and negative and will probably involve our criminal justice system.

C. Too Many Hawaiians in Our Criminal Justice System

Offenders who report being of Hawaiian ancestry are greatly over-represented in our criminal justice population because of their meth addiction.[46] Unless something significant is done soon, I do not expect this to change. The population group of offenders of Hawaiian ancestry within our criminal justice system will probably increase. Literally, as it now stands, the future of a generation of our young people of Hawaiian ancestry is doomed by this insidious and dangerous drug and its associated criminality. At the very least we are losing the enormous potential and positive contribution that these young people could be making to our society, to their families and to their culture.

V. THE ANSWER TO THE RIDDLE OF RECIDIVISM: DRUG COURTS

First, what is a drug court? The basic concept for the drug court provides for direct and significant oversight and leadership over the drug treatment of drug addicted offenders by the judge, for an extended period of time. In our Drug Court, this time is a minimum of twelve months. Offenders are required to appear in court for regular reviews of the offender's progress. The offenders receive treatment designed specifically for criminal offenders in order to change their criminal thinking.[47]

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[46] *See generally* the Uniform Crime Reports published annually by the State of Hawai'i Department of the Attorney General, *available at* http://ag.Hawaii.gov/cpja/rs/cih.

[47] The role of the judge is crucial to the success of drug courts and cannot be overemphasized. Both the offenders who participate in drug court and the treatment providers respond and perform better when a judge utilizes his or her authority and prestige of office to provide strong and visible leadership. The judge can substantially influence the success of the drug court by: 1) exerting effective leadership in the promotion of coordinated drug court control efforts from his or her unique leadership position, among other actions; 2) encouraging full commitment to the success of the drug court by ensuring that program staff and the drug court stakeholders participate fully in the design and implementation of the program; 3) exercising his or her unique position of authority to create partnerships between criminal justice agencies and the treatment provider by allowing and promoting collaborative decision-making, sharing of resources and coordination of efforts; 4) maintaining a non-adversarial, therapeutic, positive and supportive atmosphere in the drug

Drug courts have demonstrated a remarkable ability to rehabilitate and redeem a very high proportion of offenders who have graduated from the program.

The drug court movement in the U.S., of which the Maui Drug Court is the second Hawai'i iteration, is now over 20 years old. The model for drug courts in the U.S. is credited to the former U.S. Attorney General Janet Reno and Judge Herbert Klein, a trial judge from Dade County, Florida. Attorney General Reno and Judge Klein worked out the essential structure of the drug court treatment model to address a growing drug problem they were facing in Miami, Florida.

In 1989, since this modest beginning in Florida and with the opening of the first drug court, the drug court movement has rapidly expanded across the U.S. At the end of 2009, there were 2,459 drug courts in the U.S., and they have proven to be very successful in treating drug addiction.[48]

The National Association of Drug Court Professionals (NADCP) has stated that without effective treatment, 80% of drug addicted offenders will recidivate within six *months* of their release from prison; whereas, if given effective treatment in a drug court, the recidivism rate is only 14% within five *years* of release.[49] Every person we can redeem from drug addiction and the criminal justice system, through successful participation in our Drug Court program, can again become a contributing, not to mention taxpaying-child rearing and nurturing, member of our community. This redemption of our people, our fellow citizens, represents the preservation of an enormous community treasure and a positive contribution to the long term welfare of our community.

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court for offenders, staff and providers, and ensuring and encouraging that the staff has the full opportunity to facilitate offenders' rehabilitation; 5) being one of the key motivational forces to convince offenders to seek and maintain rehabilitation and facilitating less formal and more frequent court appearances allowing the judge to motivate and monitor offenders; 6) conducting court sessions in the most effective manner so that all offenders and staff benefit by observation of others as they progress (or fail to progress) in treatment and taking appropriate action to provide public, positive motivation of offenders; and 7) serving as the primary drug court program advocate, representing the drug court in the community, before government and criminal justice agencies, and other public forums, and being willing to seek funding and public promotion of the drug court program.

[48] There are a number of different kinds of drug courts, with the most common (56%) being the post-plea model. Arizona and Alabama have the most drug courts with 22 drug courts each. 96% of drug courts could be expanded, with the limiting factor being funding. DOUGLAS B. MARLOWE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 1 (Bureau of Justice Assistance ed., 2011).

[49] *Id.* at 9-12.

A. The Maui/Molokai Adult Drug Court Contribution

In Hawai'i, there are now both adult and family/juvenile drug courts operating in every Circuit. Operation of our Maui Drug Court began during the summer of 2000. The Maui Drug Court is a long term drug treatment program that involves an intensive, judge led, supervision and treatment of criminal offenders who are addicted to illegal drugs. The program is based upon a cognitive behavioral treatment model. The treatment is delivered over an extended period of time for at least twelve months. Our Drug Court provides treatment on both the islands of Maui and Molokai.

B. The Drug Court Results: The Sweet Smell of Success

First, and most importantly, our Drug Court program in Second Circuit actually works, and it has proven to be very successful in reducing recidivism and addiction to illegal drugs. We have kept performance data to guide and inform our operations. Recently our Second Circuit Court Program Specialist staff reviewed the conviction record of every single one of our 380 Drug Court graduates from inception of the program to the present (2011).[50] The data shows that the success rate for the entire duration of our Drug Court program (over eleven years) and for all graduates is a little over 84% (recidivism rate of less than 16%). In other words, 84% of our graduates have never been convicted of another felony crime! Consider what an enormous benefit this is for our community![51]

At 84%, the success of the Drug Court program in the Second Circuit is likely one of the most successful drug courts in the nation. In comparison to the Second Circuit, the recidivism rate for offenders on probation and parole in Hawai'i has historically been over 50% according to data compiled by the Attorney General of Hawai'i. Nationally, only 36% of the offenders entering out-patient drug treatment programs successfully complete treatment.[52] The national average is about 70% for successful drug court program completion.[53] The average period of time an offender participates in our drug court before graduation is about two to three years.

If the offender was on probation when he or she entered our Drug Court, based upon successful completion of the Drug Court program, their

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[50] Program Specialists are charged with reviewing the performance of entities and programs providing purchase of service contract services for the Judiciary of Second Circuit.

[51] DOUGLAS B. MARLOWE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES (Bureau of Justice Assistance ed., 2011).

[52] *Id.*

[53] *Id.*

probation is terminated early by the judge, saving them and the State of Hawai'i the cost of two to three additional years of supervision. Probation is required to be for a period of five years, unless the judge terminates it early, which is rare in Hawai'i.[54] Out-patient treatment in the Maui Drug Court costs about one-fifth the cost of incarceration in prison.[55] The cost of one year of incarceration in prison is about $30,000 per year.[56]

This data proves that without question, our Maui Drug Court is successful in stopping drug addiction, its associated criminal harm and the unnecessary expense, loss and trauma caused to our community. Very importantly, now that we have a proven, successful program, our goal is to increase the size of our program to serve as many people as possible, while we continue to refine and improve our program. The proven success of our Drug Court should inform and guide criminal drug treatment for the rest of Hawai'i's criminal justice system.

C. Meth Offenders are per se "High-Risk"

The NADCP points out that, in general, jurisdictions have tended in the last few years to use post-plea/probation models for drug courts and postulates that the reason for this shift is the desire to target the "more serious" offenders with drug courts because of scarce resources.[57] At the same time, however, the NADCP restates its long held advice that there is no "best model" for an individual drug court as long as the "10 Key components" are observed.[58] Each community must decide for itself the ultimate form of drug court that is most appropriate for its needs and challenges, based upon its specific circumstances.[59]

Because of the prevalence of Meth addiction and abuse in Hawai'i, we tend to think our circumstances are similar to those in other jurisdictions in the United States, but this is not true. There is a surprisingly great mix or variety of types of illegal drugs that challenge different jurisdictions. In some jurisdictions the problem drug is heroin, in others it is crack-cocaine.

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[54] Significant meta-analyses show that adult drug courts significantly reduce crime and they are highly cost effective. Put in a very interesting way, one study found that drug courts produced an average of $2.21 in direct benefits to the criminal justice system for every $1.00 invested—a 221% rate of return on investment. For high-risk offenders the direct benefit is $3.36 for every $1.00 invested. No other institution in the criminal justice system can produce such benefits! *Id.*

[55] *Id.*

[56] *Id.*

[57] Drug Court Standards Comm., Nat'l Ass'n of Drug Court Prof'ls, Defining Drug Courts: The Key Components (2004).

[58] *Id.*

[59] *Id.*

On the other hand, it is very well documented that it has been meth that has dominated the criminal justice system in Hawai'i for the past decade or two. The reason for this predominance of meth as the drug of choice in Hawai'i is not known. Some postulate it is our proximity to Asia or the ease with which meth can be imported from Mexico, but no one really seems to know.

The reason the primacy of meth in Hawai'i is mentioned here is to briefly address the fact that in its latest report, the NADCP suggests that jurisdictions may wish to consider using a "coerced-abstinence" HOPE type (or our SSU type) probation program for "high-risk" substance-involved offenders.[60] "High-risk" offender is not defined in the report. The NADCP report is not entirely clear regarding its specific recommendation, but whatever may be regarded as "high-risk" elsewhere, a meth addicted offender in the Hawai'i criminal justice system certainly qualifies as "high-risk" by any reasonable standard. Simply supervising these offenders in a HOPE or SSU type probation program is unlikely to reduce their recidivism except perhaps while they are in the program and under the judge's tight supervision.

The author suggests that if an offender has lost control over his or her life to the degree that they have come into the criminal justice system for their meth use; he or she, *by definition,* qualifies as a serious, "high-risk" offender. For example, in our SSU probation program, in Second Circuit, we define "high-risk" for purposes of participation in the program as an offender who has a score of 26 or greater on the LSI-R, a drug (meth) offender, or a sex offender.

In describing our drug involved offenders in the Hawai'i criminal justice system, most judges or law enforcement persons will tell you that 95% or more are there because of their involvement with meth, not marijuana (although a powerful gateway drug) or cocaine, heroin or other illegal drug. The fact that our problem drug in Hawai'i is meth is maybe one of the reasons our recidivism rate is so high and has been so difficult to reduce.

This view of criminal meth use as being "high risk" is also supported anecdotally by offender responses in the "trigger" letters mentioned earlier in this report. More than 800 of them so far tell the same story: the offender was more or less managing their life, holding down a job or going to school until they tried meth. From that day, from that first use, their lives soon became completely dysfunctional, out of control and they ended up in our criminal justice system. They all tell the same story; it is a common denominator or characteristic of meth use.

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[60] *Id.*

Based upon the author's more than twenty-four years of experience as a criminal trial judge in Hawai'i courts, the author can state that most of these offenders come before the court as a result of their disfunctionality—having come to the attention of the police by driving in the wrong lane of traffic, by bizarre behavior or failed attempts at crime and the like. The symptoms of their addiction cause them to come before their court. It is their behavior that causes them to come to the attention of the police. They were simply highly intoxicated, out of control and breaking the law and a policeman was present to see them. Therefore, programs like HOPE and our Second Circuit SSU may play a role in keeping some offenders, who perhaps refuse treatment, have mental problems or do not wish to change for some reason, crime free. The high levels of supervision during the time they serve out their five year term of probation, however, is not enough to change their behavior once they are no longer under the thumb of the judge. Changes in offender thinking and behavior necessary to reduce recidivism require a great deal more than negative sanctions for dirty drug tests for five years. The fact that recidivism in Hawai'i has been in excess of 50%, except for drug court graduates, proves this quite clearly. Some may argue that these HOPE or SSU offenders can be referred to treatment for their drug problems; however, as mentioned earlier in this report, there is no data to suggest that the drug treatment the judiciary has been sending offenders to reduces recidivism. The recidivism rate has stayed at about 50%; this is depressingly clear. We need to change what we are doing and utilize drug court models in order to reduce our recidivism rate. This type of change makes sense and is based upon solid data and evidence of success.

D. Stand Alone Drug Court—Because it is Treatment, Not Supervision

The first decision we faced in establishing our Maui Drug Court was whether our program should be a part of the adult probation department (Adult Client Services) as is the drug court program the First Circuit.[61] We recognized that a Drug Court is something different than community supervision alone (traditional probation); it is a treatment modality in and of

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[61] "We" refers to and includes the Maui Drug court stakeholders which was made up in the Second Circuit of the Judiciary of the Drug court Judge and Administrator, Maui Prosecutor, Maui Public defender, defense attorneys, Maui Police Department, PSD, Warden of Maui Community Correctional Center, Sheriff, Hawai'i Department of Health, Maui County council, and others, who met, collaborated, and agreed upon the structure and process of our Maui Drug Court. We followed the basic model of the First Circuit Drug Court, and adapted it to our unique, collective vision of a drug court to serve the challenges unique to Maui County (inclusion of citizens resident on three, separate populated islands and one very remote community, Hana, for instance) and its distinctive citizenry.

itself. Supervision and drug treatment are very different functions. They require very different skill sets. As an example, probation officers, who play a supervisory role, are not ordinarily trained to perform drug treatment.

We therefore decided that establishing our Drug Court as a separate entity within Second Circuit with its own Drug Court Administrator and its own budget was a more effective approach to serve our Maui community. This establishes our Drug Court as complementary with probation.

E. The Basics: 10 "Key Components" of Drug Courts

The Bureau of Justice Assistance, U.S. Department of Justice, has identified "10 Key Components" of drug courts.[62] The "10 Key Components" represent the national model for drug courts. This model has enabled these courts to be successful. We incorporated all ten of these key components into the structure of our Maui Drug Court. This national model recognizes that each drug court will, out of necessity, differ somewhat from others in order to meet the needs and aspirations of each particular community. However, the purpose of using the "10 Key Components" as the structure for drug courts is to ensure and protect drug courts against and to avoid guess work and *ad hoc* treatment structures. Using guess work and ad hoc treatment structures may look or "feel good" or "seem correct", but they are not based upon program structures that have been empirically proven to be effective. Effective drug courts are based upon a structure of intensive judge supervised treatment using proven, best practices and evidence based practices. These drug courts employ therapeutic graduated rewards and sanctions, proven cognitive behavioral treatment and intensive case management for an extended period of time, usually at least twelve months.

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[62] The 10 Key Components that must be incorporated in order to qualify as a drug court are: 1) Alcohol and other drug treatment services are integrated with justice system case processing; 2) Use of a non-adversarial approach, prosecution and defense counsel cooperate to promote public safety while protecting participants' due process rights; 3) Eligible participants are identified early and promptly placed in the drug court program; 4) Access is provided to a continuum of alcohol, drug, and other related treatment and rehabilitation services; 5) Abstinence is monitored by frequent alcohol and other drug testing; 6) A coordinated strategy (by drug court team) governs drug court responses to participants' compliance; 7) Ongoing drug court judge interaction with each drug court participant is essential; 8) Monitoring and evaluation measure the achievement of program goals and gauge effectiveness; 9) Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations; and 10) Forging partnerships among drug courts, public agencies, and community-based organizations generates local and community support and enhances drug court program effectiveness. Drug Court Standards Comm., Nat'l Ass'n of Drug Court Prof'ls, Defining Drug Courts: The Key Components (2004).

F. The Life Blood: Funding of the Maui Drug Court and "the Friends"

Our Maui Drug Court is funded by the Second Circuit budget which is funded by the Hawai'i legislature. The treatment component of the Drug Court is primarily provided by private, non-profit drug treatment providers under purchase of service contracts with the Hawai'i judiciary. These treatment providers and their contracts with the judiciary are closely monitored by Program Specialists of the Second Circuit Court.

Currently, the Maui Drug Court contracts with Aloha House of Maui for out-patient treatment and BISAC (Big Island Substance Abuse Council) for treatment provided in our residential Dorms located within MCCC. Our Maui Drug Court Case Managers oversee the overall progress of each participant and also provides supplemental counseling and treatment. Case managers are employees of the Second Circuit Court, supervised by the Maui Drug Court Administrator and Clinical Director.

In addition to funds provided by the Hawai'i Legislature, the Maui Drug Court receives small amounts from donations to a non-profit, charitable corporation named "The Friends of the Maui Drug Court" ("The Friends"), which we established at the same time as the Maui Drug Court. The Friends is completely separate from the Hawai'i judiciary. As such, it engages in fund raising activities in order to assist the Maui Drug Court with additional funding.

The existence of The Friends allows our program to source modest amounts of money to provide for extras, such as small rewards and incentives for offenders. These extras provide for the positive reinforcement we strive to emphasize in our Maui Drug Court. The Friends pays for and organizes an informal "pot luck" celebration held at a nearby community center for our graduates, their families and guests after the formal Maui Drug Court graduation held at Second Circuit Court.

We have always wanted to establish an alumni organization for our Drug Court in order to support the long term recovery of our graduates. We will seek support from The Friends in this and other related activities, for which we are not likely to be able to receive public funds. We were the first Drug Court in Hawai'i to establish a non-profit charitable support corporation; now most Hawai'i Drug Courts are supported by a similar entity.

G. More Basics: Four Phases of Treatment

Offender treatment in the Maui Drug Court is divided into four phases, each with a different content and level of intensity.[63] The level of supervision of the participants gradually decreases over time.

In order to be effective, treatment programs must be centered on causing changes in a person's thinking patterns and ability to rationally asses and consider the consequences of their behaviors. If we can change an offender's thinking, we can change his or her behaviors. We do this by identifying for offenders their thinking errors. We show these offenders how their thinking errors have led to their criminal/addictive behavior and negative consequences. Then, we show and train them how to avoid those and similar thinking errors in the future. This treatment requires a great deal of practice, roll playing, counseling, and other treatment. Of course we also provide group and individual counseling, problem solving and medical/psychological treatment, group counseling sessions and support to address issues in a person's past that contribute to their faulty thinking and criminal behavior, such as childhood trauma or abuse.

H. Abused Offenders Get Extra Treatment

Not surprisingly, many offenders are victims of childhood, as well as adult psychological, physical and sexual abuse (unfortunately, far more often than not) and neglect. Some of our offenders' stories are, indeed, tragic, shocking and heartbreaking. It is unforgivable that in our society such abuse occurs, leaving us with its victims, many of whom end up in the criminal justice system. In the Maui Drug Court, in addition to other treatments, we are able to offer a range of group, individual counseling, therapy and/or medications if necessary, in order to help these offenders identify and overcome these experiences and change their behavioral responses to traumatic events in their past lives.

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[63] The four Phases of treatment are: 1) Phase I–"Intensive care/orientation/education" (out-patient/in community, minimum twelve weeks or possibly in residential treatment Dorms in MCCC); 2) Phase II–"Low Intensity care/treatment" (out-patient/in community minimum 14 weeks from advancing from Phase I); 3) Phase III–"Continuing care" (out-patient/in community minimum 10 weeks from advancing from Phase II); 4) Phase IV–"Aftercare/recovery" (minimum 12 weeks out-patient/in community, may be re-referred to lower Phase as needed).

I. Mentally Ill Offenders Get Extra Treatment

In addition, and perhaps not as well recognized or appreciated as it should be, many of our citizens in the criminal justice system suffer from severe mental illness, such as ADHD, Bi-Polar disorder, severe depression, etc. People who suffer from mental illness may "self-medicate" with illegal drugs, especially meth. While it is difficult to know which came first, the illness or the meth use, the meth use itself may be the cause of the mental illness we observe in our offenders This remains to be studied. In any case, the high incidence of mental illness in the population we treat in our Drug Court increases the challenges we face in treating these offenders for their illegal drug addiction problems. However, we have found that once stabilized on appropriate psychiatric medication, these offenders can be successfully treated for their illegal drug addictions and criminal behaviors. Indeed, because of their unique challenges, these offenders would be truly lost, but for their opportunity to seek and receive treatment for their complicated and debilitating combination of addiction and mental illness in our Maui Drug Court.

When we began our Drug Court we had decided that we would exclude from participation those offenders who presented dual, co-occurring diagnosis or mental disorders. We felt we could not adequately address the treatment needs of persons with serious mental health illness. We found, however, very early on, that a large percentage of the offenders who applied to our Drug Court in fact suffered from a diagnosed mental illness. Perhaps about 70% of our treatment population suffers from one or more co-occurring disorder. Fortunately, we do not need to answer the causation question. These offenders, perhaps aided by the unique structure and support offered by the program, can succeed. These offenders often do very well in our Drug Court and this has been an unexpected, but very rewarding development of our Drug Court experience.

J. AA/NA, Rewards and Punishments & Graduated Sanctions

As an essential component of treatment, we encourage each Drug Court participant to engage with and become a part of the Maui "Recovery Community". Our participants are encouraged to join together with all of the other people in our Maui community who regularly help themselves and others by attending AA or NA and ALANON meetings, get a sponsor and "work the 12 steps." Some may think that this ignores more modern or sophisticated treatment methods, but based upon our experience, those graduates who continue to stay "clean and sober" after they graduate from our Maui Drug Court program are much more likely to achieve long term

sobriety if they engage with and continue to remain a part of our Maui Recovery Community. Therefore, we strongly encourage participation in the "12 Step" and Recovery Community, both during treatment in our Maui Drug Court and, after they graduate in order to assist them in remaining strong in their recovery. In fact, the author believes that the more we support and direct our graduates to become contributing members of our Maui Recovery Community, the better our community will be over all. Having a large proportion of our community actively participating in and adhering to the remarkable self-help "12 Step" principles will be a good influence on our Maui community as a whole.[64]

An essential component of the successful Drug Court treatment model is a system of rewards/encouragements, punishments/discouragements and graduated sanctions to be applied by the Drug Court judge to help create changes in a participant's thinking and behavior. For example, a person might be given a gift certificate redeemable at a market or a theater ticket for advancing to the next phase of treatment or completing his or her assigned community service hours ahead of time. On the other hand, they might be ordered by the Drug Court judge to spend a weekend in jail working on a writing assignment designed to cause him or her to evaluate the cause and effect and consequences of an act of negative behavior, such as driving without a license, missing a counseling appointment or failing to perform community service hours on time. A second transgression will result in an increased or "graduated" sanction of enhanced severity. Studies show that positive reinforcement of behavior is more effective than *negative* reinforcement, and our Drug Court is guided by this knowledge.[65]

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[64] The "12 Steps" of Alcoholics Anonymous are: 1) We admitted we were powerless over alcohol—that our lives had become unmanageable; 2) Came to believe that a Power greater than ourselves could restore us to sanity; 3) Made a decision to turn our will and our lives over to the care of God as we understood Him; 4) Made a searching and fearless moral inventory of ourselves; 5) Admitted to God, to ourselves, and to another human being the exact nature of our wrongs; 6) Were entirely ready to have God remove all these defects of character; 7) Humbly asked Him to remove our shortcomings; 8) Made a list of all persons we had harmed, and became willing to make amends to them all; 9) Made direct amends to such people wherever possible, except when to do so would injure them or others; 10) Continued to take personal inventory and when we were wrong promptly admitted it; 11) Sought through prayer and meditation to improve our conscious contact with God, as we understood Him, praying only for knowledge of His will for us and the power to carry that out; and 12) Having had a spiritual awakening as the result of these Steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs. *The Twelve Steps of Alcoholics Anonymous*, Alcoholics Anonymous (Sept 9, 2011).

[65] *See* C. West Huddleston III, *Drug Courts: An Effective Strategy for Communities Facing methamphetamine*, DOJ (Sept 9, 2011), http://www.ojp.usdoj.gov/BJA/pdf/MethDrugCourts.pdf.

K. Our Potential: 120-200 Clients/Tracks I-V & Inclusiveness

Currently, we have about 120 active participants in our program and usually we have over seventy offenders on our wait-list. There has been a wait list of offenders to participate in our Maui Drug Court since its inception.[66] Because of our limited resources and the current financial crisis, the demand for Drug Court treatment far exceeds our ability to provide treatment services or to provide the staff training and motivation at the level we know we need. For the time being it is the high morale and dedication to the mission of our Maui Drug Court that sustains us. If we could obtain the funding, we could treat at least 200 participants on an ongoing basis in our Maui Drug Court.

The philosophy of our Maui Drug Court program is to attempt to treat as many offenders as possible from our criminal justice system, so long as an offender demonstrates a desire to change his or her life. Accordingly, in order to provide effective drug treatment for as many drug addicted offenders as possible, we have structured our Maui Drug Court to provide for five "Tracks" by which an offender may participate.[67] A "Track"

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[66] Often an offender will wait for one year or more in custody while waiting to be admitted into the Maui Drug Court. This is an important fact for several reasons. First, it reflects the high level of desire of drug addicted offenders for recovery, which explains the high level of offender "buy in" our Drug Court has created. Second, these offenders will avoid a prison sentence. Third, these high risk offenders will not, while they are waiting their turn, be out of custody and in our community without receiving the high level of treatment and program structure that these high risk offenders require in order to ensure that they do not cause harm.

[67] The 5 Tracks are: 1) Track I–Pre-Charge, post-arrest; 2) Track II–Pre-trial, post-charge; 3) Track III–Post-Conviction, on probation facing revocation for violation of probation; 4) Track IV–Post-Sentence to prison, paroled, but facing parole revocation for violation of parole; and 5) Track V–Sentenced to prison, but nearing end of prison sentence and entering Furlough processing within prison/jail. Once an offender is sentenced to prison without probation, jurisdiction over the offender transfers from the Judiciary to the Hawai'i Department of Public Safety (PSD). Therefore, in order for the Drug Court to exercise authority over the offender in Tracks IV and V during their Drug Court participation we operate under an authorizing Memorandum of Understanding between Second Circuit Court and PSD. Basically, in Tracks IV and V treatment in our Drug Court can augment or substitute for drug treatment that an offender would ordinarily receive from PSD as part of his or her "out–mustering" or Furlough process during which PSD prepares an offender to leave prison and again become a productive member of the community after completing his or her prison term. We have had several successful graduates from our Drug Court who entered in Tracks IV and V, although they are challenged with not only having to comply with our Drug Court requirements as well as, and in addition to, the rules and restrictions that apply to them as sentenced prisoners under the jurisdiction of PSD. Treatment in Tracks IV and V is sometimes referred to as a "re–entry" program or court. The Maui Drug Court is the only drug court in Hawai'i to offer Track IV and V treatment opportunities in Hawai'i.

describes the point in the cycle of the criminal justice system at which the offender may enter the Maui Drug Court. For instance, a Track II participant will have been charged with a crime, but not convicted; whereas, a Track IV participant will have been convicted, sentenced to prison and paroled; and, will currently be facing parole revocation before the Parole Board, usually for a drug related crime or drug use. By providing for five "Tracks" by which to enter into our program, we are able to be more inclusive than any other drug court program. We are able to offer treatment to offenders with the most severe addiction challenges, virtually without any limitation based upon where an offender happens to be in the cycle of the criminal justice system. Most drug courts, including those in Hawai'i, offer only Tracks I, II and/or III, and philosophies of inclusiveness vary among drug courts. The Maui Drug Court is designed to provide for maximum inclusiveness.

Our philosophy is, then, very simple: our Maui Drug Court is proven to work and has provided a tremendous benefit to the people of our community; therefore, we must strive to treat as many Maui offenders as possible. Accordingly, all a qualified offender needs in order to participate in our Maui Drug Court is to be charged with a drug related felony, be non-violent and possess a strong desire to change their criminal and addictive thinking and life-style, and we will find a Track by which they can participate. This philosophy also recognizes our existential need to treat Maui offenders; they will not go away and will harm our community if left untreated.

In fact, often, offenders will be participating in our Maui Drug Court on more than one Track at the same time. This can occur when an offender has several cases which are at different stages in the criminal justice system. For example, an offender may be on probation, but face having his or her probation being revoked because he or she has committed a new crime for which they have not yet been convicted. That person could enter the Drug Court as a Track II (the new case) and a Track III (the probation case) offender. If the drug court only offered track III participation, such an offender would not qualify for participation.

The Track an offender enters the Maui Drug Court through will, in turn, dictate the disposition of their case upon their successful graduation. Therefore, for Track I or II offenders, since they have not been convicted on their criminal charges, their charges will be dismissed by the Court and the charges will never be a part of their criminal record as a conviction. Track III participants, since they are probationers, have already been convicted of their crimes, but the Court will terminate their five year term of probation early based upon their successful graduation. Track IV offenders are on parole; therefore, upon successful graduation the Drug

Court judge will inform the Hawai'i Paroling Authority (HPA) that the participant has successfully completed the Drug Court program. Such an offender will usually have a violation of his or her parole pending by the HPA and will be subject to being sent back to prison to finish the remainder of their original prison sentence. Therefore, their successful graduation from the Maui Drug Court will be very helpful to such an offender in convincing the HPA to keep them on parole, based upon their successful graduation. Usually, this is the result. A Track V participant who successfully graduates may qualify early for favorable disposition of their application for parole, and may thus be released from prison early based upon their successful graduation from the Drug Court. These favorable consequences for the offender as a result of their successful graduation from the Drug Court are an added and strong incentive to motivate them to be successful.[68]

L. Unique Basics: Treatment Dorms at Jail for Men and Women

Usually, drug courts treat only so-called "non-violent" offenders and provide only out-patient treatment.[69] However, we recognized during our initial planning that, while technically non-violent, many offenders are nevertheless so badly addicted to illegal drugs and out of control of their lives that they are virtually unmanageable in an out-patient setting. If our

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[68] It should be pointed out here that in order to graduate from our Maui Drug Court an offender, in addition to all of the other requirements, must pay any restitution (payments to the person harmed), fines, fees or other amounts owed. In addition the Maui Drug Court charges each offender a fee of $500 to participate in the Maui Drug Court, which they may pay with funds or they may work off with community service. This $500 fee provides the offender with an additional stake in the Drug Court program and requiring the other payments to be completed helps make the community whole. The overall effect of both of these requirements is an important therapeutic aspect of the Maui Drug Court.

[69] A "non-violent" offender for purposes of Drug Court is defined as a person who has been convicted of a crime of violence within the previous five years. This was a requirement of our initial federal funding, which we obtained during the planning and start-up phases of our Drug Court. The purpose of this requirement now is to keep separate the more serious, dangerous offenders. This is not a "bright line" determination and decisions on who to include are made on a case-by-case basis. As a practical matter, if an offender is truly dangerous or has committed a serious harm, he or she will probably have been sentenced to prison. We could later treat this offender in Track V or IV, if the Drug Court judge determined he or she is appropriate for our Drug Court. If a "violent" offender was not sentenced to prison, then most likely they are not seriously dangerous and can safely be treated with the other offenders; but, nevertheless, the Drug Court judge will have a close look first in order to be satisfied that we are not inappropriately mixing the serious with the less serious offenders for treatment. In any case it should not be difficult to keep offenders appropriately with the group they belong with for treatment.

Drug Court provided only for out-patient treatment, these offenders would likely, because of the severity of their addiction and potential for harm, be sentenced to prison. However, it is precisely these offenders who cause the most harm in our community and are, therefore, the most in need of treatment. Recognizing this dilemma, we believed that it was essential to extend our treatment program to include these more challenged offenders. In order to accomplish this we arranged to create our Dorm III and Dorm V residential treatment dorms at our local jail (the Maui Community Correctional Center), which we operate under a memorandum of agreement with PSD.

Having our Maui Drug Court residential treatment dorms at our local jail that are exclusively dedicated to treating Drug Court offenders allows us to treat these more challenged offenders in a setting separate from the MCCC general jail population. This treatment is usually for about 90 days before an offender transfers to our out-patient program with supervision in the community. Supervision and treatment of offenders as out-patients in the community is much less costly than residential or in-custody treatment.

With the support and cooperation of PSD, we are able to treat up to 24 men (Dorm III) and 12 women (Dorm V) in our Drug Court residential treatment dorms. We also use these dorms to place offenders back into custody for a period of refresher treatment if they falter in treatment, at any time, after they have completed their initial 90 days of treatment. And, we also place offenders in our treatment dorms who may have started the program in an out-patient status, but who have faltered in their treatment and require the increased intensity of dorm treatment for a discrete period of time.

Therefore, our treatment dorms have allowed us to offer more effective treatment to more people who are in the most need of treatment. This would not be possible if our program was limited to out-patient only treatment. In fact, we are able to offer treatment to almost any offender who is appropriate for probation and, later, those who qualify for Tracks V or IV.

The Maui Drug Court is the only Drug Court in Hawai'i that offers treatment in a dorm setting while incarcerated. Our residential treatment dorms are an essential reason for the remarkable success of our Maui Drug Court and reflect the flexibility of our ability to treat offenders who would not ordinarily qualify for treatment in programs that do not offer residential dorm treatment. Remarkably, more than 80% of our offenders begin their treatment in our residential treatment dorms! And, most of our offenders who begin treatment in an out-patient status eventually spend time in our treatment dorms.

All drug courts could benefit, likewise, from including a dorm treatment component in their programs. Sometimes drug courts are criticized for so-called "cherry picking" for selecting only the easiest case for inclusion and treatment. The reader can see that this is clearly not the case in the Maui Drug Court; in fact, the emphasis is just the opposite. If our drug courts cannot treat the serious offender (excluding those who require prison for our safety) then they are of little use. This is simply not the case, which will be apparent to anyone who reads this Report or studies drug courts.

There are two additional considerations about our Maui Drug Court that the reader should know about. First, as previously noted, courts that provide drug treatment for inmate drug offenders as part of their pre-release programming are referred to nationally as "re-entry" programs/courts. We learned of these types of programs/courts during our initial planning through the National Association of Drug Court Professionals (NADCP). There are very few re-entry programs/courts nationally, but they are growing in number because of the obvious benefit of providing effective drug treatment to inmates prior to their release into the community. Our appreciation of this concept has guided our philosophy in creating our five Track program, and the inclusion of the dorm treatment opportunities in our program. In fact, our Tracks IV and V qualify as "re-entry" court Tracks. Second, our dorm treatment program provides us with a therapeutic place in which to stabilize participants who suffer from mental illness, after which they can transition to treatment as out-patient participants. Again, we try to be as inclusive as possible to treat as many offenders as possible.

M. Graduation Day!!

Graduation day at Maui Drug court is a remarkable event that lives in one's memory.

Graduation from our Maui Drug Court program requires, among other things, that a participant complete a minimum of twelve months of successful participation, although, as previously mentioned, most participants take two or more years to graduate. The relatively long duration of the program is an important factor in its success. The four phases of treatment, coupled with various "set-backs" that can be imposed as sanctions, often result in an offender taking a much longer (but for him or her the "correct") amount of time necessary to be fully ready to graduate and return to society. Each offender takes the time that is appropriate for that offender's treatment and recovery. In order to graduate from the Drug Court a participant must complete all four phases of treatment, remain drug/alcohol free for an extended period, possess (or have earned) a high school diploma or equivalent, perform 30 hours of restorative justice

helping a person they have harmed, pay off any restitution owed to their victims and fines owed, and have a full-time, tax-paying job or be attending college full-time working towards a degree, and reside in approved clean and sober housing. We also strongly encourage each offender to stop using tobacco products as an integral part of their treatment and recovery and to recognize the danger of continued tobacco addiction to their sobriety. As a result of our successful collaboration with the University of Hawai'i Maui Campus, more than one-third of our participants are currently enrolled and attending classes as students!

As one can appreciate, many of the offenders in our Maui Drug Court program never graduated from high school. Because one of the many requirements of our Drug Court is to graduate high school, for those who reach this goal it is a singular life achievement for which they and their families can be justly proud. It is truly an honor to be small part of a program such as our Maui Drug Court that has the ability to help these offenders free themselves from the curse of drug addiction, and also to provide them with the means to heal spiritually, become whole and recognize their own remarkable achievement. That our Judiciary has been able to grow and adapt to serve the needs of our citizens in such a remarkable way has been truly inspiring.

The substantial number of offenders in the Maui Drug Court who have attended college while they are in our program has been a remarkable and unanticipated development, of which we initially were astonished, but are now very proud. It turns out that many of our offenders are highly motivated to return to school, in particular to go to college. I believe by enrolling in college, something most of them would never have done but for their participation in the Maui Drug Court, an offender makes a significant commitment to themselves and a statement to society that they are in fact fully ready in their recovery to return to a normal, productive life in our community. Finally, our case managers have worked with the outreach counselors at the University of Hawai'i Maui Campus to help our offenders and have been very successful in assisting them to obtain the necessary funding to go to college. This is a good example, I believe, of how others in society want to and will help those who they see are trying to change their lives and return to being productive members of society. I believe it represents a combination of community forgiveness and mutual reconciliation.

N. There are No "Failures"

Another more subtle but important benefit of the treatment dorm component of our Maui Drug Court program is the long-term benefit

provided to those offenders who participate, but who nevertheless fail the program. This may appear to be counterintuitive, but rarely is a participant terminated from the Maui Drug Court program before he or she has completed 90 days of Dorm treatment or 90 days of out-patient treatment. This is the most intensive part of our treatment protocol. Therefore, even when a participant is eventually terminated from the program, by having provided that initial, in-custody treatment experience, our Maui Drug Court has, nevertheless, exposed the offender to high quality drug treatment for an extended period of time. If and when these offenders eventually decide to stop their drug use, which we know that at least some will do later on, these former Maui Drug Court participants will certainly know how to re-engage with the treatment/recovery community, go to a meeting, get a sponsor, work the 12 steps, etc. This is especially significant when one considers that the average age of drug use onset in Maui is 12-14 years; often younger.[70] These youthful drug users are devoid of any accurate knowledge about the harmfulness of the drugs they use or of any useful information about finding help or drug treatment or recovery. By providing this initial treatment experience, even participants who are program failures are, as a result of the treatment they have received, capable of re-initiating recovery, and thus represent a treatment success that will assist in reducing community harm in the long run. Literally, then, every penny invested in our successful Maui Drug Court is a community investment that pays great and long lasting dividends in harm reduction and community redemption for offenders.

O. We Need Clean and Sober Housing

A very serious problem we face is in assisting our offenders to obtain clean and sober housing when they are released from our residential treatment dorms into out-patient treatment. Often they have no money and many of them have alienated their families to the point that they are offered no help. Later on, families often do offer help, but initially the challenge is great. Sometimes the families themselves are not clean and sober.

Local churches and service clubs have provided significant financial help to our offenders by providing funds to help pay their initial rent, support and clothing. Assisting our clients with housing is a very real and difficult challenge. We encourage our participants who are working their way through their dorm treatment phase to write to local churches, non-profit organizations, service clubs and more recently community businesses, as

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[70] This insight has been provided by reading the more than 800 "trigger letters" our offenders have written to me during the past 11 years of Drug Court.

well as other organizations, for donations to pay their "start up" expenses, for rent, clothing, sundries, etc. This has proven surprisingly successful. The success reflects the strong community support that our Drug Court has earned and enjoys in Maui. We are also working with a local non-profit corporation that provides housing for the elderly to attempt to acquire an apartment building to rent exclusively to offenders who are participating in our Drug Court or who are on probation.

Because of the funding challenges we face, and the Maui Drug Court will no doubt continue to face, for the foreseeable future, we must seek and explore creative and collaborative solutions to this and other problems in addressing the ongoing rehabilitation and reintegration challenges of our offender/participants. Allowing an offender to reside in questionable housing merely sets them up for failure.

VI. THE FUTURE: CHANGING THE PARADIGM AND KEEPING US SAFE

At this point the reader may be thinking that if our State's need to address the Meth epidemic is so serious and our Maui Drug Court program is so successful, why are the criminal justice system in Hawai'i, the Judiciary, and our ICIS collaborators not recognizing this fact and actively developing a plan to move our criminal justice system to this or a variation of this model?

We now have enough data proving our success and for us as a State, under the leadership of our Hawai'i Judiciary and with the collaboration of our ICIS partners, to begin moving to restructure our criminal justice system to this new, much more promising, effective and humane paradigm. Given the criminal justice data that exists in Second Circuit, the fact that overall recidivism exceeds 50%, and that the only program proven to effectively reduce our recidivism, and therefore crime is a drug court, it makes good sense to consider changing our criminal justice system to incorporate some of the features of our Drug Court as soon as possible.[71]

In order to help move us towards this new reality, we in the Second Circuit are currently working to expand our use of our Drug Court methodology to the rest of our offenders under supervision. We are about to implement a pilot program for high risk offenders on probation from our SSU (including some of the so-called "violent offenders" I described

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[71] The author acknowledges there may be divergent ideas about how best to proceed in evolving our Hawai'i criminal justice system. However, basing our efforts and direction upon the proven successes of the past 11 years of our Maui Drug Court is sound, and the author believes that it is literally guaranteed to yield much better results and enormous benefits for our citizens and our society; certainly much better than anything else we presently have and with which we can address our very serious Meth problems.

earlier) who do not qualify for or who have rejected participation in the Maui Drug Court program. This pilot program will bring to bear upon this criminal justice population the elements of our Maui Drug Court that have generated our success (close, direct supervision by the judge with immediate consequences coupled with cognitive based treatment). I expect that this program will yield much better results in recidivism reduction than we have seen in probation to date, even considering our implementation of the LSI-R and such programs as HOPE and our SSU. I believe that HOPE and our SSU may continue to make important contributions while offenders work their way through probation, but without more, significant reductions in criminality and recidivism are unlikely. This conclusion is obvious from the data we have.

This evolution to a new system of criminal justice remediation will involve utilizing judicial resources in new and creative ways that some traditionalists may resist, but serving the people of Hawai'i to resolve disputes in the criminal justice system through the use of intermediate sanctions is squarely within the mission statement of the Hawai'i Judiciary.

This evolution will also result in changes to the traditional functioning and roll of some of our trial judges. However, our trial judges are already evolving into many new, and more effective and socially responsive constructs that our society has asked them to fill, and our judges have already proven themselves to be flexible, creative and adaptable in finding new ways in which to serve their communities. Our judges in fact are very well suited to acting in new and creative capacities to serve our communities. All we need to do is make the vision clear and then empower our trial judges to simply build upon the roles that are already evolving and creating as they serve our communities and our State in such capacities as adult, family, and juvenile drug court judges, mental health court judges and girls court judges. Our family court trial judges have an outstanding reputation and record of solving the most difficult and demanding human dilemmas imaginable.[72] With trial judges like this, we are more than qualified and ready to tackle and meet the challenges of reinventing,

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[72] Judges in other states have created all manner of "problem-solving" courts, in addition to drug courts, including gun courts, community courts, mental health courts, domestic violence courts, prostitution courts, parole violation courts, homeless courts, truancy courts, child support courts, gambling courts, DWI courts, and veterans treatment courts. These courts employ many of the same core principles as drug courts, in particular ongoing supervision, graduated sanctions, evidence based treatment and case management. All problem-solving courts share a commitment to the core principles of therapeutic jurisprudence and recognize the importance of the court in addressing the major challenges our society is facing. They seek to solve problems, not just resolve disputes or punish offenders.

leading and meeting the responsibilities of our Judiciary to evolve our criminal justice system, and in assisting our collaborating ICIS partners in adapting and refining their new roles as well.

All of these creative "service" courts that we have now were, for the most part, simply evolved by our trial judges as a natural progression of what the Judiciary does best, serve the people of Hawai'i where and when there is a perceived need and where other resources have not proven capable. Our trial judges and our Judiciary, it turns out, are very effective in these roles and in serving society in these capacities. Very importantly, they relish the challenge of finding new ways to serve our people. Perhaps even most importantly, there is no other branch of government or institution that is as effective in these roles as are trial judges, and that is the reason we have assumed these roles by natural selection and evolution already.

VII. WE CAN DO THIS!

Finally, I recognize that changing the paradigm of our criminal justice system to one centered on the proven, successful drug court model will not be either simple or easy. However, if there is any State in which these challenges can be successfully met, that these changes can be made and that this paradigm can be successfully adopted and implemented, surely it is our State of Hawai'i. We are truly blessed to be here. Hawai'i is indeed a special place with unlimited possibilities and wonderful, creative people, and, most importantly, we law professionals owe a duty to our fellow citizens and to our communities to do our very best to address and do something about this terrible problem of criminal drug addiction that is crushing the dreams and hopes of our citizens, and to stop the ever increasing harm that is victimizing our innocent families and children. There must never again be a drug intoxicated person who throws an innocent child off a freeway overpass to his death in this State![73]

Put our differences and our challenges aside for a moment and imagine with me a time in our State when our community jails are in fact "community treatment campuses", where offenders who are amenable to treatment are educated and trained to change their thinking and behavior and to recover and, under the supervision of our judges, make amends to their community, their families and to their victims, and re-enter our society to be successful, contributing citizens! I say "imagine" because that is what it takes. When I first learned about drug courts our judges here in Maui

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[73] *See* Mary Vorsino, *Babysitter throws tot off Honolulu overpass*, HONOLULUADVERTISER.COM, January 18, 2008, http://the.honoluluadvertiser.com/article/2008/Jan/18/ln/hawaii801180391.html

were sentencing Meth offenders to 5 years in prison for trace amounts of Meth because the sentencing was mandatory, yet, on Oahu, where there was a new drug court, judges had the option of referring such offenders to treatment, and avoiding sending them to prison. It was a terrible dilemma; it was the law. I imagined that we could have our own drug court here in Maui so we could qualify for this exemption and, as a result of a lot of hard work by our Maui Judiciary staff, we had our Maui Drug Court up and running within a year. These challenges can be met and these changes can be made. Recognize the challenges and problems and solve them. I believe with the data and techniques we now possess and the leadership of dedicated Drug Court/Recovery Court judges, and our talented judiciary staff, treatment providers and ICIS collaborating partners the whole paradigm for our treatment of criminal justice offenders in Hawai'i can and must be transformed into this new, much more successful and humane paradigm.

Property Law and American Empire*

Michael Burger** & Paul Frymer***

ABSTRACT

Current scholarship by legal commentators and political scientists recognizes that the weapons of American empire have involved non-militaristic activities as much as militaristic ones. Such non-militaristic activities include the hegemonic influence of trade agreements, the imposition of legal and procedural norms, and the dissemination of ideological and cultural predispositions through corporations and diverse medias. In this paper, we examine an under-explored area on the "soft" belly of the American leviathan, focusing specifically on how property and intellectual property law have operated on physical and ideological frontiers to comprehend, participate in, and legitimate the expansion of American empire. We offer new accounts of two historical instances of empire-building: the acquisition and seizure of property from Native Americans in the early- and mid-19th century, and the expropriation of intellectual property rights to plant genetic resources from indigenous communities in the global South in the late 20th century. These two stories, taken together, offer unique insights into both the process and the substance of law's operation on the frontier of empire. They illuminate how the authority of law has fused with private power and legal legitimacy to enable the nation to expand swiftly, energetically, and powerfully. These insights, in turn, lead toward the more general conclusion that the rhetoric of property has functioned to subjugate peoples and places, cultures and natures, to an imperial regime.

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I. INTRODUCTION

For decades, the phenomenon of American empire has prompted a widely discussed and highly charged debate among pundits and academics alike.[1] This discussion most often revolves around the United States' military involvement overseas, particularly when such involvement includes additional efforts to "nation-build" in the conquered land.[2] The United States has frequently during the 20th and 21st century attempted to impose new constitutions on conquered nations with laws that encourage free-market economies and liberal political values, and impose

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[1] *See, e.g.*, AMY BARTHOLOMEW, ED., EMPIRE'S LAW: THE AMERICAN IMPERIAL PROJECT AND THE 'WAR TO REMAKE THE WORLD' (2006); G. John Ikenberry, *Illusions of Empire: Defining the New American Order*, 83 FOREIGN AFFAIRS (2004/05); Kim Lane Scheppele, "The Empire's New Laws" Terrorism and the New Security Empire After 9/11," 15 CONSTELLATIONS 456 (2008); George Steinmetz, *The State of Emergency and the Revival of American Imperialism: Toward an Authoritarian Post-Fordism*, 15 PUBLIC CULTURE 323 (2003).

[2] *See, e.g.*, NIALL FERGUSON, COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE (2004); JOHN IKENBERRY, LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER (2010); ROBERT KAGAN, DANGEROUS NATION: AMERICA'S PLACE IN THE WORLD FROM ITS EARLIEST DAYS TO THE DAWN OF THE TWENTIETH CENTURY (2006); Daniel H. Nexon and Thomas Wright, *What's at Stake in the American Empire Debate*, 101 *AM. POLI. SCI. REV.* (2007).

Americanized legal structures.[3] In recent years, scholars have importantly expanded the debate about American empire to include a longer history of imperial acts and aspirations, and a broader conception of what constitutes acting like an empire. This research has illustrated that the American empire dates back to its earliest days when Americans declared independence from the British empire, found themselves geographically surrounded by the French and Spanish empires, and made repeatedly bold proclamations to create their own "empire of liberty" with the same grandeur as Rome.[4] Researchers have argued further that the weapons of the American empire during this historical range have involved non-militaristic activities as much as, or even more so, than militaristic ones, including the hegemonic influence of trade agreements, the imposition of legal and procedural norms, and the dissemination of ideological and cultural predispositions through corporations and diverse medias.[5]

In this paper, we extend this recent work to a focus on the varied and important ways in which Americans have utilized understandings of property rights to continually authorize the taking of other people's lands, plants, and products. In line with this recent scholarship, we seek to illustrate the ways in which American property law—a law initially developed out of a range of European imperial projects, though with notable and new translations and alterations—has provided not just a political authorization but a meaningful institutional capacity for acquiring and using new properties. In so doing, we also hope to draw out a more

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[3] *See, e.g.*, JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2000).

[4] *See, e.g.*, DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE 213, 376 (2005); PETER S. ONUF, JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD (2000); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010); CHRISTOPHER TOMLINS, FREEDOM BOUND (2010); Stefan Heumann, "The Tutelary Empire: State and Nation-Building in the 19th Century United States," (Dissertation, University of Pennsylvania, 2009); John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 754, 766 (2007).

[5] Regarding economic, political and "soft power," see JOSEPH S. NYE, JR., BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER (1990). For the argument that empire is most powerfully transmitted through colonial control of ideology and culture, see EDWARD W. SAID, ORIENTALISM: CULTURE AND IMPERIALISM (1978); JULIAN GO, AMERICAN EMPIRE AND THE POLITICS OF MEANING (2008). For a historical overview of the different forms and features of empire in world history, see JANE BURBANK & FREDERICK COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE (2010); MICHAEL DOYLE, EMPIRES (1986). There are some who argue even more expansively, claiming that the modern phenomenon of empire is a state-less, trans-national-economic network closely associated with the institutions and force of globalization. *See* MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (7th ed. 2001); SASKIA SASSEN, TERRITORY AUTHORITY RIGHTS (2006).

explicit understanding of the relationship between law and power, and power and the state.

The question we ask is a straightforward one: How do political actors utilize laws and legal systems to help achieve imperial ambitions? Recognizing that law's power does not emanate simply from judicial declarations, our account and inquiry includes an investigation into the nature of American legal power and how it intersects with national governing authority. Our hope is to illuminate features of legal authority, such as control over land, property, and natural resources that, with the important fusing of private power and legal legitimacy, have enabled the nation to expand swiftly, energetically, and powerfully. It is law, after all, that has consistently provided the language through which an imperial project may be recognized within broader notions of rights, liberties, and property.[6]

We focus specifically on how American property and intellectual property law have operated on physical and ideological frontiers to comprehend, participate in, and legitimate the expansion of American empire. As an initial foray into this area, we are as yet unable to look at the full universe of real and intellectual property takings that defined and define the empire's reach.[7] Instead we analyze two historical instances of empire-building: the acquisition and seizure of property from Native Americans in the early- and mid-19th century, and the expropriation of intellectual property rights to plant genetic resources from indigenous communities in the global South in the late 20th.

The periods we examine immediately raise important differences; the first takes place entirely within the confines of American declarations—whether recognized or not—of sovereignty. Multiple legal forums were prominent during this time period, but indigenous legal frameworks were not effective in influencing the development of law, even if indigenous individuals and leaders participated as litigants in American courts.[8] In the second period, much of the activity engages international and non-

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[6] *See, e.g.*, LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900 (2010); Hulsebosch, *supra* note 4; Tomlins, *supra* note 4; Witt, *Anglo-American Empire and the Crisis of the Legal Frame*, *supra* note 4.

[7] In using the word "taking" here, we do not mean it in the sense of a constitutional taking or statutory condemnation, though those instances are obviously important analogs. Moreover, we are not looking at other legal themes of American empire, such as the rights of those people who live in colonized territories. For an extensive discussion of the Insular Cases and related matters, *see* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009); BARTHOLOMEW SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006).

[8] *See, e.g.*, Deborah A. Rosen, *Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790-1880*, 46 AM. J. LEGAL HIST. 26, 26-54 (2004).

American domestic law, and as such, indigenous rights are more prominent and significant, if not often victorious. Another, perhaps more abstract difference also occurs: The settlement and ownership of land is obviously territorial—it involves the control of physical space, of land, and its attendant natural resources. In contrast, the settlement and ownership of intellectual property rights to plant genetic resources is not territorial—rather, it dislocates a natural resource, a product of nature, and removes it to the market sphere.

Yet, each of these legal processes is also premised on an ideological move—they involve the investment into the land and its resources of a set of ideas; that is, they each create an idea of "nature" where land is worthless and juxtapose it with an idea of cultivated land that attains market and material value.[9] And the ideas in these two historical instances are similar. Land in mid-19th century America was not only unencumbered by prior title, it was "uncultivated," and "vacant" land, and thus those who "plant themselves" become the "prince" or sovereign owners of the land.[10] These characteristics, or rather these characterizations, enabled courts and other legal actors to legitimize the dispossession of Native Americans of land that had until then been used, if not necessarily owned, by them. Similarly, plant genetic resources in the 20th century were "wild," "uncultivated," and, then, in an important twist, "manufactured" by biotechnology firms.[11] By characterizing property in this way, and by imposing an ideological predisposition of cultivation and production, courts and other actors to legitimated the patenting of intellectual property rights to living things. Thus, in each case, we are dealing with foundational conceptualizations of nature and culture, of land and community, and of the relationships between them. By privileging one conception over another, a range of American political actors have consistently used legal methods and language to privilege an artificially constructed neutrality, and thus effectively mis-categorizing an abruptly political act.

The contribution of law and legal discourse to the taking and maintenance of power has been told many times before.[12] The two stories

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[9] *See, e.g.*, John Locke, SECOND TREATISE ON CIVIL GOVERNMENT 21("*As much land* as a man tills, plants, improves, cultivates, and can use the product of, so much is his *property*. He by his labour does, as it were, inclose it from the common.") *See*, too, David Armitage, *John Locke, Carolina, and the Two Treatises of Government*, 32 POL. THEORY 602 (2004); Tomlins, *supra* note 4, at 120-31; 144-56.

[10] *See, e.g.*, John Locke, SECOND TREATISE ON CIVIL GOVERNMENT 21, 40.

[11] *See infra* Part III.

[12] *See, e.g.*, LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900 (1998); Robert W. Gordon, *The History in Critical Legal Histories"*, 36 STAN L. REV 57 (1984); MINDIE LAZARUS-BLACK AND SUSAN F. HIRSCH, EDS.,

detailed here offer insights into both the process and the substance of law's operation on the frontier of empire. Procedurally: In both instances, expansion of the American empire was effected incrementally, through a dynamic process between private bargaining and inter- and intra-group power-brokering among U.S.-backed agents, local leaders, and their constituents situated on the periphery, on the one hand, and institutionalized lawmaking at the center, on the other. Substantively: In both instances law provides a means of institutionalizing, constituting, and legitimizing cultural interpretation, in the sense of evaluating the relative merits of different civilizations or cultures. Property law, real and intellectual, inscribes these norms, and provides the means for achieving legal judgment.

These procedural and substantive lessons lead in the direction of a more general inquiry into the nature and rhetoric of property in relation to empire. It is not only the profitability of property that is important to empire's purpose, but also the way in which property laws are tied to notions of progress and civilization. In a sympathetic view, property and property law is tied to the desire to free individuals from the exercise of arbitrary power, to promote personhood, to promote human rights. In these stories we see how the rhetoric serves a different end, namely the subjugation of peoples and places, of cultures and natures, to an imperial regime.

II. THE LEGAL FRAMEWORK FOR INDIAN REMOVAL IN THE CONTINENTAL UNITED STATES

Alexis de Tocqueville, in his visit to the United States in 1831, was famously struck with how Americans borrowed "legal phraseology and conceptions" in their controversies, ideas, and language.[13] "Democratic government favors the political power of lawyers," he wrote, because "lawyers constitute a power which is little dreaded and hardly noticed. But it enwraps the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire."[14] The power of lawyers, and of law, was most striking with regard to the removal of Native American nations from lands they owned east of the Mississippi River: "The dispossession of the Indians

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CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE (1994); SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW (2000); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT (1975).

[13] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (Harvey C. Mansfield & Delba Winthrop ed., trans., Univ. of Chicago Press 2000) (1835).

[14] *Id.* at 266, 270.

is accomplished in a regular and, so to say, quite legal manner."[15] Tocqueville writes, "The Spaniards, by unparalleled atrocities which brand them with indelible shame, did not succeed in exterminating the Indian race."[16] In contrast, Americans attained this result "with wonderful ease, quietly, legally, and philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect to the laws of humanity."[17]

Tocqueville overstates the civility with which indigenous populations were removed from their land. Settler violence and military wars were common throughout the period, and they involved frequent brutality and human rights atrocities directed at people of all ages.[18] The U.S. government also employed its military strategically, often opting for indirectly violent moves such as using armed settler populations as a defensive barrier to potential attack instead of direct warfare.[19] But what Tocqueville recognized was the way in which legal mechanics disempowered indigenous populations on a day-to-day basis, moving slowly but surely to engulf their lands within the province of American authority. Although it was not until 1830 that Indian removal became the official policy of the national government, when Congress passed legislation authorizing the government take direct action to move the vast majority of Indian nations east of the Mississippi River to lands further west, much of the work of American property expansion—as we will see below— had already been accomplished through decades of incremental political and legal decisions.

When Tocqueville remarked on the importance of the American legal system in bringing about this precipitous outcome, he was not limiting his reference to actions by the U.S. Supreme Court. In fact, the Supreme Court often played a secondary role to other actors—private, political, and legal—in land taking. The Court's most famous decision in response to Indian removal, *Worcester v. Georgia,* is best remembered for its futility. There,

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[15] *Id.* at 324.

[16] *Id.* at 339.

[17] *Id.* at 339. Tocqueville's argument continues to inspire current work, as reflected in Daniel Hulsebosch's recent claim that Americans "conquered the continent less with violence than with the confidence with which they carried forward their notions of constitutional liberty, notions forged in the matrix of empire." HULSEBOSCH, *supra* note 4, at 11.

[18] *See, e.g.*, NED BLACKHAWK, VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST (2008); PATRICK GRIFFIN, AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER (2007).

[19] *See* Paul Frymer, *Building an American Empire: Territorial Expansion in the Antebellum Era*, 1 U.C.I. L. REV. 913 (2011).

the Court held that actions by the state of Georgia to intervene in the Cherokee nation's affairs were unconstitutional because the Cherokees were an independent nation that could only be engaged with by the United States federal government, not a state such as Georgia.[20] Chief Justice Marshall's decision, as with other decisions of this time on Indian affairs such as *Georgia v. Tassels*, was effectively ignored by elected officials at both the national and state level.[21] President Andrew Jackson reportedly said at the time that if Chief Justice Marshall wanted the law enforced, the Chief Justice would have to enforce it himself.[22] As will be discussed further below,[23] the Marshall Court[24] was dedicated to promoting a contractual understanding to property law. This view was frequently contested and, as exemplified by cases such as *Green v. Biddle*,[25] rejected by local and state governments promoting alternative understandings of property that rested on republican ideological traditions, cultivation, and settler rights.[26] The Supreme Court did play a role in legitimating the taking of land from indigenous peoples, most notably in the high profile cases of *Fletcher v. Peck*[27] and *Johnson v. McIntosh*,[28] which denied indigenous title to land based on legal doctrines deriving from sources as varied as natural law and declarations by the Pope. Yet, although these

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[20] 31 U.S. 515 (1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353, 361 (2001). Chief Justice John Marshall delivered the opinion of the court.

[21] Regarding *Georgia v. Tassels*, a case in which the state of Georgia defied a motion by Justice Marshall to hear an appeal in the Georgia state decision by executing Tassels before Marshall could hear the case, *see* TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS (2002), 103-24. More generally, on the Marshal decisions of the time, *see* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 136-37 (2005).

[22] *See* Barry Friedman., *A History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 Geo. L. J. 1, 49 (2002) (Quoting Andrew Jackson who "supposedly (but more probably apocryphally) said, 'John Marshall made his decree; now let him enforce it,'"). Tim Alan Garrison suggests that Jackson's quote, which he attributes to Horace Greeley at the time, may well have been invented. Regardless, Garrison writes, "the statement did generally represent the president's position." Garrison, *supra* note 21, at 193. *See also* ROBERT V. REMINI, THE LEGACY OF ANDREW JACKSON: ESSAYS ON DEMOCRACY, INDIAN REMOVAL, AND SLAVERY 25 (1988).

[23] *See infra* Section II. C.

[24] The "Marshall Court" is used to refer to the U.S. Supreme Court from 1801 to 1835, when John Marshall served as the Chief Justice.

[25] 21 U.S. 1 (1823).

[26] RANA, *supra* note 4.

[27] 10 U.S. 87 (1810).

[28] 21 U.S. 543 (1823).

cases are severely criticized—rightly so—for failing to protect the types of indigenous rights that would later be protected in *Worchester*,[29] even in these landmark cases the Court was limited to legitimating a property law that had developed through extra- or non-legal means. The Court was merely one of a number of important actors in a much broader political and legal process that had created, certainly by 1830, a *fait accompli*.

Tocqueville, then, was referring to a broader legal system and its range of courts, litigators, and laws that would predominate in promoting American expansion during these years. Property law, with its symbolic rituals of legality marked by formalized legal process and its dispersal of institutionally-sanctioned norms, was chiefly important not only in justifying but in providing the principal means through which land taking was channeled. The mere assertion of legal jurisdiction on lands owned and occupied by Indian nations expanded American control, and effectively enforced economic contracts and property rights in a range of individual confrontations between American settlers and indigenous peoples that created boundaries between legitimate insiders and outsiders.

In this section, we focus on three ways in particular that the U.S. legal system promoted expansionist policies that intruded on the sovereignty of indigenous lands: (1) its particular understanding of property law; (2) the activity of local and state courts in enforcing property law independent of the Supreme Court; and (3) the particular role of the Supreme Court in *not* defending Native American property rights, when the Court's own jurisprudence provides reason to think that it should have.

A. Property Law

The federal government, state and local governments, private land companies, and a range of settlers all consistently relied on common law traditions of property ownership—although they emphasized different pieces of this tradition, with some emphasizing the importance of cultivation for ownership, others the contractual exclusivity of property rights, and still others popular sovereignty—to defend their own claims to land.[30] As such, federal, state, and local courts quickly became critical of the process of establishing legal ownership over land to sort through the myriad number and types of conflicting claims.[31] An 1806 congressional

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[29] *See, e.g.*, GARRISON, THE LEGAL IDEOLOGY OF REMOVAL, *supra* note 21; ROGERS M. SMITH, CIVIC IDEALS 182-85 (1997).

[30] *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND 10-85 (2005).

[31] *See, e.g.*, TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); MARÍA E. MONTOYA, TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840-

report on the territory of Michigan was indicative of the complications that faced the granting of legal title: "notwithstanding the settlement of this country for nearly one hundred and fifty years, only *eight* regular titles are to be found within its limits."[32] This particular report found title claims dating back to the first years of the 1700s that were founded on French, British, Canadian and Indian grants, as well as claims by squatters basing their rights on settlements and improvements.[33] The claims involved land masses as great as one hundred thousand acres.[34]

Given the range of cultural differences over the meaning of property and the evidence of ownership, the effect of the judicial forum, along with the language and power of the courts, was to give an insurmountable advantage to speculators and settlers in their contestations with indigenous claims of prior land ownership. [35] Land speculators and settlers recognized what types of legal actions were needed to win in court, and shaped their strategies and took action accordingly. At the same time, a lack of familiarity with the legal system left indigenous populations constantly making mistaken choices. The process of litigation, and in particular its costs, often overwhelmed them into compliance, even when the law was at least arguably on their side.[36]

The common law applications of land rights and property acquisition were in themselves grounded in notions about the right of European conquest and an evolving understanding of racial hierarchies that dated as far back as Roman law. As Robert Williams has written, it was the law that provided Europe with its "most vital and effective instrument of empire," and the development of these legal notions was subsequently transferred, often awkwardly, to 15th and 16th century European law of nations (*jus gentium*) and imperial law.[37] Roman Emperor Justinian I's *Corpus Juris Civilis* ("Body of Civil Law"), written in the 6th century, first codified modes of acquiring territory, enabling claims of *imperium* (the government's use of law to authorize the right to rule) and *dominium* (the idea of territorial sovereignty), dependent on certain conditions of

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1900 46-78 (2002).

[32] JOHN G. JACKSON, LAND TITLES IN MICHIGAN TERRITORY, H.R. Doc. No. 9-126, at 263 (1st Sess., 1806).

[33] *Id.* at 268-69.

[34] *Id.*

[35] *See, e.g.*, MONTOYA, *supra* note 31.

[36] *See, e.g.*, ALMAGUER, *supra* note 31, at 80-81; SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994); Rosen, *supra* note 8, at 26.

[37] ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 6 (1990).

possession, prescription, and taking being met.[38] The rise of nation states in Europe at a time when monarchs were asserting independence from the remnants of the Roman Empire, led legal and political supporters of the new states to articulate a political and legal system that would lay out the foundations of territorial sovereignty and justify the taking of new lands both in and outside of Europe.[39] The Justinian codes were influential in part because prior to the codes, there was simply no established understanding of what constituted a legal taking and possession.[40] Among the most notable writers, Francisco de Vitoria, Alberico Gentili, Hugo Grotius drew in different ways on Roman law in order to make new claims to authorize certain forms of sovereignty and taking, hoping to make the types of arguments that would buffer the property aspirations of the particular sovereign under which they wrote.[41] Writing in what was effectively a legal vacuum, they had to establish an understanding of what, in the context of an imperial encounter, or any other encounter with an indigenous population in a frontier area, constituted legal possession, legal ownership, or a legal taking.[42]

Among the most prominent arguments these and other scholars created were those pertaining to the rule of effective occupation, the doctrine of discovery, and the rights of individuals both inside and outside the sovereignty of nation states.[43] Some of these questions pertained to distinguishing and justifying claims by competitive European empires,

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[38] *See* Ken MacMillan, *Sovereignty "More Plainly Described": Early English Maps of North America, 1580-1625*, 42 JOURNAL OF BRITISH STUDIES 413, 427-28 (2003) (describing the legal foundations of European imperial law, grounded in the Justinian Codes, and furthered by competitive European states and their leading legal minds in the 14th, 15th, and 16th centuries as they embarked on a competitive race to colonize Africa, North and South America, and Asia); TOMLINS, *supra* note 4.

[39] MacMillan, *supra* note 38; TOMLINS, *supra* note 4.

[40] MacMillan, *supra* note 38, at 428. This vacuum or lacuna is critical, as it is the ambiguity or uncertainty of the law that creates the condition for imperial expansion by allowing for discourse that explains imperial actions in light of the culture's dominant themes and motifs—such as manifest destiny, liberty, liberality, markets, or freedom. *See* Witt, *supra* note 4, at 796.

[41] Lauren Benton & Benjamin Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 LAW & HIST. REV. 1, 3 (2010); LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788-1836 (2010); HULSEBOSCH, *supra* note 4, at 18-32; TOMLINS, *supra* note 4, at 104-31; WILLIAMS, *supra* note 37.

[42] Lauren Benton & Benjamin Straumann, *supra* note 41; TOMLINS, *supra* note 4, at 104-31; WILLIAMS, *supra* note 37.

[43] Lauren Benton & Benjamin Straumann, *supra* note 41; TOMLINS, *supra* note 4, at 104-31; WILLIAMS, *supra* note 37.

some between the empires and their colonial antecedents, and still others between empires and the indigenous peoples they confronted.

Legal claims of what constituted effective occupation quickly became critical to nation-state authority over new lands.[44] What constituted effective occupation in situations with varying sizes of indigenous populations and often wide swaths of land was a matter of significant legal debate, and often involved different nation-states engaging in a series of rhetorical politics and the writing of new legal doctrines to justify what was ultimately a doctrine that privileged European settlers and rigid racial hierarchies.[45] When Europeans arrived in the western hemisphere, the immediate question became one of the potential rights of existing indigenous populations.[46] Was this land considered "*res nullius,*" i.e. land belonging to no one and thus open to new occupiers, or, did the existing inhabitants already own all or parts of it?[47]

Much of the early justification for taking land came down to the power of the conqueror, and as such, many of the assumptions of the common law origins only worked if indigenous populations were not perceived as equals. The "discovery doctrine," deriving from Spanish law, legitimated taking of indigenous land on the assumption that Christians had a right to conquest.[48] Vitoria posed the question of whether "these barbarians, before the arrival of the Spaniards, had true dominion;" he concluded that even though indigenous people were "foolish and slow-witted . . . it is still wrong to use these grounds" to deny them pre-existing property rights.[49] Some legal scholars at the time were more open to indigenous rights than others, but even those most open to such rights believed that they existed within certain confines of "international" law.[50] Thus, Vitoria offered opportunities for Spanish conquest by writing that if Indians were already sharing certain things with strangers it would be unlawful for them to prohibit the Spanish, just as it would also be unlawful for Indians to interfere with Spanish rights to commerce and travel, and to prohibit access to things not belonging to anyone. Indians, Vitoria implied, were bound by the same laws of *res nullius* that the Spanish were.[51]

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[44] MacMillan, *supra* note 38.

[45] Lauren Benton & Benjamin Straumann, *supra* note 41.

[46] *Id.*

[47] *Id.*

[48] WILLIAMS, *supra* note 37.

[49] Francisco de Vitoria, *On the American Indians*, POLITICAL WRITINGS 239, 251 (Anthony Pagden & Jeremy Lawrance eds., 1991).

[50] Benton & Straumann, *supra* note 41.

[51] Benton & Straumann, *supra* note 41, at 22-23.

Arguably the most direct influence on the development of American common law, however, was the British justice and legal scholar, Sir Edward Coke. Coke, in the famous decision in *Calvin's Case*, first addressed the rights of aliens under British common law, and thereby helped provide an early legal legitimacy for imperial conquest.[52] In the case, involving a Scotsman's rights under British law, Coke delineated a theory of rights for the British Empire that held its common law protections did not extend beyond English soil.[53] Coke made a critical distinction between the legal rights of aliens who were friends of Britain, those who were enemies, and—among those enemies—those who were temporary or perpetual enemies.[54] He argued that perpetual enemies "cannot maintain any action, or get anything within this realm. All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is a perpetual hostility, and can be no peace[.]"[55] Since infidels are outside of the law and its potential protections, the conquering king has absolute authority over conquered subjects.[56]

Scholars have been careful to point out both the degree to which Coke's arguments rested on faulty case law, as well as the limited use of *Calvin's Case* as an outright sanctioning of imperial conquest. The case has never officially been followed, has been disagreed with, and widely manipulated and maneuvered by numerous judges and legal experts.[57] At the same time, Coke's influence as both a judge and interpreter of British law had huge influence both for British and later American conceptions of imperial authority.[58] As Lauren Benton and Benjamin Straumann have argued, the case's discussion of differential citizenship and subjectivity as well as divided sovereignty, "provided part of the framework for describing legally uneven imperial territories."[59]

These ancient and medieval doctrines were incorporated into American common law through the common law necessities of cultivation and

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[52] Calvin's Case, 77 ENG. REP. 377, 398; 7 Co. Rep. 1a, 1b (1608).

[53] *Id.*

[54] *Id.* at 397.

[55] *Id.* at 398.

[56] *Id.*

[57] *See, e.g.*, FORD, *supra* note 41, at 14-15; HULSEBOSCH, *supra* note 4, at 20-32; RANA, *supra* note 4, at ch. 1; WILLIAMS, *supra* note 37, at 199-205.

[58] *See* HULSEBOSCH, *supra* note 4, at 20-32; J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY, ch. 2 (1987).

[59] Benton & Straumann, *supra* note 41, at 29.

exclusive possession; requirements that encode not only power relations among settlers and Indians but also very specific cultural norms regarding proper relationships between the nation, its citizenry, and nature. British philosophers and legal theorists, from Adam Smith and Thomas More to John Locke, John Stuart Mill and William Blackstone, developed a series of arguments premised in ideas of progress and civilization that legitimated the taking of uncultivated land that was deemed as not being properly used.[60] Emmerich Vattel, a Swiss writer and scholar who received ample citations from American jurists and was quoted frequently by George Washington, Thomas Jefferson, and others, wrote in 1758 in *The Law of Nations*, that cultivation and ownership of land was a critical part of his idealistic notions of the purportedly natural laws of progress, and the future of the human species.[61] Although he rejected the discovery doctrine and trusted democratic sovereignty even in times of war and conquest, he wrote of indigenous populations, that "disdain in the cultivation of the soil" entitles Europeans to occupy their land and even to exterminate them "like wild beasts of prey."[62] His claims that those who were ill-prepared to partake in this process of "progress" could be removed or even enslaved were widely received by American legal thinkers.[63] In viewing cultivation as critical to land possession, American settlers were able to view the land of the North American continent as empty, and their own role in cultivation as a legitimate reason for taking possession.[64]

In addition to cultivation, a popular definition of property rights in many parts of the United States required that an individual take singular possession of the land to obtain title. Courts consistently held (often inaccurately) that because Native Americans were in constant motion, they could not claim attachment to a specific area of land to legitimate a right to property.[65] Squatters, under asserted common law rights of preemption, and occasionally under federal preemption laws passed periodically by Congress that gave squatters title to the land if they occupied and

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[60] UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999); JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION (2010).

[61] *Id.*

[62] *Id.* at 70-71.

[63] *Id.* at 70-71.

[64] *See* BANNER, *supra* note 30, at 150-90; RANA, *supra* note 4. Rana's argument focuses on the historical longevity of this view dating back to Locke and British legal thought. Banner argues, however, that it was a newer phenomenon, dating to the beginning of the 19th century when Americans began to focus more directly on cultivation and farming as a necessity for property ownership. Prior to that time, Locke aside, Americans recognized that Indians were farmers and legitimate owners of their land.

[65] *See, e.g., infra* notes 60-64.

continually improved the land,[66] were entitled to land they occupied as long as they were not removed from the land by the previous owner.[67] Unaware of such legal formalities, indigenous populations often let settlers live peaceably on their land, only to later find that those settlers had attained title.[68] Similar problems occurred when Indians "sold" land with an expectation that they were really "renting" the land, which was indicated by the fact that Indian nations would ask for continual payments over time for settlers to occupy the same piece of land.[69]

State courts consistently upheld the twin requirements of cultivation and exclusive possession, finding against Indian ownership when settlers were able to show either one or the other. The New York Supreme Court, for instance, held that "[i]t is a fact too notorious to require proof that Indian lands . . . were invariably held in common, and that individual property was not known amongst them."[70] A few years later, Justice Kent referenced Vattel's writings in describing Indians as weak, unable to be agriculturally self-sufficient, and thus "under the protection" of Americans and New Yorkers.[71] The Louisiana Supreme Court denied the Caddo Indians ownership to disputed territory because there was "no evidence that the Indians ever hunted over them, although they appear sometimes to have turned their horses on them . . . ."[72] The Alabama Supreme Court referenced Vattel in defense of the assertion that "a mere travelling over a country, and occasionally erecting a monument, without occupying and cultivating the soil, is not sufficient, to give a title to the domain, nor to empire; and that the pretensions of those who live by the chase, must yield to the cultivator of the soil."[73] The Tennessee Supreme Court found property rights in land coming from the "usefulness" of creating "a barrier

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[66] *See, e.g.*, The Preemption Act of 1841, 27th Congress, ch. 16, 5 Stat. 453 (1841) (repealed 1891).

[67] *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 413-14 (2D ED. 1985); PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1.

[68] Accusations of lawyers manipulating, swindling, and otherwise ascertaining power of attorney over indigenous people, leading to land sales, was commonplace. Questions of who within indigenous populations had the authority to sell land also marred an otherwise messy and corrupt process by which Native Americans sold land to speculators.

[69] Thomas J. Sugrue, *The Peopling and Depeopling of Early Pennsylvania: Indians and Colonists, 1680-1720*, 116 PA. MAG. HIST. & BIOGRAPHY 3, 21-23 (1992).

[70] Jackson v. Sharp, 14 Johns. Cas. 472, 476 (N.Y. Sup. Ct. 1817).

[71] Goodell v. Jackson, 20 Johns. Cas. 693, 711-12 (N.Y. Sup. Ct. 1823).

[72] Brooks v. Norris, 6 Rob. 175, 183 (La. 1843).

[73] Caldwell v. State, 1 Stew & P. 327, 339 (Ala. 1832).

to the Indians in difficult times," and preparing "for the production of food and sustenance for the population of the country."[74] In a later case from the same state, written by future U.S. Supreme Court justice, John Catron, the court cited *Calvin's Case*, international law dating to Roman times, and numerous European philosophers to support its assertion that "[o]ur rights on this continent had their origin in discovery in the fifteenth century."[75] The doctrine of discovery entitled Tennessee to have ownership over Cherokee lands on grounds that the lands have been conquered:

> [T]he right to subdue and govern infidel savages found in countries newly discovered by Christians, pertained to the first Christian discoverer. By this rule, the Indians found on this continent, the Cherokees inclusive, were allowed no political rights, save at the discretion of the European power that colonized the country. Such is the international law as declared by papal authority—such is the common and national law as declared in Calvin's case; and such the only possible rule that could be observed by our ancestors. That the colonial charter of Charles II, rightfully conferred sovereign power to govern all the people abiding within its limits, and which the courts of the colony would not disregard in cases of Indian culprits, and refuse to punish those charged with crimes. That the royal government, after 1729, had, and exercised at discretion, the same authority; and by the revolution, it devolved on the State of North Carolina.[76]

Finally, certain features of property law enabled and ultimately legitimated this arguably more aggressive land taking from the Indians. For example, common law property rights, holding that there is no one "true" owner of land, only a multitude of potential claimants with title ultimately determined by the entity with the "best" claim helped inspire competition for acquiring land even in times when it was politically prohibited.[77] As Stuart Banner argues, courts also helped speculators during this time by authorizing the "airey sales" of land speculators; settlers and land speculators often bought land owned by Indians in time periods when the government either did not own the land itself, or owned the land but prohibited private sales with indigenous people.[78] These private buyers made these purchases as 'speculative' buys, assuming all the while that their interests would be retained in a court of law.[79] And they were right. The Virginia Supreme Court in *Marshall v. Clark*, for instance, supported the ability of land buyers, through the grants of state legislatures, to

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[74] Gould v. Hoyle, 4 Tenn. (3 Hayw.) 100, 102 (1816).

[75] State v. Foreman, 16 Tenn. (8 Yer.) 256, 258 (1835).

[76] *Id.* at 278, 283-84, 335.

[77] *See* GATES, *supra* note 67.

[78] BANNER, *supra* note 30, at 160.

[79] *Id.*

purchase land that they did not own, even if the land had yet to be sold by Native Americans to the sole authoritative buyer, the United States.[80] Speculators took this and other state court decisions as a sign that they could go ahead with land accumulation even when the United States had not yet purchased the land through treaty, because they assumed that the U.S. would *eventually* own the land (and later sell to these speculators): "When speculators traded in Indian land, what they were buying and selling was not *land*, or even the right to *buy* land from the Indians, but rather the prospect of being the owner of the land once the *government* bought the land from the Indians."[81] States during this time sold parcels of land that they did not own, in part because they believed that they did own them, and in part because they believed that they (or the federal government) would soon own them.[82] Lawyers versed in property law seized on these opportunities of pre-emption; as long as Indian land was a title in *fee simple*, they could draw up contracts that provided a transfer of the land in the event of a future transaction.[83] The result, then, was that settlers and speculators were dividing up land that was not theirs and relied on the dynamics of property law—with, as we will see in the next two sections, the help of a range of courts from local to national—to gain a subsequent legal claim.

B. Legal Federalism

As evident in the paragraphs above, a great deal of the activism around land taking took place outside of the Supreme Court; only in subsequent years would the Court more directly intervene, and even then would do so quite tentatively.[84] Instead, it was a myriad of actors on frontier lands who forged a dynamic that removed Indians from the land they owned–settlers continually battled over land rights with land speculators, land companies, foreign nationals, veterans with claims of military bounty rights, and an array of indigenous populations.[85] Although the federal government passed numerous Land Acts, preemption laws, and bounty rights in an effort to maintain some semblance of national regulatory control over the distribution of land, it too struggled to maintain authority, as battles over

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[80] 8 Va. (4 Call) 268 (1791), cited in BANNER, *supra* note 30, at 161-62.

[81] BANNER, *supra* note 30, at 160.

[82] *Id.*

[83] *Id.*

[84] GARRISON, *supra* note 21.

[85] *See, e.g.*, BANNER, *supra* note 30 at 85-150; LAURA JENSEN, PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY 136-64 (2003); D.W. MEINIG, THE SHAPING OF AMERICA 240-49 (2d vol. 1993).

the rightful owners of land on the frontier were rampant and fierce, and largely between non-governmental actors.[86] In territories where the number of disputes overwhelmed any prospect of courtroom adjudications, the federal government created Land Commissioners for the purpose of settling disputes between indigenous people and settlers in new territories.[87] Settlers flooded these Land Commissioners and other local courts with property claims, and even set up local Squatters Associations, Claim Clubs, and other organizations designed to resolve land disputes in a manner favorable to them; these settler court decisions did not always withstand legal challenge from state and federal courts, but their commanding presence over the land (as forged by squatter justice) frequently forced legislative officials to negotiate compromises of preemption to satisfy the new status-quo.[88] A multitude of recent historical accounts of these local legal apparatuses have found widespread inequities of outcomes benefiting American interests over those of indigenous peoples, as Americans utilized a range of legal tactics, from standing claims to denying oral testimonies.[89]

A common method by which these local legal systems succeeded in authorizing and enabling property takeover was by asserting jurisdiction over the federal government in order to enable the local populations to take matters into their own hands.[90] In Georgia, for instance, the state proceeded with a survey and lottery of Cherokee lands while the case was being heard by the Supreme Court, enabling settlers to purchase and reside on the land, pushing off the Cherokees—all the while, the Supreme Court deliberated the constitutionality of the matter.[91] Local and state courts consistently made creative legal arguments for why they, and not the federal government, had jurisdiction over Indian lands.[92] One claim that state judges were often sympathetic to was that if indigenous populations were surrounded by the state, the Interstate Commerce Clause of the federal

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[86] On the federal land policies, see JENSEN, *supra* note 85; MEINIG, *supra* note 85.

[87] *See* ALMAGUER, *supra* note 31; MONTOYA, *supra* note 31.

[88] For examples in Kansas, see Martha Caldwell, ed., *Records of the Squatter Association of Whitehead District,* 13 KANSAS HISTORICAL QUARTERLY 1, 16-35 (1944), http://www.kshs.org/p/kansas-historical-quarterly-records-of-the-squatter-association-of-whitehead-district/12956; Annie H. Abel, *Indian Reservations in Kansas and the Extinguishment of Their Title,* THE KANSAS HISTORICAL COLLECTIONS 72-109 (1904). In Texas, *see* MONTOYA, *supra* note 31, at 117.

[89] GARRISON, *supra* note 21; HARRING, *supra* note 36; MONTOYA, *supra* note 31; ANTHONY MORA, BORDER DILEMMAS: RACIAL AND NATIONAL UNCERTAINTIES IN NEW MEXICO, 1848-1912 (2011) 1-4; Rosen, *supra* note 8.

[90] GARRISON, *supra* note 21; FORD, *supra* note 41.

[91] GARRISON, *supra* note 21, 198-200.

[92] *Id.*

Constitution failed to apply.[93] State courts also were active in determining whether Native Americans' had an initial right to sell land to whites, whether whites' had a corresponding right to purchase the land, whether such contracts were enforceable, and whether Native Americans were provided standing in these cases so that they could participate as parties in litigation.[94] Finally, states regulated criminal jurisdiction, whether on matters of violence, stealing, or trespass. New York and numerous New England state laws claimed jurisdiction over Indian lands in criminal cases—they argued that when Indians interacted with the state, they subjected themselves to state law.[95] In the 1820s, southern states such as Alabama, Georgia, and Mississippi used state criminal law to expand state jurisdiction through Indian land, claiming that states and not the federal government had the authority through the commerce clause to regulate affairs internal to state sovereignty.[96]

Even when the Supreme Court decided on a matter of specific relevance to Indian property rights, state courts often felt empowered to move in different directions. The Supreme Court's decision in *Fletcher v. Peck*[97] (discussed further below) was ambiguous enough in its understanding of Indian title that it "provided temporary political acquiescence rather than legal certitude and did nothing to slow down the encroachments of whites onto Indian lands."[98] Georgians, for example, took the case to mean that they controlled the fate of Indian lands in their territory, and surmounted a kind of legal rebellion, referring to *Fletcher* as precedent for state authority over Indian nations.[99] As the state court declared in *Georgia v. Tassels*, "every acre of land in the occupancy of his sovereign, independent Cherokee Nation, is vested in fee in the State of Georgia."[100] The Tennessee Supreme Court allowed the state to extend its jurisdiction into Cherokee territory on grounds that the Cherokees were not a sovereign nation but living within the state's borders, shortly after the Supreme Court ruled to the contrary in *Worcester*.[101]

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[93] Rosen, *supra* note 8, at 32-33. *See also*, United States v. Cisna, 25 F.Cas. 422 (C.C. Ohio 1835) (Federal laws inoperative in Ohio because reservation was so small and surrounded by state populations.)

[94] Rosen, *supra* note 8, at 28.

[95] *See, e.g.*, Goodell v. Jackson, 20 Johns. Cas. 693 (N.Y. Sup. Ct. 1823).

[96] HARRING, *supra* note 36, at 36. *See also* FORD, *supra* note 41.

[97] 10 U.S. 87 (1810).

[98] GARRISON, *supra* note 21, at 84.

[99] *Id.*

[100] 1 Dud. 229, 480 (Ga. 1830). *See* GARRISON, *supra* note 21, at 112-16, for further discussion of this case.

[101] 16 Tenn. 256, 335.

The Georgia government was particularly emphatic in asserting its rights to extinguish Indian land claims and fight wars with Indians within its declared territory. In the mid-1790s, state officials there, led by governor Jared Irwin continued to form and maintain their own militia to fight the Creek Indians, claiming that they had a constitutional right to protect themselves against what they perceived to be imminent danger (despite being told repeatedly by the federal government that it was unconstitutional under Article 2, without evidence that a threat was "imminent," and unwarranted given the broader foreign policy agendas of the time).[102] After protracted battles with national officials over land claims, Georgia agreed to give up land rights that extended to the Mississippi River in exchange for the rights of legitimate settlers to keep their land possessions, and for the federal government "at their own expense, [to] extinguish, for the use of Georgia, as early as the same can be peaceably obtained, on reasonable terms, the Indian title" that remained within state boundaries.[103]

C. The Supreme Court and the Nature of Indian Title

The Supreme Court was by no means a bystander to all of this activity. As we will see below, the Court at times legitimated certain practices, and at other times tried to intervene on behalf of indigenous rights, though ultimately unsuccessfully. What is perhaps surprising is that the Supreme Court did not intervene with greater respect for Native American property rights. The Marshall Court, after all, was renowned for emphasizing the importance of contract law and nationalizing economic procedures.[104] Although state courts frequently protected the rights of settlers who gained title by adding value to the land, the Marshall Court is well remembered for protecting the interest of corporations and sanctifying the right of contract, often at the expense of republican values and community rights that settlers associated with owning land—such as values of cultivation and improvement, and the "elevation of the productive laborer."[105]

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[102] Reports from the War Department, Made to the House of Representatives on the Fourteenth March, 1800, Respecting Claims against the United States for services of the Militia of Georgia in the years 1793-1794 (Published February 20, 1800 and printed by the House of Representatives, January 2, 1818). The government's finding that a threat was not imminent is on page 17 of the report.

[103] GA. CONST. OF 1848, art. I, § 2 (1802).

[104] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

[105] *See, e.g.*, Trs. of Dartmouth College v. Woodward, 17 U.S. 518 (1819); Fletcher v. Peck, 10 U.S. 87 (1810). *See generally* HORWITZ, *supra* note 104. The quote comes from RANA, *supra* note 4, at 130.

Indeed, in one of Marshall's earliest decisions regarding contractual rights, *Fletcher v. Peck*, the Chief Justice elevated the sanctity of the contract even in the face of bribery.[106] The case involved the New England Mississippi Land Company's successful appeal of its claim to a contract provided them by the Georgia state legislature—a contract that had been fueled with bribery money.[107] The Court declared that the contract could not be invalidated by a decision of a state legislature, even as the state legislature rested its invalidation on the premise that the contract was the result of bribery and scandal: "No state shall pass any . . . law impairing the obligation of contracts."[108] The Court held that the sale of land by the Georgia legislature had to stand as a private transaction, and the speculators who purchased the land were to receive compensation.[109] It is also in *Fletcher* that the Court, for the first time, addressed partially the question of Indian land rights. Some of the land had been occupied by Indian nations at the time of the sale, whereas Georgia had proclaimed the lands "vacant" and assumed dominion.[110] The Court largely skirted the issue of Indian title, dropping a seeming afterthought in the final paragraph of the decision: "the nature of the Indian title . . . is not such as to be absolutely repugnant to seisin in fee on the part of the state."[111] Native Americans, then, held title to the land and a right to occupy it "until it be legitimately extinguished."[112]

Fletcher foreshadowed many of the great contract decisions of the Marshall years, from *McCulloch v. Maryland*[113] to *Trustees of Dartmouth College v. Woodward*[114] to *Gibbons v. Ogden*.[115] One of those cases, *Green v. Biddle*,[116] could well have established the precedent by which Marshall would handle the rights of indigenous populations who claimed land ownership. The case pitted settlers in Kentucky who improved and possessed otherwise unoccupied land against those who claimed original title in absentia.[117] The Kentucky legislature passed multiple laws preventing the contractual owners from claiming land against the settlers who had cultivated and lived on the land without providing payments for

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[106] 10 U.S. 87 (1810).
[107] *Id.* at 123.
[108] *Id.* at 138.
[109] *Id.* at 142-43.
[110] ROBERTSON, *supra* note 21.
[111] *Fletcher*, 10 U.S. at 142-43.
[112] *Id.* at 143.
[113] 17 U.S. 316 (1819).
[114] 17 U.S. 518 (1819).
[115] 22 U.S. 1 (1824).
[116] 21 U.S. 1 (1823).
[117] *Id.* at 3-4.

the value of improvements.[118] There was no claim by the absentia owners of possession or cultivation; merely a contractual right.[119] The Marshall Court, in an opinion written by Justice Story, dismissed the importance of land cultivation and current possession; original title—in this case involving pre-existing agreements between Kentucky and Virginia—was an original contract, and this was most sacred under law.[120]

But in the same year as *Biddle* was decided, the Supreme Court also decided *Johnson v. McIntosh*, a case that involved a title dispute between private land speculators from the Illinois-Wabash Company and the U.S. government over lands that had been owned by Native American nations in Illinois.[121] Here was the first case before the Supreme Court where the rights of indigenous people came directly to the fore and where the Court offered lengthy analysis. The legal question was whether Indian tribes were a sovereign people, or whether Indian claims to the ownership of land was entirely subsumed by the sovereignty of the U.S. government.[122] If they were, the tribes could legally sell their land to the land company who then could claim title; if not, the land was owned by the United States.[123] The tribe's legal claim was fairly well settled in other areas of the British empire and under developing British common law.[124] Justice Marshall however, went in a different direction, drawing on the lengthy history of European conquest and its legal underpinnings, and choosing themes from Coke as much as Vattel and Grotius: "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[125] Country after country in Europe had divided up the American continent and distributed land possessions on the basis of the principle of discovery that gave them title to the land they conquered.[126] Indeed, while Indians initially occupied the land, "all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to

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[118] *Id.* at 3-7.
[119] *See id.* at 11-12.
[120] *Id.* at 12.
[121] 21 U.S. 543 (1823).
[122] *Id.* at 572.
[123] *Id.*
[124] KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 227 (1989).
[125] *Johnson*, 21 U.S. at 588.
[126] *Id.* at 573-75.

appropriate the lands occupied by the Indians."[127] Ultimately, "[c]onquest gives a title which the Courts of the conqueror cannot deny[.]"[128]

Marshall's legitimacy rested on a variety of themes, none of which were fully explicated in the case itself, about the rights of the conqueror, rights that may have been rooted in the discovery doctrine, Coke's division between infidels and Christians, or Locke's understanding of property rights.[129] Indians "were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness[.]"[130] The State of Virginia, he argued later, was granted rights to "vacant lands" and no distinction was made between such lands and those "occupied by the Indians."[131] Indians were hunters, not farmers; they roamed and killed, but they did not cultivate or possess.[132] "As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed."[133]

These last passages about "vacant lands" were inconsistent with Marshall's standard views about original title as seen in *Fletcher* and

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[127] *Id.* at 584.

[128] *Id.* at 588.

[129] For an interesting account of Marshall's opinion, *see* JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 67-86 (2010). Purdy recounts several scholarly approaches to the case, including one that views the case as an abject lesson in the way law serves power, and the particular way in which property law serves the colonial enterprise of expropriation (citing Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991)); one that views the case as exhibiting the incommensurability of law and power (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993)); and one that views the case as law, i.e., as doctrinal interpretation of customary international law of the time (citing Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 LAW & HIST. REV. 67 (2001)). Purdy's own view is that the case is an expression of a distinctly American "legal imaginary," though one painted in ironic hues. This "legal imaginary" viewed the Indian system of property and governance as essentially incommensurable not only with contours of the Anglo-American system but with its broader purpose of promoting "progress." PURDY, *supra* note 129, at 84-85. On the incommensurability of Indian and Anglo-American property, see WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (2003).

[130] Johnson v. M'Intosh, 21 U.S. 543, 590 (1823).

[131] *Id.* at 596.

[132] Lawyers for M'Intosh had argued before the Court that because Indians were hunter and gatherers, they were thus "an inferior race of people" with no territorial rights. SMITH, *supra* note 23, at 184.

[133] *Johnson*, 21 U.S. at 590-91.

Biddle.[134] And in diverging from his own precedent, Marshall rejected arguments made before the Court that Indians inherently had first possession and thus full sovereignty over the land.[135] This was the argument of the land speculators who hoped, if the Court granted original title to the Indians, that they would be the recipients of the title through their own purchases.[136] M'Intosh countered that the Indians had not used the land for agricultural purposes and thus, the land was open to "a people of cultivators."[137] In siding with M'Intosh, Marshall is remembered primarily for putting his stamp on American imperial law: the United States reigns supreme in its right to conquest, and all those who are defeated have secondary rights under the nation.[138] But, it is worth also noting that Marshall reversed himself on the sacredness of contract law—here, unlike in *Fletcher* and *Biddle*, Native Americans were distinguished as not having the right of original title.[139]

More than a decade later, Marshall attempted to alter, or at least change the emphasis of the Supreme Court's position on Indian land rights. In *Worcester v. Georgia*, a case involving four missionaries contesting their arrest by the Georgian government on Cherokee land—and a case decided in the midst of congressional action to officially remove the Cherokees from their land—the Court broke from *M'Intosh*. Here, it held that the discovery doctrine did not provide a legal title to European would-be conquerors and that Native American tribes were sovereign nations akin to small countries in Europe: "[T]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power."[140] As a result, Marshall held that "all intercourse with the Indian

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[134] *See, e.g.*, HURST, *supra* note 67.

[135] *Johnson*, 21 U.S. at 590-91.

[136] *Id.* at 562-65.

[137] *Id.* at 569-70. *See also* GARRISON, *supra* note 21, at 91.

[138] "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; . . . it becomes the law of the land, and cannot be questioned." *Johnson*, 21 U.S. at 591-92.

[139] "*The absolute ultimate title has been considered as acquired by discovery*, subject only to the *Indian title of occupancy*, which title the discoverers possessed the exclusive right of acquiring." *Id.* at 592 (emphases added).

[140] 31 U.S. 515, 559 (1832). The Court stated that the state of Georgia had proven its "acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States with their consent[.]" *Id.* at 560.

territory shall be carried on exclusively by the government of the union."[141] This was in many ways a bold decision, one the legal scholar Philip Frickey argued was a particularly courageous one, given the confines of the times:[142] state law, Marshall declared, was preempted by federal law and by treaties between the national government and the Cherokees.[143] The Cherokees, in turn, ought to be recognized as at least a quasi-state, and not simply a conquered underling.[144] This case, however, would not mark a turning point in the law, but merely a failed moment of an alternative possibility. As mentioned above, President Jackson actively ignored the decision, as did numerous state courts and governments, and with additional appointments to the Court, had the precedent overturned—once again re-establishing the right of discovery for a conquering nation.[145]

III. PLANTS AND PROPERTY IN THE 20TH CENTURY

Land is not the only form of property that has been sought by empires. The possession, cultivation, and marketing of plants and plant-derived products—from tobacco and sugar to pepper and tea—have also been the object of imperial ambition. Early Spanish explorers famously aimed to secure sea routes to the spices and silks of Asia and India, and the Dutch East Indies Company at one time imported as many as six million pounds of black pepper to the Netherlands each year.[146] As early as the 16th century European nations were competing with one another to extract, transplant, and exploit plant genetic resources from Africa, Asia and South America.[147] Lucile Brockway and Chandra Mukerji have shown how the

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[141] *Id.* at 557.

[142] Frickey, *supra* note 21, at 439.

[143] *Id.* at 561. "The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States." *Id.*

[144] *Id.* at 560-61. "[A] weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection." *Id.* at 561. The Court continued, "The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress." *Id.*

[145] *See* Mitchel v. United States, 34 U.S. 711 (1835); United States v. Fernandez, 35 U.S. 303 (1836); Mitchel v. United States, 40 U.S. 52 (1841); Martin v. Lessee of Waddell, 41 U.S. 367 (1842). Moreover, lower federal court judges repeatedly ignored *Worcester*. *See* SMITH, *supra* note 29, at 239-40.

[146] See COLONIAL BOTANY: SCIENCE, COMMERCE, AND POLITICS IN THE EARLY MODERN WORLD (Londa L. Schiebinger & Claudia Swan eds., 2005). *See also* NATURE AND EMPIRE: SCIENCE AND THE COLONIAL ENTERPRISE (Roy MacLeod ed., 2000).

[147] KEITH AOKI, SEED WARS: CONTROVERSIES AND CASES ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY 6 (2008); SEEDS AND SOVEREIGNTY: THE USE AND CONTROL

administration of the British Royal Botanic Gardens and the Jardin du Roi in Paris, respectively, intersected directly with British and French colonization efforts, providing profitable products and projecting an image of royal power as part of a lawful system of nature.[148] In one infamous story, a British adventurer employed by Kew Gardens in 1876 smuggled some 70,000 rubber tree seeds out of Brazil; a theft that ultimately resulted in the collapse of the Brazilian rubber industry and the consolidation of the rubber market by British plantations.[149] Law has consistently helped enable these extractions, often with quite similar principles to those justifying taking possession of land.

More recently, in the last quarter of the 20th century and the early years of the 21st, intellectual property law has operated on the biotechnology frontier to expand the reach of American empire, ultimately placing developing nations in a "structurally subordinate" position within the international economic order through the use of both international agreements[150] and "extraterritorial" presence[151] that establish intellectual property rights ("IPR"s) for previously unpatentable plant genetic resources ("PGR"s).[152] In the process, PGRs have been reduced, conceptually and

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OF PLANT GENETIC RESOURCES 154 (Jack Kloppenburg Jr. ed., 1988). *See also* LONDA SCHIEBINGER, PLANTS AND EMPIRE: COLONIAL BIOPROSPECTING IN THE ATLANTIC WORLD (2004).

[148] LUCILE H. BROCKWAY, SCIENCE AND COLONIAL EXPANSION: THE ROLE OF THE BRITISH ROYAL BOTANIC GARDENS (2002); Chandra Mukerji, *Dominion, Demonstration, and Domination: Religious Doctrine, Territorial Politics, and French Plant Collection, in* COLONIAL BOTANY, *supra* note 146, at 19.

[149] Lucile H. Brockway, *Plant Science and Colonial Expansion: The Botanical Chess Game*, in SEEDS AND SOVEREIGNTY, *supra* note 147, at 49, 57-58.

[150] *See* Keith Aoki, *Distributive Justice and Intellectual Property: Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency and Development)*, 40 U.C. DAVIS L. REV. 717, 773 (2007) [hereinafter *Distributive Justice*] ("There are many important parallels between historical structural subordination of racial groups within the United States and contemporary structural subordination of countries and people living in the global South. A focus on [these parallels] . . . provides a unifying, if controversial, analytic thread within which to begin to think about the effects of globalization, historically or in the present time"); VANDANA SHIVA, BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE 2-3 (1997) ("Columbus set a precedent when he treated the license to conquer non-European peoples as a natural right of European men . . . . These Eurocentric notions of property and piracy are the bases on which the IPR laws of the GATT [General Agreement on Tariffs and Trade] and World Trade Organization (WTO) have been framed.").

[151] KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009).

[152] In using the term "plant genetic resources" we employ an obviously contestable term. Scientifically, "plant genetic resources" refers "to the genetic information found in the chromosomes of the nucleus and associated subcellular structures of plants." Garrison

literally, from being common pool resources held in the public domain, i.e., "the heritage of mankind,"[153] to being privately-owned goods subject to individual proprietary rights and the sovereign control of individual nation-states.[154]

The legal redefinition of PGRs may properly be understood as an enclosure movement. Some commentators object to the enclosure categorically, on moral or ethical grounds.[155] Others object to its

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Wilkes, *Plant Genetic Resources Over Ten Thousand Years: From a Handful of Seed to the Crop-Specific Mega-Genebanks*, *in* SEEDS AND SOVEREIGNTY, *supra* note 147, at 67, 79. *See also* Keystone Center, Final Consensus Report of the International Dialogue Series on Plant Genetic Resources, Madras Plenary Session 8 (1990) [hereinafter Keystone Center, Madras Session] (Plant genetic resources include genetic material from "all agricultural crops, fruit, nut and forest trees, forage crops, medicinal and ornamental plants, unexploited plants, wild relatives and ecosystem diversity," and are broken down into primary, secondary and tertiary resources. Primary resources denote the commercial cultivars—obsolete, current and newly developed; secondary resources denote folk (i.e., indigenous) varieties; tertiary resources denote the "wild and weedy" plant varieties.). Politically, the term reflects the reality of the treatment of plant life and biodiversity under domestic and international intellectual property rights regimes.

[153] The phrase "common heritage of mankind" was most likely derived from Hugo Grotius and brought into contemporary usage by the Ambassador of Malta, Arvid Pardo, in an address on November 1, 1967, where he spoke of the deep sea-bed and ocean floor lying beyond national jurisdictional limits. *See* ANTHONY J. STENSON & TIM S. GRAY, THE POLITICS OF GENETIC RESOURCE CONTROL 137 (1999). In his speech, Pardo proposed that these areas ought to be free from national appropriation of any kind; reserved exclusively for peaceful purposes; open to non-military research whose results would be available to all; exploited for mankind, in general, and to serve the needs of poor countries, in particular; and explored and exploited in ways that would neither obstruct movement on the high seas nor seriously impair the marine environment. *See* Address by Arvid Pardo, Ambassador, Malta, to the 22nd session of the General Assembly of the United Nations, U.N. GAOR, 22d Sess., 1516th mtg. at 2, U.N. Doc. A/C.1/PV.1516 (Nov. 1, 1967), *available at* http://www.un.org/Depts/los/convention agreements/texts/ pardo ga1967.pdf. *See also* SUSAN J. BUCK, THE GLOBAL COMMONS: AN INTRODUCTION 28-29 (1998). It bears noting that the principle of common heritage does not necessarily create a commons for exploitation, but rather a common benefit to be shared; that is, the principle may be understood as pertaining to distribution, rather than ownership. *See* STENSON & GRAY, *supra* note 153, at 137-38.

[154] For a thorough discussion of the normative conceptions of IPRs that predominate in the PGRs discourse—proprietary rights, community rights, national sovereignty and the common heritage of mankind, see STENSON & GRAY, *supra* note 153. For a textbook-like introduction to the political and legal issues surrounding PGRs, see RIGHTS TO PLANT GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: BASIC ISSUES AND PERSPECTIVES (Susette Biber-Klemm & Thomas Cottier eds., 2006).

[155] INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 59 (2002) ("Some people object altogether to the patenting of life forms on ethical grounds, considering that the private ownership of substances created by nature is wrong, and inimical to cultural values in

consequences, including limitations on access to medicines in the developing world;[156] adverse impacts on animal welfare and biodiversity;[157] the suppression of knowledge to preserve patentability;[158] the deepening economic divide between the global North, where the patent-holders reside, and the global South, where the PGRs are located;[159] and the affirmation of the cultural bias implicit in the imposition of intellectual property rules on traditional, indigenous, or otherwise local knowledge.[160] This last concern is critical to understanding the law's imperial affect: the patenting of PGRs enabled by U.S. law and projected into the international sphere privatizes a

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different parts of the world"); Sean D. Murphy, *Biotechnology and International Law*, 42 HARV. INT'L L.J. 47, 65 (2001) (Resistance to IPRS in PGRS "turned in part on an ethical or moral belief that life forms, as a general matter, should not be treated like an invention. Life forms were considered special and different and not reducible to property rights that might be possessed by some and denied to others."). *See also* STENSON & GRAY, *supra* note 153, at 31 (explaining categorical objections as (1) a reaction against the fact of biotechnology and genetic engineering; (2) a reaction against the idea of private ownership of biology, from molecules to living animals; or (3) opposition to the monopolization of PGRs by IPR holders).

[156] There is an extensive literature on the problems posed by international intellectual property law to guaranteeing access to essential medicines, as required by the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 994 U.N.T.S. 3. *See, e.g.*, HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2007). One legal area in which this has been most visible is the availability of compulsory licenses under Article 31 of the TRIPs agreement. *See, e.g.*, Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation*, 25 AM. U. INT'L L. REV. 357, 362 (2010); Tsai-Yu Lin, *Compulsory licenses for access to medicines, expropriation and investor-state arbitration under bilateral investment agreements: are there issues beyond the TRIPS Agreement?*, 40 INT'L REV. INTELL. PROP. COMPETITION L. 123, 152 (2009).

[157] STENSON & GRAY, *supra* note 153, at 37-40; CARY FOWLER & PAT MOONEY, SHATTERING: FOOD, POLITICS, AND THE LOSS OF GENETIC DIVERSITY 125 (1990) ("[p]rompted in considerable measure by the opportunity for exclusive monopoly patents, the new seed houses have driven many varieties and crops into local oblivion"); Aoki, *Distributive Justice*, *supra* note 150, at 801 (asking whether expanded IPRs regime for PGRs will result in loss of PGR diversity and access); Rebecca L. Margulies, Note, *Protecting Biodiversity: Recognizing International Intellectual Property Rights in Plant Genetic Resources*, 14 MICH. J. INT'L L. 322, 323-27 (1993).

[158] STENSON & GRAY, *supra* note 153, at 37-40.

[159] *Id.*

[160] Ruth Okedji, *The International Intellectual Property Roots of Geographical Indications*, 82 CHI.-KENT L. REV. 1329, 1330 n.4 (2007) ("the scope and conditions of protection of these major subjects of intellectual property do not accurately or completely capture the values, methods, or processes of creative endeavor in societies not structured principally around commoditization, consumption, and the absence of strong kinship/communal ties"); Ruth Okedji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 350-51 (2003).

non-territorial frontier for the benefit of the United States and its domestic corporate interests; simultaneously, it encodes the American vision of culture's dominance over nature[161] and of its own civilization's dominance over the indigenous civilizations and contemporary national identities of the global South.[162]

How, exactly, did this happen? The following sections recount the story of the conquering of an intellectual frontier, first through the patenting of PGRs in the United States and then through the export of that norm into international law and the domestic law of foreign countries. It is, like the taking of land from indigenous peoples in North America, a story of the law operating through private bargaining, courts, and legislatures to authorize and legitimize expropriations by the United States and its domestic concerns. For our purposes, the story can be broken into three parts: First, the expansion along an intellectual and ideological frontier marked by the judicial interpretation of domestic law to provide patent protections to biotechnology developers for living organisms and plant life.[163] Second, the expansion along a physical frontier demarked by instances of "biopiracy" and "bioprospecting"[164] in territories in the global South, and the concomitant investment in the research and development of marketable biotech products, enabled by the change in U.S. law. Third, the legitimization of the ideology and practice of patenting living organisms and plant life through the projection of U.S patent law into international law and the domestic law of foreign nations.

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[161] *See* HERBERT MARCUSE, ONE DIMENSIONAL MAN (1964); MURRAY BOOKCHIN, OUR SYNTHETIC ENVIRONMENT (1962).

[162] *See, e.g., Intellectual Property Rights: A Current Survey, in* INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK 5-6 (Tom Greaves ed., 1994) [hereinafter IPR SOURCEBOOK] (noting that international IPR regimes demand that indigenous groups and developing nations who may have their own conception of property and rights play by the dominant society's rules).

[163] The "modern biotechnology" that employs PGRs refers to a process of research and development and the produces that result, as defined in the Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 3, Jan. 29, 2000, 2226 U.N.T.S. 208, republished in Michigan State University—Detroit College of Law, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 9 MSU-DCL J. INT'L L. 227, 229-30 (2000).

[164] For our purposes "bioprospecting" will be taken to mean the search for genetic and biochemical sources of lead compounds for products with commercial application, whether in the pharmaceuticals, agrochemicals, biotechnology and cosmetic industries. *See* Leanne M. Fecteau, *The Ayahuasca Patent Revocation: Raising Questions About Current U.S. Patent Policy,* 21 B.C. THIRD WORLD L.J. 69, 69-71 (2001) for a general definition of biopiracy.

A. The Patenting of PGRs in the United States

1. The Statutory Setting

The U.S. Constitution provides Congress with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[165] The Patent Act of 1952 provides for three different types of patents: utility, design, and plant.[166] To obtain a utility or design patent the applicant must prove the invention is useful, novel and non-obvious.[167] Prior to satisfying these criteria, a proposed invention must be patentable subject matter. The original Patent Act of 1793 defined patentable subject matter as "any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement,"[168] and that definition essentially remains the same today.[169] Though the courts and the U.S. Patent and Trade Office ("PTO") once endorsed a number of categorical exclusions, only a few remain in force: mathematical formulae,[170] natural laws, and "products of nature."[171]

The increasingly limited number of categorical exclusions flows from the Jeffersonian rationale for the temporary exclusivity secured by patents, namely, the belief that such exclusivity fosters and incentivizes invention

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[165] U.S. Const. art. I, § 8, cl. 8.

[166] 35 U.S.C. § 103 (utility), 35 U.S.C. § 171 (design), and 35 U.S.C. § 161 (plant). For a general overview of the patent system, *see* DONALD S. CHISUM, PATENTS, 4.01-4.04 (1988).

[167] 35 U.S.C. §§ 101, 171 (2006).

[168] Patent Act of 1793, ch. 11, § 1, 1 Stat. 318-323 (1793).

[169] The sole difference between the 1952 and 1793 versions of the Act is found in the replacement of the word "art" with the word "process." The current statute, last amended in 1952, provides that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U.S.C. § 101 (2011).

[170] *See* Gottschalk v. Benson, 409 U.S. 63 (1972) (holding that a a digital computer program that converted binary-coded numerals to pure binary numerals, was not a patentable process where the patent for the program would "in practical effect . . . be a patent on the algorithm itself").

[171] *See* Funk Bros. Seed Co. v. Kalo Inoclant Co., 333 U.S. 127 (1948). It bears noting here that it has been difficult to apply the concept of products of nature in the context of genetic modifications of living organisms; however, it has been held that one can claim a patent in an isolated, purified or altered form of a "product of nature." *See* Merck & Co. v. Olin Mattheison Chem. Corp., 253 F.2d 156 (4th Cir. 1958) (upholding patentability of form of vitamin B-12, which is found naturally in cow livers); Amgen, Inc. v. Chugai Pharm. Co., 927 F.2d 1200 (Fed. Cir. 1991) (granting patent for purified and isolated DNA sequence encoding human erythropoietin).

by directing resources to the creation, development, and marketing of new products.[172] This rationale has been frequently challenged by scholars and activists.[173] Renee Marlin-Bennett, among others, has argued that the goal of an ethical society should be the production and distribution of knowledge that addresses critical problems faced by vulnerable populations, rather than knowledge that creates private profit.[174] In this view, the U.S. patent system has worked against the public interest by shrinking the amount of public funds given over to scientific research, expanding the scope of patentable subject matter, encouraging secrecy, and incentivizing only profitable technologies, rather than those that provide pure public goods, such as vaccines.[175] Arguably, the change in the treatment of PGRs conforms to this critical view.

Historically, plants and living organisms were generally considered not to be patentable subject matter.[176] Two reasons are typically advanced to explain the early absence of patent protection for plant life. First, plants and living organisms were considered "products of nature."[177] Second, plant breeders found it difficult to meet the written disclosure requirements necessary to obtain a utility patent.[178] Both of these hurdles to patentability began to lessen, however, in the 1920s, as technology advanced and agricultural research became privatized.[179]

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[172] *See, e.g.*, Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977); Mark F. Grady & Jay J. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305 (1992).

[173] *See* Aoki, *Distributive Justice*, *supra* note 150, at 801 (asking "[t]o what extent does IP law extinguish the communal, undeniably innovative, and syncretic activities and practices that farmers have engaged in for millennia?"); John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439 (2004); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996); A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831 (1987); IPR SOURCEBOOK, *supra* note 162, at 8-10.

[174] Reneé E. Marlin-Bennet, *Science in Whose Interest? States, Firms, the Public, and Scientific Knowledge*, *in* WHO OWNS KNOWLEDGE?: KNOWLEDGE AND THE LAW 125, 125-26 (Nico Stehr & Bernd Weiler eds., 2008). *See also* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2823 (2006).

[175] Marlin-Bennet, *supra* note 174, at 138-42.

[176] *See* Ex parte Latimer, 1889 Dec. Comm'r Pat. 123 (finding cellular tissues of pine tree ineligible for patent protection). There were, of course, exceptions. In 1873, for instance, Louis Pasteur obtained the right to exclude others from making, using, or selling "[y]east, free from organic germs of disease, as an article of manufacture." U.S. Patent No. 141,072 (issued July 22, 1873).

[177] *See* Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948).

[178] 35 U.S.C. § 112 (2011).

[179] In the early part of the 1920s, both public agricultural Land Grant Colleges (LGC) and private companies began experimenting with producing higher-yielding hybrid corn. Later in that decade, the Pioneer Hi-Bred Corporation began marketing its line of hybrid corn. At

In response to new developments in plant breeding, two pieces of federal legislation were created to provide IP protection for plant life. In 1930 Congress passed the Plant Patent Act ("PPA"), "the first legislation anywhere in the world to grant patent rights to plant breeders[,]"[180] which was incorporated into the Patent Act. The PPA authorized the federal government to grant protection, in the form of so-called "plant patents," to asexually reproduced plants, and loosened the requirements for written description.[181] Forty years later, in 1970, Congress passed the Plant Variety Protection Act ("PVPA"), creating a patent-like system for protection of sexually-reproduced plants and seeds.[182] Under the PVPA, upon a showing that the variety is new, distinct, uniform and stable,[183] a plant breeder can obtain a plant variety protection certificate that provides a similar "right to exclude" as that available under the PPA.[184]

There are distinct advantages to a utility patent, as compared to a plant patent under the PPA or the PVPA. Most importantly, a utility or design patent gives the holder the exclusive right to make, use, and sell the patented invention in the United States for a period of twenty years from the date of application.[185] This includes the right to prevent others from using the invention, even if independently developed.[186] Thus, it is not surprising that the earliest biotechnology innovators sought utility patents for their inventions.

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around this same time, the private sector began to dominate agricultural research, carving out parent lines as trade secrets. The LGCs, by contrast, had traditionally held parent lines out for the public. AOKI, SEED WARS, *supra* note 147, at 3-4; JACK R. KLOPPENBURG JR., FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY, 235-36 (2d ed. 2004).

[180] Imazio Nursery, Inc. v. Dania Greenhouses, 69 F.3d 1560, 1563 (Fed. Cir. 1995).

[181] The 1930 PPA amended the Patent Act to read, "[a]ny person who has invented or discovered any new and useful art, machine, manufacture, of composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propogated plant . . . may . . . obtain a patent therefore." 46 Stat. 376 (1930) (current version at 35 U.S.C. § 161 (2006)). The 1952 revision to the Patent Act separated out the Plant Patent Act provisions into a separate section. *See* 66 Stat. 804 (1952) (current version at 35 U.S.C. §§ 161-62 (2011)).

[182] 7 U.S.C. §§ 2321-2582 (2011).

[183] 7 U.S.C. § 2402(a) (2011).

[184] 7 U.S.C. § 2483(a)(1) (2011) (providing right "to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom"). For a brief overview of the PVPA's development, see AOKI, SEED WARS, *supra* note 147, at 34-41.

[185] 35 U.S.C. §§ 111, 115, 116 (2011).

[186] *See* 35 U.S.C. §§ 154, 271(a) (2011).

2. Chakrabarty *and the Patenting of Life for the Sake of Industry*

The availability of utility patents for living organisms resulting from biotechnology was the subject of a 5-4 Supreme Court decision in the famous case of *Diamond v. Chakrabarty*.[187] In *Chakrabarty*, the Court held that human-made, genetically engineered, living bacteria capable of converting petroleum into biomass was eligible for a utility patent as a "manufacture" or "composition of matter."[188] This was the first time the Court, or any court, had held that living organisms were patentable subject matter under Section 101 of the Patent Act.[189]

The decision was made in the heated, anxiety-ridden climate surrounding the advent of gene-splicing techniques and the sudden growth of biotechnology industry in the United States.[190] Although the oil-eating bacteria that were the subject of the patent in the case were not the product of gene-splicing, the importance of the decision on the evolving biotech economy was evident to the Court. Newspapers and magazines had reported on the potential ramifications of the case for the industry,[191] and amicus briefs filed by the small-but-influential company Genentech, the Pharmaceutical Manufacturers Association, numerous university-affiliated scientists, and the American Patent Law Association all laid out economic arguments in favor of patenting life-forms.[192]

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[187] 447 U.S. 303 (1980).

[188] *Id.* at 308.

[189] The patent office examiner who originally rejected the patent application had done so both because the microoganisms were "live organisms" and because they were "products of nature." *In re* Chakrabarty, 571 F.2d 40, 42 (C.C.P.A. 1978). The PTO Board of Appeals, however, had set aside the latter rationale, agreeing with Chakrabarty that his genetic invention was not naturally-occurring. *Id.*

[190] For an extensive account of the history of the *Chakrabarty* case, see Daniel J. Kevles, *Ananda Chakrabarty Wins a Patent: Biotechnology, Law and Society, 1972-1980*, 25 HIST. STUD. IN THE PHYSICAL AND BIOLOGICAL SCIENCES 111 (1994). For a more brief but insightful re-telling, see Rebecca S. Eisenberg, *The Story of Diamond v. Chakrabarty: Technological Change and the Subject Matter Boundaries of the Patent System, in* INTELLECTUAL PROPERTY STORIES 327, 327-57 (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2006). Both pieces take time to note that popular concerns over the significance and use of these techniques remained even after the scientific community had resolved its own internal concerns.

[191] Eisenberg, *supra* note 190, at 342 (quoting from Washington Post article on the related CCPA decision in *In re* Bergy, 563 F.2d 1031 (C.C.P.A. 1977)). Eisenberg (noted that the case "represents a potential gold mine for corporations involved in genetic engineering research." *Id.* at 349 n.99 (citing to articles from 1979-1980 on potential profits to be made in biotech).

[192] *See* Brief of Genentech, Inc. as Amicus Curiae Supporting Respondents, Diamond v. Chakrabarty, 447 U.S. 303 (1980) (No. 79-136), 1980 U.S. LEXIS 112; Brief of Dr. Leroy

In addition, the rhetoric employed in the majority opinion reveals an awareness that the fate of a potentially important industry was at stake, and a commitment to fostering that industry through patent law. On its face, the opinion pursues the question as a matter of statutory interpretation: the plain meaning of "manufacture" and "composition of matter," combined with the broad legislative mandate to pursue invention encoded in the Patent Act, result in living organisms being patentable subject matter.[193] Yet, the Court's concern that the biotechnology sector be given every opportunity to profitably flourish is transparent: "The subject matter provisions of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting 'the Progress of Science and the useful Arts' with all that means for the social and economic benefits envisioned by Jefferson."[194] These benefits, in the Court's view, include the development of the specific field of biotechnology: "Whether respondent's claims are patentable may determine whether research efforts are accelerated by the hope of reward or slowed by want of incentives."[195]

Justice Brennan's dissent, by contrast, takes the majority to task for moving so boldly into unchartered areas, pointing out that precedent cautions against extending patents into areas unanticipated by Congress.[196] As a matter of statutory interpretation, Brennan also challenges the majority's disregard for the relevance of the PPA and the PVPA as federal legislation specifically addressing the issue of how to protect living organisms under IP law.[197]

The gap between the majority and dissent turns on two notable lacunas in the law: the absence of specific Congressional direction on how to interpret the Patent Act in areas unanticipated by Congress, and the absence of any specific indication in the PVPA and its legislative history as to how living

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E. Hood et al., as Amicus Curiae Supporting Respondents Diamond v. Chakrabarty, 447 U.S. 303 (1980) (No. 79-136), 1980 U.S. LEXIS 112; Brief of the Pharmaceutical Manufacturers Ass'n as Amicus Curiae Supporting Respondents, Diamond v. Chakrabarty, 447 U.S. 303 (1980) (No. 79-136), 1980 U.S. LEXIS 112; Brief of the American Patent Law Ass'n, Inc. as Amicus Curiae Supporting Respondents, Diamond v. Chakrabarty, 447 U.S. 303 (1980) (No. 79-136), 1980 U.S. LEXIS 112. Ironically, the only amicus brief submitted in opposition to the patent grant granted many of the economic effects the patent would have – only, it saw these effects as a reason to *deny* the patent. Brief of Peoples Business Commission, as Amicus Curiae Supporting Petitioner, Diamond v. Chakrabarty, 447 U.S. 303 (1980) (No. 79-136), 1980 U.S. LEXIS 112.

[193] *Chakrabarty*, 447 U.S. at 307-08.

[194] *Id.* at 315.

[195] *Id.* at 317.

[196] *Id.* at 319 n.2 (Brennan, J., dissenting) (citing Parker v. Flook, 437 U.S. 584, 596 (1978)).

[197] *Id.* at 319-20.

organisms other than plants ought to be viewed under patent law. The majority says that the absence of any mention of bacteria in the PVPA does not necessarily mean that bacteria was intended to be excluded from patentability under Section 101 of the Patent Act.[198] The dissent argues that because Congress, like the general public, was under the impression that living organisms not covered under the PPA were not patentable, the exclusion of bacteria from the PVPA meant that they were not patentable.[199] The Pac-Man view of patent law won.

3. Ex parte Hibberd *and* J.E.M. Ag Supply*: The patenting of plant life*

Chakrabarty set the stage for the patenting of plant genetic resources in a couple of important ways. First, the opinion inscribed an expansive reading of the intended scope of the Patent Act, opening up the possibility of further extensions of patent protections in the bio-science/biotechnology field.[200] Second, the opinion reinforced the "genius inventor" theory of patent law.[201] Indeed, in differentiating the human-made bacteria that was the subject of the litigation from bacteria occurring in nature, the Court emphasized the genetic engineering techniques employed.[202]

Five years after *Chakrabarty*, the Board of Patent Appeals and Interferences followed the Court's lead. In *Ex Parte Hibberd*, the Board overturned a patent examiner's determination that the PPA and the PVPA, having come later in time and being more specific than Section 101, were intended to be the "exclusive forms of protection for plant life covered by those acts," and granted utility patents to plants, seeds and tissue cultures for a genetically modified line of maize.[203]

The Board, like the Supreme Court before it, invoked a number of interpretive ploys that signal law's operating independent of any specific executive or legislative policy direction. First, the Board followed the precedent established by *Chakrabarty* in granting a broad reading to the terms of Section 101, thus making it seem as if its decision were a necessary result, compelled by the essential expectations of *stare decisis*.[204]

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[198] *Id.* at 313-14 (majority opinion).

[199] *Id.* at 320-21 (Brennan, J., dissenting).

[200] *Id.* at 309 (majority opinion) (reading legislative history to indicate intention for expansive reading of law).

[201] *Id.* at 307 (noting that Constitution grants patent power to Congress in order to incentivize innovation); *Id.* at 308-09 (quoting Thomas Jefferson for the proposition that "ingenuity should receive a liberal encouragement.").

[202] *Id.* at 310.

[203] Ex parte Hibberd, 1985 WL 71986, 227 U.S.P.Q. 443, 447 (B.P.A.I. Sept. 18, 1985).

[204] *Id.* at 444.

Second, the Board rejected the argument that the PPA and the PVPA restrict or limit the scope of Section 101 because there is no *explicit* statement to that effect in either of the laws or the legislative history,[205] invoking the "cardinal principle of construction that repeals by implication are not favored," and the correlative principle that there must be an "irreconcilable conflict" or a "positive repugnancy" between alternative laws in order for one to limit the other.[206] Similarly, the Board rejected the salience of the International Union for the Protection of New Plant Varieties ("UPOV"),[207] holding that as an executive agreement not ratified by the Senate the UPOV cannot trump Congressional legislation.[208]

The Board's decision was affirmed by the Supreme Court in 2001, after the period of biopiracy and bioprospecting described in the next section, when the Court held that utility patents may be issued for plants under Section 101.[209] In that case, the narrow question before the Court was whether the PPA and PVPA provide the exclusive means for protecting IPRs to plant life.[210] In affirming the PTO's opinion in *Hibberd*, the Court noted the broad reading of Section 101 endorsed by *Chakrabarty*;[211] denied that Congress' understanding in 1930 that plants were not patentable subject matter was correct;[212] explained away the statutory protections under the PPA and PVPA as being based on the limits of scientific knowledge at the time;[213] and affirmed that the differential protections afforded under the PPA, the PVPA and the Patent Act offered evidence of Congressional intent to allow for greater protection where more stringent requirements are met.[214] In his dissent, Justice Breyer pointed out that the legislative history of the PVPA showed that in 1968 Congress rejected the option of including sexually reproduced plants under the scope of utility patents, and instead negotiated a compromise that granted plant breeders a weaker form of protection.[215] The weaker protections serve a distinct purpose: seed planting and research exemptions under the PVPA become null and void if utility patent simultaneously granted prohibits such actions.[216]

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[205] *Id.* at 444-45.

[206] *Id.* at 445 (quoting United States v. Borden Co., 308 U.S. 189, 198-99 (1939)).

[207] *See infra* note 272.

[208] *Hibberd*, 227 U.S.P.Q. at 447.

[209] J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 127 (2001).

[210] *Id.* at 131-32.

[211] *Id.* at 129.

[212] *Id.* at 134-35.

[213] *Id.* at 135-36, 141.

[214] *Id.* at 137-38, 140-44.

[215] *Id.* at 155 (Breyer, J., dissenting).

[216] *Id. See also* Joseph Mendelson III, *Patently Erroneous: How the U.S. Supreme*

The question left unasked and unanswered by these legal opinions is whether certain forms of human intervention—namely, those undertaken by scientists and technicians in a laboratory setting—warrant patents, while other forms of intervention—namely those represented by traditional agriculture, gardening, and medicine, i.e., those that are "collectively generated, generally anonymous and incremental over long periods of time"[217] do not. The implied answer to these questions, of course, is yes. In imposing these differing values on the different methods of utilizing existing genetic resources and life forms and creating new ones, and in failing to fully account for its definition of and differentiation between the "raw" and the "worked,"[218] the law establishes and reifies the dominance of one culture over another.

B. Biopiracy and Bioprospecting

The effect of the Patent Board's ruling in *Hibberd* was truly extraordinary. In its wake, large pharmaceutical and agricultural companies, start-up biotech firms and others began to scour the global South in search of PGRs and other genetic material, traveling to "'untapped' geographical regions with the aim of amassing either local knowledge of useful biological applications or genetic samples from plants, animals, and humans for later use in product research and development."[219] The result was that, in the fifteen years that followed, the U.S. Patent and Trademark Office issued some 1800 utility patents for plants, plant parts and seeds.[220] Some of these expropriations took the form of something approximating theft, or what the activist and scholar Vandana Shiva called "biopiracy,"[221] and robbed the developing world of tremendous economic

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Court's Decision in Farm Advantage Ignored Congress and Threatens the Future of the American Farmer, 32 ENVTL. L. REP. 10698 (2002).

[217] AOKI, SEED WARS, *supra* note 147, at 42.

[218] *Id.* at 69.

[219] Emily Marden, *The Neem Tree Patent: International Conflict Over the Commodification of Life*, 22 B.C. INT'L & COMP. L. REV. 279, 279-80 (1999).

[220] J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 127 (2001).

[221] SHIVA, BIOPIRACY, *supra* note 150, at 69 (defining biopiracy as the patenting of produces and processes derived from plants based on indigenous knowledge). Shiva argues that "biopiracy" is essentially a continuation of the British Empire's colonization of India, and of the implementation of the Green Revolution. *Id.* at 11-16. *See generally* VANDANA SHIVA, VIOLENCE OF THE GREEN REVOLUTION: THIRD WORLD AGRICULTURE, ECOLOGY AND POLITICS (4th ed. 2000) (arguing that Green Revolution was advertised as a means to improve lives but resulted in ecological crisis and agricultural dependency). Indeed, in Shiva's view, the push toward "development" itself represents a form of imperialism: "Development is a beautiful word, suggesting evolution from within . . . . But the ideology

value.[222] But not all were surreptitious. Some of them were the result of private bargains struck between bioprospectors and local communities and/or national governments. In the following sections we recount both instances of "biopiracy" and examples of bioprospecting arrangements to illustrate law's frontier existence.

1. Biopiracy

There are a large number of appropriations of local knowledge and plant use that resulted in U.S. patents for genetic resources, some of which involved little or no genetic modification. Perhaps most famously, W.R. Grace, a U.S.-based company, was granted patents in the United States and Europe for the Indian neem tree, *azadirachta indica*, known in Sanskrit as *sarva-roga navarini*, or "curer of all ailments."[223] In some areas in India the neem tree is held sacred, its shoots eaten to celebrate the New Year; parts of the tree have also long been used for medicinal and hygienic purposes.[224] However, no patents were issued in India on neem-derived products because agricultural and pharmaceutical inventions were non-patentable subject matter under their patent laws.[225] In the early 1990s, a group of American researchers uncovered a way to alter the active

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of development has implied the globalization of the priorities, patterns, and prejudices of the West. Instead of being self-generated, development is imposed. Instead of coming from within, it is externally guided. Instead of contributing to the maintenance of diversity, development has created homogeneity . . . ." SHIVA, BIOPIRACY, *supra* note 150, at 106. *See also* NICANOR PERLAS, OVERCOMING ILLUSIONS ABOUT BIOTECHNOLOGY (1994); Craig D. Jacoby & Charles Weiss, *Recognizing Property Rights in Traditional Biocultural Contribution*, 16 STAN. ENVTL. L.J. 74, 89-91 (1997).

[222] The attempt to quantify the degree of appropriation dates back as far as 1991, when the Office of Technology and Assessment estimated that the developing world could gain $5.4 billion per year if compensated by royalties for local knowledge and plant varieties. *See* OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, OTA-BA-494, BIOTECHNOLOGY IN A GLOBAL ECONOMY (1991), *available at* http://govinfo.library.unt.edu/ota/Ota_2/DATA/1991/9110.PDF.

[223] Marden, *supra* note 219, at 283-84; Shayana Kadidal, *Subject-Matter Imperialism? Biodiversity, Foreign Prior Art and the Neem Patent Controversy*, 37 IDEA 371, 372 (1997). *See also* SHIVA, BIOPIRACY, *supra* note 150, at 69-72 (discussing the neem tree controversy).

[224] SHIVA, BIOPIRACY, *supra* note 150, at 69-72.

[225] Kadidal, *supra* note 223, at 373. *See also* The Patents Act, 1970, No. 39 of 1970, INDIA CODE (1970), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=128092. For a more general discussion of developing nations not patenting biodiversity, *see Exclusions from Patent Protection, Memorandum of the International Bureau of WIPO*, 27 Indus Prop. 192, 192-93 (1988); Kadidal, *supra* note 223, at 403 (recommending foreign prior art distinctions in Section 102 be eliminated); Fecteau, *supra* note 164 (arguing for recognition of foreign prior use as prior art).

ingredient (azadrirachthin) to extend its shelf life from a few days to two years, and W.R. Grace filed for a patent.[226]

Activists responded by challenging the patents, both in the United States and Europe, claiming it was an "imperial appropriation" of traditional knowledge and resources.[227] The petition, filed on behalf of "225 agricultural, scientific and trade groups as well as over 100,000 individual Indian farmers," and led by biotech-critic Jeremy Rifkin's Foundation on Economic Trends, argued that the patent should be revoked because it was obvious, lacked novelty, and was immoral.[228] At the press conference announcing the challenge, Rifkin emphasized the moral imperative behind the action, declaring that "the real battle is whether the genetic resources of the planet will be maintained as a shared commons or whether this common inheritance will be commercially enclosed and become the intellectual property of a few big corporations."[229] Beyond the moral argument, there were real economic concerns motivating the activists and farmers. At that time, Grace purchased only three percent of the neem seed harvested in India, but there was a concern that that percentage could multiply, driving up prices for domestic buyers; at the same time, the patent could deny Indian companies access to the U.S. market.[230] In addition, there was some concern that Grace might ultimately attempt to recover compensation from Indian farmers for their own traditional uses of neem.[231]

The U.S. PTO rejected the citizen petition.[232] The European Trade Office granted it.[233]

The controversy surrounding the patenting of the turmeric plant offers another well-known tale of biopiracy. In 1993, two Indian researchers were

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[226] U.S. Patent No. 5,124,349 (filed June 23, 1992).

[227] Marden, *supra* note 219, at 285, 289 (citing Request for Reexamination of Patent No. 5,124,349, requested by Foundation on Economic Trends, c/o Jeremy Rifkin, Reexamination No. 90/004,050 (Off. Gaz. Pat. Office, Jan. 16, 1996)).

[228] Marden, *supra* note 219, at 285-86.

[229] *See* John F. Burns, *Tradition in India vs. a Patent in the United States*, N.Y. TIMES, Sept. 15, 1995, at D4.

[230] Kadidal, *supra* note 223, at 376-77. The fear was not as far-fetched as it might at first seem. There were previous instances of countries extracting genetic resources from a country then reimporting it at commercial prices. In one case, Kenya imported legumes from Australia which were derived from seeds taken from Kenya; in another case, Libya did much the same with forage seed. *See* PAT R. MOONEY, THE LAW OF THE SEED 77-78 (1983). *See also* CALESTOUS JUMA, THE GENE HUNTERS: BIOTECHNOLOGY AND THE SCRAMBLE FOR SEEDS 169-70 (1989) (observing that industrialized nations collect and "improve" Third World resources before selling such resources back at high prices).

[231] Marden, *supra* note 219, at 289-90.

[232] Reexamination certificate, U.S. Patent No. 5,124,349 (issued Oct. 20, 1998).

[233] Decision Revoking European Patent No. 0436257, European Patent Office, at 2-3 (Feb. 13, 2001).

granted a U.S. patent on "Use of Turmeric in Wound Healing."[234] The patent claimed that the administration of certain amounts of turmeric to help heal wounds was a novel finding.[235] The Council for Science and Industrial Research (CSIR), an arm of the Indian government, located 32 references, some of them more than 100 years old, showing prior use of turmeric for this purpose in India.[236] In October 1996, the Indian government filed a petition for re-examination at the U.S. PTO, and the following year the office overturned the patent.[237] This was the first time that a patent based on traditional knowledge of a developing country was challenged successfully in the United States.[238]

The story surrounding the patenting of the *hoodia gordonii cactus* provides a third illustration.[239] The San people, an indigenous hunter-gatherer people in Southern Africa, have long known that one can stave off hunger and thirst by eating slices of *hoodia* cactus.[240] This knowledge was used by the South African army at the beginning of the 20th century, and has been described in ethnobotanical literature.[241] In the 1990s, scientists from the South African Council for Scientific and Industrial Research (CSIR) isolated the active molecule in the plant, and in 1996 filed for a patent on the molecule that reserved the right to make use of it for commercial purposes.[242] CSIR then licensed the right to develop and market products from the molecule to Phytopharm, Inc., a British company, who turned around and sold the rights to Pfizer for $21 million.[243] It was estimated at the time that there was an $8 billion market for effective appetite suppressants.[244]

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[234] U.S. Patent No. 5,401,504 (filed Dec. 28, 1993).

[235] *Id.*

[236] *See* Neha Sharma and Sushmita Singh, "Conservation of Traditional Knowledge through Proactive Defense Mechanism", WTO, INDIA, AND EMERGING AREAS OF TRADE: CHALLENGES AND STRATEGIES at 248 (P. Rameshan, ed.).

[237] *See* Use of Turmeric in Wound Healing, U.S. Patent and Trade Office Reexamination Certificate B1 (3500th), April 21, 1998 (canceling turmeric patent claims).

[238] *See, e.g.*, The Mandatory Disclosure Requirement as a Third World TRIPs Riposte: Recognizing Tradition Knowledge, Prior Art, and the Lockean Ideal, 79 PHILIPPINE L. J. 457, 465 (2004). For a similar story regarding the ayahuasca plant, *see* GLENN M. WISER, CTR. FOR INT'L ENVTL. LAW, PTO REJECTION OF THE "AYAHUASCA" PATENT CLAIM: BACKGROUND AND ANALYSIS § 2 (1999); Fecteau, *supra* note 164, at 69-71.

[239] Wolfgang van den Daele, *Does the Category of Justice Apply to the Drug Research Based on Traditional Knowledge? The Case of the Hoodia Cactus and the Politics of Biopiracy*, WHO OWNS KNOWLEDGE?: KNOWLEDGE AND THE LAW, *supra* note 174, at 255-56.

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

The San people then launched a political and legal campaign, making allegations of biopiracy.[245] The campaign resulted in a Memorandum of Understanding granting the San people 8% of all milestone payments CSIR would receive from Phytopharm during drug development and 6% of all license fees to be paid when the drug reached market.[246] But Pfizer soon stopped production, and returned the license to Phytopharm.[247] There was no further development, and no payments were ever made to the San people.[248]

The stories of the neem tree, the turmeric plant, and the hoodia gordonii cactus are a small and well-known sampling of biopiracy tales. A number of years ago Professor Naomi Roht-Arriaza excavated several others, telling, for instance, of how pharmaceutical company Eli Lilly developed the anti-cancer drugs vincristine and vinblastine from the Madagascar rosy periwinkle; how the University of Toledo patented the endod berry, which has been used for centuries in Ethiopia as a laundry soap and as a treatment for parasitic infections from snails; how the University of California and Lucky Biotech, a Japanese corporation, were granted a patent for the sweetening proteins naturally derived from two African plants, katempfe and the serendipity berry, traditionally used as sweeteners; how a barley gene that confers resistance to the yellow dwarf virus was patented by U.S. farmers and scientists, despite the centuries of breeding and cultivation by Ethiopian farmers that produced the plant; and how a California scientist was able to patent colored cotton, developed from a seed that had been developed over generations by Latin American farmers.[249] Of course, biopiracy is not unique to the United States.[250] But it is U.S. law that legalized the end result, and provided a legitimate market for the "stolen

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[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 919, 921-26 (1996).

[250] For example, the Japanese company Asahi Foods registered the name "Cupuacu" as a trademark for various products derived from the cupuacu tree, a member of the cocoa family native to the Amazonian rainforest, and claimed a number of patents on purported Cupuacu-related inventions. In 2002, two Brazilian advocacy groups launched a campaign to challenge the patent; the next year, the groups, having enlisted the support of the Brazilian government, filed a petition with the Japanese Patent Office. In 2004, the Japanese Patent Office annulled the trademarks and denied a patent application for a chocolate-like product made of processed Cupuacu seeds. *See generally* VIVIANA MUNOZ TELLEZ, QUEEN MARY, UNIV. OF LONDON, BIODIVERSITY IN THE AMAZON: THE "CUPUACU IS OURS" CAMPAIGN IN BRAZIL, http://www.ipngos.org/NGO%20Briefings/The%20Case%20of%20Cupuacu.pdf.

goods." Importantly, despite advances on many fronts, biopiracy continues to occur.[251]

2. Bio-prospecting

Not all the appropriations of PGRs and associated traditional knowledge were simple thefts. Private bargaining with state governments and community representatives also produced contracts whereby upfront payments and royalties earned on patents that produced marketable goods would be paid back. In one early deal, Merck agreed to pay Costa Rica's National Institute of Biodiversity (INBio) an initial fee of $1 million to undertake bio-prospecting in that country's rain forests, and to pay royalties on any drugs derived from plants or microorganisms found there.[252] More recently, the United States National Institute of Health (NIH), Conservation International, Bristol-Myers Squibb, Virginia Polytechnic Institute and State University, and the Missouri Botanical Garden contracted with the country of Suriname to study medicinal plants.[253] Other initiatives sponsored by the NIH include an agreement between Monsanto and the Cayetano Peruvian University to study medicinal plants from Andean rain forests; one among Walter Reed Army Institute of Research, the University of Yaounde in Cameroon, and several U.S.-based conservation groups and pharmaceutical companies to search for parasitic drugs in the African rainforest; and another involving American Cyanamid and various universities of Argentina, Chile, Mexico, and the United States to study medicinal properties of plants from arid regions.[254]

The benefits of such arrangements are obvious: They provide for local involvement and compensation, some measure of fairness, and flexibility. But skeptics note that the parties are in essentially unequal positions, with

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[251] For a more recent survey of instances of "biopiracy" in Africa (that is, instances where PGRs were appropriated in the apparent absence of either prior informed consent and/or benefit-sharing agreements), *see* JAY MCGOWN, EDMUNDS INST. & THE AFRICAN CTR. FOR BIOSAFETY, OUT OF AFRICA: MYSTERIES OF ACCESS AND BENEFIT-SHARING (2006).

[252] Leslie Roberts, *Chemical Prospecting: Hope for Vanishing Ecosystems?*, 256 SCIENCE 1142, 1142-43 (1992). *See also* SILVIA RODRIGUEZ & MAIA ANTNIETA COMACHO, *Bioprospecting in Costa Rica: Facing New Dimensions of Social and Environmental Responsibility*, *in* THE GREENING OF BUSINESS IN DEVELOPING COUNTRIES: RHETORIC, REALITY AND PROSPECTS (Peter Utting ed., 2002); Roht-Arriaza, *supra* note 249, at 958. At around the same time, the American Cancer Institute and Smith-Kline Beecham made similar arrangements in Cameroon and Ghana, respectively. Tom Reynolds, *Drug Firms, Countries Hope to Cash in on Natural Products*, 84 J. NAT'L CANCER INST. 1147, 1148 (1992).

[253] Roht-Arriaza, *supra* note 249, at 958-59.

[254] *Id.* at 959.

radically different financial resources, and different degrees of access to information about potential values.[255] Both sides are also likely to suffer from uncertainty regarding potential values at the time of collection, when the deal is struck.[256] In addition, the host community, whether it be indigenous or not, may suffer exacerbated internal strife as some members seek to capitalize on the opportunities to the exclusion of, and perhaps in the face of opposition by, others.[257] The result is that these deals are relatively cheap for the patent-seekers, involving an upfront payment and generally small royalties.[258]

What's more, these contracts, like 19th century contracts for land between land speculators and Indians, bring local groups into the fold of the American empire by commodifying and monetizing "nature" that had previously been free and public, and by granting rights to knowledge that had not been identified as rights-based. Indeed, the contract approach "fits nicely with the capitalist commodity relationship, creating a 'loop' of commodification in germplasm within which capitalist companies are only too happy to operate."[259]

C. The International Regime: The Export and Internalization of the IPR Regime

The global subjugation of PGRs to patent protections represents a classic enclosure movement, in which natural resources held in a commons, or else in the public domain, are privatized for the purpose of increasing profit and, in the case of American empire, a kind of cultural power.[260] The enclosure may be plausibly explained by classic Dersetzian economic theory operating on an international scale,[261] or by some other more critical

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[255] *Id.* at 959-61.

[256] Aoki, *Distributive Justice*, *supra* note 150, at 796.

[257] *Id.* (noting that "communities from whom consent is sought are not homogenous and stable but are often fragmented, with compositions that are dynamic over time"); Roht-Arriaza, *supra* note 249, at 961.

[258] STENSON & GRAY, *supra* note 153, at 123-24.

[259] *Id.* at 124.

[260] Though the global commons or common heritage designation is often associated with PGRs, the truth is that PGRs are situated in specific places, within territorial jurisdictions. As phrased by Vandana Shiva: "Even though references are increasingly made to global genetic resources biodiversity—unlike the atmosphere or the oceans—is not a global commons in the ecological sense. Biodiversity exists in specific countries and is used by specific communities. It is global only in its emerging role as the raw material for global corporations." SHIVA, BIOPIRACY, *supra* note 150, at 66.

[261] Thomas W. Merrill, *The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. 331 (2002).

theory.[262] Alternatively, the projection of American law and values may be seen in a more historically-contingent light, as a product of and participant in the broad forces of globalization that especially marked the period between the collapse of the Soviet Union and 9/11.[263] ("Globalization" is a contentious and well-covered field of study, and we wade into it conscious of the deep literature in the fields of both political science[264] and law.[265]) Without disputing either of these theoretical frames, we adopt something more akin to a realist perspective in arguing that the export of IPRs to PGRs has *functioned* to serve the growth of American empire.[266]

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[262] *See* Okedji, *supra* note 160; Aoki, *Distributive Justice, supra* note 150; SHIVA, BIOPIRACY, *supra* note 150. In another way, Peter Yu has argued that the export of international property rights ("IPRs") to PGRs represents an enclosure not of public natural goods, the public domain, but instead the "policy space of individual countries in the name of international harmonization." Peter K. Yu, *International Enclosure, The Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 3 (2007).

[263] *See, e.g.*, Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); Fred H. Cate, *Introduction: Sovereignty and the Globalization of Intellectual Property*, 6 IND. J. GLOBAL LEGAL STUD. 1 (1998).

[264] A summary of the relevant political science literature is virtually impossible. Several major contributions include BENJAMIN R. BARBER, JIHAD V. MCWORLD (1996); DAVID J. ELKINS, BEYOND SOVEREIGNTY: TERRITORY AND POLITICAL ECONOMY IN THE TWENTY-FIRST CENTURY (1995); JEAN-MARIE GUÉHENNO, THE END OF THE NATION-STATE (Victoria Elliott trans., 1995); HARDT & NEGRI, EMPIRE, *supra* note 5; ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES (1998); DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (1999); ANDREW LINKLATER, THE TRANSFORMATION OF POLITICAL COMMUNITY: ETHICAL FOUNDATIONS OF THE POST-WESTPHALIAN ERA (1998); JAN AART SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION (2000); PAUL N. DOREMUS ET AL., THE MYTH OF THE GLOBAL CORPORATION (1999); MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY (1995); LINDA WEISS, THE MYTH OF THE POWERLESS STATE (1998).

[265] *See, e.g.*, WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L LAW 369 (2005); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 399-402 (2003); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1 (2006). The internationalization of domestic intellectual property law also raises fundamental questions about the role of international law in promoting development in the global South. *See, e.g.*, Chon, *supra* note 174, at 2823 (noting "the absence of any explicit overarching principle or policy of international intellectual policy," leading to "growing and dangerous asymmetries in intellectual property norm-setting and interpretation occurring in multilateral and bilateral activities across the world. Intellectual property, while purporting to heed the issues of development, often runs rough-shod over the central concerns of development").

[266] For realist and quasi-realist accounts looking at the dynamic between law and empire,

The export of patent protections, from domestic into international law and from there into the domestic law of foreign countries, has occurred along two parallel trajectories.[267] On one hand, the developing world has mounted a continuous and spirited resistance to the IPR regime in United Nations-related organizations including the World Intellectual Property Organization (WIPO) and the Food and Agriculture Organization (FAO), and within the Secretariat of the Convention on Biological Diversity (CBD). As we shall see, however, the debates in even those fora have moved away from the fundamental question of the right to patent PGRs toward how to ensure access for northern companies to the PGRs located in the South and how to ensure southern nations and communities obtain their fair share of commercial benefits from their extraction.[268] At the same time, the United States ensured that IPRs to PGRs were integrated into the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs), part of the package deal resulting from the Uruguay Round of negotiations on the General Agreement on Tariffs and Trade (GATT). TRIPs—unlike WIPO, the FAO, and the CBD—is a highly "legalized" institution: its rules are precisely worded, compliance is required of all members of the World Trade Organization (WTO), and the rules are enforceable through the WTO's dispute resolution body.[269] This enforceability is a critical component to the imperial effect of the law's operation, ultimately distinguishing the "hard law" of TRIPs' requirements from the "soft law" of the CBD's access and benefit-sharing regime.

1. Access and Benefit-Sharing: Resistance and Capitulation

The 1970s and early 1980s were, broadly speaking, a time of international upheaval in regards to PGRs, and the change in U.S. law marked by *Chakrabarty* and *Ex Parte Hibberd* provoked an international reaction. The period had seen the internationalization of agriculture and the Green Revolution; the rapid rise of gene splicing techniques and

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see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); Susan Marks, *Empire's Law*, 10 IND. J. GLOBAL LEGAL STUD. 449 (2003); Detlev F. Vagts, *Editorial Comments: Hegemonic International Law*, 95 AM. J. INT'L L. *843* (2001); Krisch, *supra* note 265.

[267] For a more extensive treatment of the development of the international regime complex, see generally AOKI, SEED WARS, *supra* note 147, at 61-97.

[268] *See supra* notes 270-286, and accompanying text.

[269] *See* Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 387 (2000) (defining comparative "legalization" of institutions according to the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party).

biotechnology; and, in the developing world, a growing awareness of and dissatisfaction with the inequalities in the emerging global economy.[270] To voice their objection to the U.S. regime, developing nations turned first to the FAO, where they had a strong and visible presence, and in 1983, over U.S. objections, passed the International Undertaking on Plant Genetic Resources for Food and Agriculture (IUPGR).[271] A non-binding agreement, the IUPGR directly challenged the commodification of PGRS by seeking to apply the common heritage designation not only to traditional landraces and wild plants but also to plant varieties already protected by breeder's rights and plant patents under the PPA, PVPA and the International Union for the Protection of New Varieties of Plants (UPOV), the European analog to the PVPA.[272] Not surprisingly, the United States refused to participate in the IUPGR.

In addition to opposition from the United States and other developed nations, the developing world was far from united in its desired approach to IPRs. Some argued that the IUPGR's common heritage approach was a remnant of the very same colonialism that had authorized so many previous expropriations of genetic resources.[273] The result of this diversity of opinion, both internal to the developing world and between the Northern and Southern hemispheres, was the announcement, in 1989, of the so-called "Keystone Principles."[274] The Keystone Principles declared that plants protected under the PVPA and UPOV would not be treated as common heritage, thereby acknowledging plant breeders' distinct form of IPRs in plant varieties; that access to ancient landraces and wild crops required compensation, thereby introducing the paired concepts of access and benefit-sharing into the international framework; and that there existed

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[270] STENSON & GRAY, *supra* note 153.

[271] Food and Agric. Org. [FAO], *International Undertaking on Plant Genetic Resources for Food and Agriculture*, FAO Res. 8/83 (1983).

[272] STENSON & GRAY, *supra* note 153, at 17.

[273] As mentioned above, the colonialist regimes enabled a number of surreptitious and less-than-surreptitious expropriations. *See supra* notes 141-144, and accompanying text. When these takings could no longer be pulled off as part and parcel of colonialist privilege, PGRs were maintained in an international system of seed banks under the Consultative Group on International Agricultural Research (CGIAR). According to Prof. Aoki, a disproportionate percentage of seeds under the CGIAR regime were funneled from the global South to seed banks in the United States, Europe and Japan. AOKI, SEED WARS, *supra* note 147, at 68.

[274] THE KEYSTONE CTR., FINAL CONSENSUS REPORT OF THE KEYSTONE INTERNATIONAL DIALOGUE SERIES ON PLANT GENETIC RESOURCES: MADRAS PLENARY SESSION (1990). For a more complete account of the talks, see AOKI, SEED WARS, *supra* note 147, at 75; FOWLER & MOONEY, *supra* note 157, at 197-99.

some vague set of protections for something called "farmers' rights."[275] In adopting the Principles as a new interpretation of the IUPGR, however, the FAO did not surrender on the issue of common heritage; rather, it declared that plant breeders' and farmers' rights were compatible with common heritage designation.[276]

By 1992, the international community had shifted even further away from common heritage and toward a more fully proprietary view of IPRs to PGRs. The CBD,[277] adopted at the U.N. Conference on Environment and Development in Rio de Janeiro (the famous "Earth Summit"), recognized the sovereign rights of nations over genetic resources located within their territory, and provided for access to these resources where the host nation consents to it and where there is some fair and equitable sharing of commercial and other benefits.[278] Again, negotiations raised essential issues of nature, culture and empire: As between the developing nations, many of the same arguments that arose in the FAO negotiations over the IUPGR reemerged in the CBD talks, including divisions over the distribution of biotechnology's benefits, the ethics of granting IP rights over living organisms, "and technology transfer questions regarding access to" necessary technologies.[279] As between the developed and developing nations, the divisions were starker. As described by Lawrence Helfer: "[B]iodiversity-rich but biotechnology-poor developing countries sought financial benefits and technology transfers as incentives to conserve rather

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[275] Farmers' rights advocates focused on 1) right to grow, market and improve local varieties; 2) right to access improved plant varieties and use farm-saved seeds; 3) right to compensation for use of local varieties in development of new products; 4) right to participate in PGR-related decision-making. AOKI, SEED WARS, *supra* note 147, at 77. For further elaboration of farmers' rights, see Lawrence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 28, 37 (2004). Importantly, farmers' rights never became legally binding in any form. *Id.* at 76.

[276] *Id.* at 36. It is possible that the change in recognition of breeder's rights changed the U.S. position—the government soon announced it would join the FAO Commission, and later became a party to the IUPGR.

[277] Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

[278] *Id.* at art. 3 ("States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."); *Id.* at art. 15.5 (requiring prior informed consent of party "owning" natural resource); *Id.* at art. 8(j) (examining equitable sharing of benefits).

[279] Aoki, *Distributive Justice*, *supra* note 150, at 788. *See also* SILKE VON LEWINSKI, INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 40-42 (1st ed. 2003).

than exploit the genetic resources within their borders. Biodiversity-poor but biotechnology-rich industrialized states, by contrast, sought to minimize benefits and transfers while maximizing access to those resources."[280] That is, the developing world tried to get as much payment as it could for preserving biodiversity while asserting control over access, and the developed world tried to get as much access to biodiversity as it could while giving up as little as possible.

These core debates have carried over into the ongoing efforts to implement the access and benefit-sharing mandates of the CBD. Most recently, in October 2010, members of the CBD passed the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, representing a long-sought framework agreement on access and benefit-sharing.[281] For our purposes, the details of the agreement are not terribly important, but the main provisions of the Protocol cover four primary areas. First, the Protocol imposes access obligations on host nations, including the establishment of a permitting scheme that will increase transparency, decrease uncertainty, and facilitate gaining and granting informed consent and agreement prior to the removal of PGRs.[282] Second, the Protocol imposes benefit-sharing obligations on contracting nations, including the "fair and equitable sharing" of monetary and non-monetary benefits arising from the utilization of genetic resources, where "utilization" includes research and development as well as subsequent applications and commercialization.[283] Third, the Protocol calls for prospecting nations to, in some way, support compliance with the domestic legislation of the host nation.[284] Fourth, the Protocol also provides for a measure of protection for traditional knowledge associated with PGRs.[285]

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[280] Helfer, *supra* note 275, at 28.

[281] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Feb. 2, 2011, *available at* http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf [hereinafter *Nagoya Protocol*]. Negotiations for an international ABS regime were originally initiated after the seventh meeting of the Conference of Parties of (COP) in 2004, which established an Ad Hoc Open-ended Working Group on Access and Benefit-sharing "to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument(s) to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention." *Id.*

[282] *Nagoya Protocol*, *supra* note 281, at art. 6.

[283] *Id.* at art. 5.

[284] *Id.* at art. 12.

[285] *Id.*

The Nagoya Protocol may well prove an effective agreement that assures more consistency, fairness and equality.[286] Then again, it may not. There are important shortcomings in the Protocol. It does not provide for the protection of publicly available traditional knowledge, placing the onus on host nations to collect and record those sources in order to protect them. It does not make any provision for the disclosure of the source traditional knowledge, or for disclosure of evidence for fair and equitable sharing of benefits. And it does not specify what measures should be taken to ensure compliance with domestic laws, what the standard for evaluating appropriate efforts to ensure compliance would be, or what the penalties for non-compliance are. However, even beyond these shortcomings, the Protocol is deeply revealing in its broad outline. Even within the "soft law" universe of the CBD—a convention to which the United States is not even a party—the values and norms of the United States have settled into a dominant position, settling the biotechnology frontier and enclosing the PGRs commons. The question is no longer whether PGRs are properly subject to patents, but how to ensure that the appropriate corporations can find access to them and the appropriate representatives of host nations and traditional knowledge communities can receive benefits. Thus, the market for bilateral contracts between bioprospectors and host nations or their domestic companies that grew out of *Chakrabarty* and *Ex Parte Hibberd*, and which was affirmed in *J.E.M. Ag. Supply*, has been sanctioned and legitimized, and the American conceptualizations of nature, culture and civilization have been reified.

2. Economic and Political Dominance: The TRIPs Regime

Just two years after the CBD first inscribed the principles of sovereign rights, access and benefit-sharing into the PGRs discourse, the TRIPs agreement required all WTO member nations grant intellectual property rights for PGRs.[287] The addition of TRIPs to the Uruguay Round of

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[286] For a preliminary analysis of the Protocol's provisions, see Reji K. Jospeh, *International Regime on Access and Benefit-Sharing: Where are we now?*, 12 ASIAN BIOTECHNOLOGY AND DEV. REV. 77 (2010). For some preliminary thoughts on the potential impact on scientific research, see Thomas A. Kursar, *What are the Implications of the Nagoya Protocol for Research on Biodiversity*, 61 BIOSCIENCE 256 (2011).

[287] Marrakesh Agreement Establishing the World Trade Organization, Multilateral Trade Negotiations (The Uruguay Round), Document MTN/FA, Part II, Annex 1C (1993), reprinted in The American Society of International Law, *General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, 33 I.L.M. 81 (1994) [hereinafter TRIPS]. Article 27.3 provides for the patentability of micro-organisms and microbiological processes, as well as some form of IP rights for plant

negotiations reveals something of the Desetzian power play, and something of a Hardt & Negri-style conspiracy: TRIPs was added to the GATT negotiations late in the game, by the United States, after heavy lobbying by multinational corporations concerned about "piracy" of their intellectual property. By several accounts, the idea of an international IP regime was initiated, developed and promoted by the Intellectual Property Committee, a group of twelve chief executive officers representing the pharmaceutical, entertainment and software industries, including CEOs from companies with special interests in PGRs such as Monsanto, DuPont, Merck, Pfizer, and Bristol-Meyers.[288] The TRIPs agreement was pushed through despite significant opposition from developing countries, who arguably have little to gain from a strong IPRs regime.[289] Indeed, developing countries were economically pressured by developed countries to sign TRIPS, despite significant domestic opposition,[290] and arguably misled about the benefits they would receive by acceding to the TRIPs regime.[291]

In the wake of TRIPs, developing nations, activists, and some intergovernmental organizations have mounted various forms of resistance, including strategically "regime shifting to move intellectual property lawmaking" into more favorable fora, such as CBD and WIPO.[292] This has produced new treaties, including the Agreement on Plant Genetic

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varieties, either as patents or in a *sui generis* form of protection.

[288] SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 1-2 (2003). *See also* Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 186 (2003) (describing intellectual property rights as the product of interest group pressures); Justine Pila, *Bound Futures: Patent Law and Modern Biotechnology*, 9 B.U. J. SCI. & TECH. L. 326, 365 (2003) (noting key role of "effective lobbying" by the biotech industry in obtaining support for global patent protection); Susan K. Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT'L L. REV. 933, 942 (2003) (tracing history of industry lobbying for global IP protection).

[289] *See* STENSON & GRAY, *supra* note 153, at 61; Boyle, *supra* note 173, at 122. Aoki, *Distributive Justice*, *supra* note 150, at 789-90; VANDANA SHIVA ET AL., CORPORATE HIJACK OF BIODIVERSITY: HOW WTO-TRIPS RULES PROMOTE CORPORATE HIJACK OF PEOPLE'S BIODIVERSITY AND KNOWLEDGE (2002). *But see* Helfer, *supra* note 275, at 2-5 (noting that proponents of TRIPs argue that strong IP rules promote economic development and that TRIPs itself is part of WTO "package deal" that provides various benefits in exchange for short-term losses).

[290] *See* Lakshmi Sarma, *Biopiracy: Twentieth Century Imperialism in the Form of International Agreements*, 13 TEMP. INT'L & COMP. L.J. 107, 109 (1999); Kevin W. McCabe, *The January 1999 Review of Article 27 of the TRIPS Agreement: Diverging Views of Developed and Developing Countries Toward the Patentability of Biotechnology*, 6 J. INTELL. PROP. L. 41, 52 (1998).

[291] PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 11 (2d ed. 2003).

[292] Helfer, *supra* note 275, at 27-28.

Resources; the reinterpretation of existing agreements, such as in the Nagoya Protocol; and the creation of new nonbinding declarations, guidelines, and recommendations.[293] However, as discussed above this resistance has in many ways come to focus on access and benefit-sharing.

There has also been ongoing resistance with the TRIPs secretariat, in particular in relation to Article 27.3(b), which defines patentable subject matter under the TRIPs agreement. The provision allows governments to make plants, animals and "essentially" biological processes eligible for patents, and requires that they do so for micro-organisms and non-biological and microbiological processes.[294] It also requires that plant varieties have to be eligible for protection either through patents or a *sui generis* system, or some combination of the two.[295] Resistance to this extension of IPRs to PGRs has taken place primarily in the course of a review of Article 27.3(b) required by TRIPs[296] and refined by paragraph 19 of the Doha Declaration, which said that the TRIPS Council should look specifically at the relationship between TRIPS and the CBD, and the protection of traditional knowledge and folklore.[297] In this context, a group of developing nations led by Brazil and India has argued that TRIPS should be amended to require that patent applicants disclose the country of origin of genetic resources and traditional knowledge used in the inventions, evidence that they received "prior informed consent" as defined in the CBD, and evidence of "fair and equitable" benefit sharing.[298] As recently as March 1, 2011, Bolivia filed a proposal to amend Article 27.3(b) to *ban* the patenting of all life forms.[299] In its submission to the TRIPs Council, Bolivia said the patenting of life forms has led to "monopolistic control

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[293] *See id.*

[294] TRIPS, *supra* note 287, at 94 (Article 27.3(b)).

[295] *Id.*

[296] *Id.*

[297] World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/Dec/2 ¶ 4 (Nov. 14, 2001) [hereinafter Doha Declaration], *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf.

[298] In response, the developed nations have taken different stances: The United States has argued that disclosure issues are best left to contractual bioprospecting arrangements made under the CBD. The European Union has argued that all patent applicants should disclose the sources of genetic material, but with consequences for non-disclosure falling outside the realm of patent law.

[299] PLURINATIONAL STATE OF BOLIVA, ARTICLE 27.3(B) AND THE LEGALIZATION OF BIOPIRACY: TRENDS, IMPACTS AND WHY IT NEEDS TO BE AMENDED (Mar. 1, 2011), *available at* http://www.ip-watch.org/weblog/wp-content/uploads/2011/03/WTO-TRIPS-Bolivia-submission3.pdf.

over some of the most important sectors, such as food, agriculture and health, a trend facilitated by the patent system."[300]

Neither the United States nor the European Union has much interest in these reforms, and amendments to TRIPs along these lines are unlikely. Rather, the status quo appears to be firmly entrenched. This is troubling in many respects. As Bolivia points out in its submission, patents have been and are being issued for a growing number of staple crops, as well as microbial, bacterial, plant, animal and human genes, cells and tissues.[301] Patents are also being issued for "climate ready" genes in plants that are being designed to withstand the predicted impacts of climate change, such as increased flood, drought, heat, cold and other extreme conditions.[302]

In sum, then, the process looks like this: First, the law creates a new form of intellectual property, which effectively creates a new form of capital. The store of capital created "channels a threat power, or sovereignty effect, to its holder. Where the holders are few, the result is an accretion of vast power in the hands of an elite few."[303] Second, the internationalization of these IP laws, and the penetration of foreign legal territory, prevents developing nations from developing and describing property laws according to their own preferences, one of the most important powers possessed by a nation.[304] Thus, "hegemonic states . . . could use [the] global protectionist scheme to gain permanent ascendancy over other states, thereby institutionalizing and legitimizing their control over the vital capital resource of information."[305] This control has a clear economic benefit: According to the World Bank, the most developed countries stood most to gain from TRIPs in terms of the enhanced value of their patents, with the benefit to the United States estimated at $19 billion per year.[306] It also promotes the expansion of Western culture and ideas into these foreign sovereignties, amounting to "old-fashioned, Western-style imperialism."[307]

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[300] *Id.*

[301] *Id.* at ¶ 8.

[302] *Id.*

[303] STENSON & GRAY, *supra* note 153, at 51.

[304] *Id.* at 58-60.

[305] *Id.* at 60.

[306] WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2002: MAKING TRADE WORK FOR THE WORLD'S POOR 133 (2001) (cited in COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 9 (2002) [hereinafter CIPR Report], *available at* http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf).

[307] Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 615 (1996). *See also* A. Samuel Oddi, *TRIPS – Natural Rights and a "Polite Form of Economic Imperialism,"* 29 VAND. J. TRANSNAT'L L. 415 (1996).

IV. CONCLUSION

We have provided two illustrations of American property law being used in very different historical, political, and geographic environments, but with strikingly similar implications for the sovereignty of indigenous peoples. Nineteenth century property laws, derived from European imperial hierarchies, helped both authorize and politically legitimate American land taking from native populations while maintaining liberal principles and common law traditions. Twentieth century expropriation of intellectual property laws to plant genetic resources similarly provided the legal and political legitimation to extract natural resources from indigenous communities south of the United States border. From the detail of our description, it is clear that these two illustrations are not entirely parallel, as might be expected when comparing two stories separated by more than a century in time, situated in different political borders, and involving a range of different legal institutions. Yet, what is striking is the degree of legal and political similarities and historical continuity. Most importantly, for our purposes, is the similar role of American property law being imposed on indigenous populations with striking success and impact. As a language, as an expression of sovereignty, and as a form of authority and rule, law served—in Christopher Tomlins words—"the means" by which Americans would obtain the land of others.[308]

As a mechanism for the imperial reach of the United States, property law—which has developed slowly through a range of statutes, common law interpretations, and intellectual discourse and deliberation—has neither the sensational shock value of military violence nor the immediacy of a constitutional revolution. But as a method of taking property and imposing influence and authority, few forms of imperialism have had the same degree of success and range. As we move forward in understanding the forms that imperialism acts, and the specific role that law plays in enabling it, we need to pay closer attention to those features that move slowly and steadily, but under the radar of scholars and pundits. Accordingly, for those who defend the rights of indigenous people's and less powerful sovereign nations to maintain meaningful independence, we need to promote more encompassing legal reform that goes beyond the military and trade policies of U.S. presidents, and target the common law traditions and judicial practices that slowly but surely continue to expand the frontiers of American empire.

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[308] TOMLINS, *supra* note 4, at 5.

The Wash of the Waves: How the Stroke of a Pen Recharacterized Accreted Lands as Public Property

E. Kumau Pineda-Akiona*

I. INTRODUCTION

Hawaii's state-owned beaches are open to the public to engage in everything from recreation to important cultural activities. Many Hawai'i residents view the beach as a lifeline that makes possible a multitude of enjoyable hobbies such as fishing, surfing, and swimming. Littoral property owners also have the right to enjoy their property that extends makai (seaward)[1] to the "highest reach of the highest wash of the waves."[2] This definition of a beachfront owner's property line is subject to forces of nature such as accretion, erosion, and avulsion.[3] Accretion is the process by which an area of land is "formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."[4] Erosion on the other hand, is "the process by which land is gradually covered by

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[1] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 114, 225 (6th ed. 1986) (seaward, "toward the sea").

[2] Diamond v. State, 112 Haw. 161, 164, 145 P.3d 704, 707 (2006) (interpreting the precedent setting Hawai'i Supreme Court holding in *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) (shoreline boundary "usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves")); *see* HAW. REV. STAT. § 205A-1 (2010); HAW. CODE R. § 13-222-2 (LexisNexis 2006). Although the *Diamond* court further defined *Ashford*'s "upper reaches of the wash of the waves" demarcation as the "highest reach of the highest wash of the waves," this shoreline definition is still generally referred to as the *Ashford* rule/standard.

[3] *See* Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 36, 222 P.3d 441, 443 (App. 2009) (citing 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY §§ 66.01[1]-66.01[2], at 66-2 to 66-9 (2006)).

[4] HAW. REV. STAT. § 171-1 (2010); *See* Hughes v. Washington, 389 U.S. 290, 290-91 (1967) (accretion refers to land "gradually deposited by the ocean on adjoining upland property"); BLACK'S LAW DICTIONARY 23 (9th ed. 2009) (accretion is the "gradual accumulation of land by natural forces, esp. as alluvium is added to land situated on the bank of a river on the seashore").

water."[5] Under the longstanding common law, oceanfront owners assumed the risk of property loss due to erosion, but preserved their right to any newly accreted land.[6] Lastly, avulsion "denotes the process by which there is a sudden and perceptible change in the location of a body of water."[7] The boundary line, however, remains the same in cases where there has been an abrupt shoreline change due to the process of avulsion.[8]

In 2003, the Hawai'i State Legislature adopted Act 73, which provided that beachfront property owners no longer had a private right to own accreted lands.[9] Act 73 included two exceptions for private landowners to gain title to accreted land: (1) if the accretion restored previously eroded land; or (2) if a pending application for registration of land or to quiet title was initiated before Act 73's effective date.[10] In 2005, a group of landowners in the Portlock area of O'ahu filed a class action inverse condemnation[11] lawsuit alleging that Act 73 constituted a taking of their property rights without just compensation.[12] Although the Intermediate Court of Appeals of Hawai'i ("ICA") in *Maunalua Bay Beach Ohana 28 v. State* held that Act 73 effectuated an uncompensated taking of existing accreted land as of the Act's effective date, the court determined that the Act was not a taking of future accretions.[13] Under this reasoning, the right

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[5] *Maunalua Bay*, 122 Haw. at 36, 222 P.3d at 443 (citing POWELL, *supra* note 3).

[6] *Id.* at 37, 222 P.3d at 444.

[7] *Id.* at 36, 222 P.3d at 443.

[8] *Id.* at 37, 222 P.3d at 444; *see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 709 (2010) ("regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change").

[9] 2003 Haw. Sess. Laws Act 73, §§ 1-8 at 128-29 (codified at HAW. REV. STAT. §§ 171-1, 171-2, 343-3, 501-33, 669-1 (2010)).

[10] Act 73 significantly amended HAW. REV. STAT. §§ 501-33, 669-1 (2010); *see supra* note 9 (other sections amended by Act 73).

[11] United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971) ("[I]nverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'") (emphasis omitted)).

[12] *Maunalua Bay*, 122 Haw. at 36, 222 P.3d at 443; HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."); U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *see Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating the Fifth Amendment against the states).

[13] *Maunalua Bay*, 122 Haw. at 36, 222 P.3d at 443.

to future accreted land in Hawai'i is no longer considered a property interest under the Hawai'i State Constitution.[14]

Although the homeowners prevailed in Circuit Court, the ICA's bifurcation of "existing accreted land" and "future accretion rights"[15] marked a departure from the common law of accretion and shoreline boundaries. As a result of the *Maunalua Bay* decision, oceanfront owners still assume the risk of property loss due to erosion, but no longer have the right to newly accreted land. Similarly, the "highest wash of the waves" boundary classification between public and private property adopted by the Hawai'i Supreme Court in *In re Ashford*[16] is no longer absolute.[17] The public-private shoreline distinction that was once evidenced by the "debris line" or "vegetation line" is only true where there has either been erosion or no change to the beach since May 20, 2003.[18] In cases where there has been accretion, however, there is now a strip of public beach extending somewhere mauka (inland)[19] from the highest wash of the waves that is not easily ascertainable.[20]

This Note will discuss the common law of accretion in the Kingdom, Territory, and State of Hawai'i that subjected littoral owners to property loss due to erosion, but preserved their right to any newly accreted land. To provide context, Part II focuses on the seminal Hawai'i common law cases

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[14] HAW. CONST. art. I, § 20; *See* HAW. CONST. art. I, § 5 ("No person shall be deprived of . . . property without due process of law . . . ."); U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law").

[15] Interview with Carl C. Christensen, Visiting Assistant Professor of Law at the William S. Richardson School of Law, in Honolulu, Haw. (Apr. 12, 2011) [hereinafter Christensen Interview] (stating that although the Plaintiffs and the State largely ignored this issue, the ICA latched onto this distinction, which was advanced in the amicus brief he filed on behalf of Hawaii's Thousand Friends); Brief for Hawaii's Thousand Friends as Amici Curiae Supporting Defendant-Appellant, *Maunalua Bay* at 4-7, 122 Haw. 34, 222 P.3d 441 (App. 2009) (No. 28175).

[16] 50 Haw. 314, 440 P.2d 76 (1968).

[17] The *Ashford* "upper reaches" standard was affirmed and clarified in Diamond v. State, 112 Haw. 161, 145 P.3d 704 (2006). *See supra* text accompanying note 2.

[18] *See supra* text accompanying note 2 (debris line or vegetation line—whichever is farthest mauka (inland)).

[19] PUKUI & ELBERT, *supra* note 1, at 242.

[20] *See* MELODY KAPILIALOHA MACKENZIE, SUSAN K. SERRANO, & D. KAPUA'ALA SPROAT, NATIVE HAWAIIAN RIGHTS HANDBOOK 2d ed. (forthcoming 2011) [hereinafter HANDBOOK] ("*Determining the location of the shoreline is critical*, not only because it potentially affects public access, but also because structures cannot be located within the shoreline setback area, which must be at least twenty feet but not more than forty feet inland from the shoreline.") (emphasis added).

on accretion and shoreline boundaries,[21] followed by the statutory background of Act 221[22] and Act 73. Part III provides an overview of the *Maunalua Bay* decision itself, discussing the facts, procedural history, and the court's constitutional determinations on "existing accreted" land and "future accretion" rights. Part IV critiques the ICA's conclusion that there is no vested right to future accretions, and the practical consequences of the decision. Part V concludes that although public policy favors public use and ownership of Hawaii's shoreline, in this case, public access to the beach could have been preserved without changing the common law and creating a new distinction between existing accreted land and future accretion rights.[23]

II. BACKGROUND

A. Hawai'i Supreme Court Precedent

Ownership of accreted lands was first addressed in 1889 by the Supreme Court of the Kingdom of Hawai'i in *Halstead v. Gay*, a case that hinged on whether the defendant's presence on accreted land constituted trespassing.[24] In determining the property's makai boundary, the court in *Halstead* interpreted the phrase in the deed, "ma kahakai a hiki i ka hope o ka holo mua ana," to mean the "high-water mark on the sea beach."[25] The court held that the "land now above high-water mark, which has been formed by imperceptible accretion against the shore line existing at the date of the survey and grant, has become attached *by the law of accretion* to the land described in the grant."[26] The court concluded "that the plaintiff has the rights of a littoral proprietor, and that the accretion is his."[27]

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[21] *See* Halstead v. Gay, 7 Haw. 587 (1889); *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968); Cnty. of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973); *In re* Sanborn 57 Haw. 585, 562 P.2d 771 (1977); State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977); *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992); Diamond v. State, 112 Haw. 161, 145 P.3d 704 (2006).

[22] Act 221 is the predecessor to Act 73—discussed *infra* text accompanying Section II. B.

[23] *See Banning*, 73 Haw. at 309, 832 P.2d at 731.

[24] 7 Haw. 587 (1889).

[25] *Id.* at 589.

[26] *Id.* at 590 (emphasis added) ("Land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made." *Id.* at 588 (citations omitted)).

[27] *Id.* at 590.

The Hawai'i Supreme Court revisited the issue of makai boundaries over three quarters of a century later in *In re Ashford*, the 1968 landmark case in which the property owners sought registration of two parcels of land described in the royal patents as running "ma ke kai" (along the sea).[28] The petitioners asserted that ma ke kai described the boundaries at the "mean high water" mark, based on U.S. Coast and Geodetic Survey publications.[29] The State contended that the public property line was approximately twenty to thirty feet mauka of the boundary claimed by the property owners, as demonstrated by "the high water mark that is along the edge of vegetation or the line of debris left by the wash of the waves during ordinary high tide."[30] When Kamehameha V issued the royal patents for the *Ashford* properties in 1866, the custom was to rely on kama'āina testimony for boundary determinations.[31] Relying on kama'āina testimony,[32] the *Ashford* court held "that 'ma ke kai' is along the *upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris* left by the wash of waves."[33]

In 1973, the Hawai'i Supreme Court further advanced the *Ashford* rule in *Cnty. of Hawaii v. Sotomura* ("*Sotomura I*"), a case in which the makai boundary was at issue in a county initiated eminent domain action.[34] The seaward boundary that was registered with the land court eleven years earlier had subsequently eroded.[35] Rather than using the certified land court makai boundary for the valuation method, the court held that, "registered

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[28] 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[29] *Id.*; *see* Robert H. Thomas, Mark M. Murakami & Tred R. Eyerly, *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches*, 35 VT. L. REV. 437, 448-49 (2010).

[30] *Ashford*, 50 Haw. at 315, 440 P.2d at 77.

[31] *Id.*

[32] *Id.* at 315 n.2, 440 P.2d at 77 n.2; *see In re* Boundaries of Pulehunui, 4 Haw. 239, 245 (1879) (defining kama'āina as a native-born "familiar from childhood with any locality"); MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 124 (6th ed. 1986) ("Native-born, one born in a place . . . acquainted, familiar").

[33] *Ashford*, 50 Haw. at 315, 440 P.2d at 77 (emphasis added) (departing from the mean high water mark shoreline definition). The kama'āina witnesses in *Ashford* testified, "that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris." *Id.* at 316, 440 P.2d at 78; *see* Asami Miyazawa, *Public Beach Access: A Right for All? Opening the Gate to Iroquois Point Beach*, 30 U. HAW. L. REV. 495 (2008).

[34] 55 Haw. 176, 517 P.2d 57, *reh'g denied*, 55 Haw. 677 (1973), *cert. denied*, 419 U.S. 872 (1974).

[35] *Id.* at 180, 517 P.2d at 61; *see also* Napeahi v. Paty, 921 F.2d 897, 900 (9th Cir. 1990) (affirming that eroded oceanfront land becomes state land, subject to the terms of the "public trust").

ocean front property is subject to the same burdens and incidents as unregistered land, including erosion."[36] Relying on *Ashford*, the court held that as a matter of law

> where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth.[37]

The court further reasoned that, "while the debris line may change from day to day or from season to season, *the vegetation line is a more permanent monument*, its growth limited by the year's highest wash of the waves."[38] Aside from pronouncing that the location of a seaward boundary is to be determined by the *Ashford* standard, the *Sotomura I* court reasoned that *Ashford* "was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right."[39] Relying on the "public trust doctrine,"[40] the court also articulated that "[p]ublic policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[41]

The Hawai'i Supreme Court's *Sotomura I* decision was later challenged in the U.S. District Court case of *Sotomura v. Cnty. of Hawaii* ("*Sotomura II*").[42] The same landowners from *Sotomura I* asserted that the Hawai'i Supreme Court radically departed from Hawai'i common law by using the *Ashford* standard and vegetation line in its determination of the shoreline

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[36] *Sotomura I*, 55 Haw. at 180, 517 P.2d at 61.

[37] *Id.* at 182, 517 P.2d at 62.

[38] *Id.* (emphasis added). This vegetation line "preference" is addressed in detail in Diamond v. State, 112 Haw. 161, 175, 145 P.3d 704, 718 (2006).

[39] *Sotomura I*, 55 Haw. at 181-82, 517 P.2d at 61.

[40] *See* HAW. CONST. art. XI, § 1. The public trust doctrine was first adopted by the Hawai'i Supreme Court in *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899), later proposed by the Constitutional Convention of Hawai'i of 1978, and adopted by the voters of Hawai'i in November 1978.

[41] *Sotomura I*, 55 Haw. at 182, 517 P.2d at 61-62. The court further noted that "[l]and below the high water mark, like flowing water, is a natural resource owned by the state 'subject to, but in some sense in trust for, the enjoyment of certain public rights.'" *Id.* at 183-84, 517 P.2d at 63. *But see id.* at 189, 517 P.2d at 65 (Marumoto, J., dissenting) ("I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making.").

[42] 460 F. Supp. 473 (D. Haw. 1978). Although an appeal from the Hawai'i Supreme Court to the U.S. District Court of Hawaii is no longer permitted, it was procedurally proper at the time.

boundary.[43] The federal district court held that *Sotomura I* violated the landowners' substantive due process rights and found no authority for using the *Ashford* standard aside from the *Ashford* decision itself.[44] The court stated that prior to *Ashford*, the mean high water level was used to determine the high water mark.[45] The *Sotomura II* court concluded that the

> Hawaii Supreme Court's retroactive application of the Ashford standards to locate the seaward boundary of property at the vegetation line, following erosion, ignoring vested property rights and without determining the extent of actual erosion, was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation.[46]

In what has been described as "an apparent response to the anticipated federal district court opinion in *Sotomura II*,"[47] the Hawai'i Supreme Court affirmed its *Sotomura I* holding in the 1977 case of in *In re Sanborn*.[48] In *Sanborn*, a case involving a proposed oceanfront subdivision, the court addressed the issue of whether the beachfront title line would "be determined according to Hawaii's general law of ocean boundaries, or . . . certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration."[49] The court affirmed that "[t]he law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves."[50] The court further reasoned that aside from exceptions in the land court statute itself, the public trust doctrine "can similarly be deemed to create an exception to our land court statute, thus invalidating any purported registration of land below high water mark."[51] The court also reiterated its holding in an earlier

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[43] *Id.* (arguing that *Sotomura I* violated the landowners' constitutional due process rights and constituted a taking of property without just compensation); *see* HANDBOOK, *supra* note 20.

[44] *Sotomura II*, 460 F. Supp. at 482 (The State of Hawai'i, took "the Owners' property without their having been afforded any notice of the intended action, or any hearing or opportunity to present evidence or argument, or any trial by jury of the issues of fact bearing on the court's ruling.").

[45] *Id.* at 478.

[46] *Id.* at 482-83 ("in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution"); *see id.* at 481 ("A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.").

[47] HANDBOOK, *supra* note 20 (manuscript at 13-7).

[48] 57 Haw. 585, 562 P.2d 771 (1977).

[49] *Id.* at 588, 562 P.2d at 773.

[50] *Id.* (citing *Sotomura I*, 55 Haw. 176, 181-82, 517 P.2d 57, 61-62 (1973)).

[51] *Id.* at 593, 562 P.2d at 776 ("Under this analysis, any purported registration below the upper reaches of the wash of waves in favor of the appellees [is] ineffective." *Id.* at 594, 562

case, *McCandless v. Du Roi*,[52] "that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water."[53]

In another 1977 case, *State ex rel. Kobayashi v. Zimring*, the Hawai'i Supreme Court revisited shoreline boundaries in a state action to quiet title in itself to new land added to an oceanfront property as a result of a 1955 lava flow.[54] Although the original property was no longer littoral, the deed described the shoreline boundary as being "along high water mark."[55] The court provided historical context by acknowledging that, "the people of Hawaii are the original owners of all Hawaiian land."[56] It was not until King Kamehameha III's series of land reform actions in the 1840s that private individuals were able to hold title to land.[57] The court emphasized that the "encapsulation of the origin and development of the private title in Hawaii makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain."[58]

The court also stated "[a]side from acquisition of documented title, one can also show acquisition of private ownership through operation of common law or as established by pre-1892 Hawaiian usage pursuant to HRS § 1-1."[59] The court concluded that with the exception of land transferred to private ownership through common law or as established by pre-1892 Hawaiian usage, "all land not awarded or granted remains public

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P.2d at 776).

[52] 23 Haw. 51 (1915).

[53] *Sanborn*, 57 Haw. at 596, 562 P.2d at 778 (citing *McCandless*, 23 Haw. 51).

[54] 58 Haw. 106, 108, 566 P.2d 725, 728 (1977); *see* Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1 (1991).

[55] *Zimring*, 58 Haw. at 108, 566 P.2d at 728.

[56] *Id.* at 111, 566 P.2d at 729; *see* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 26-27 (2008).

[57] *Zimring*, 58 Haw. at 111, 566 P.2d at 729; *see In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864); Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW. & SOC'Y. REV. 273, 290 (2005); Maivan C. Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 253 (1989).

[58] *Zimring*, 58 Haw. at 114, 566 P.2d at 731.

[59] *Id.* at 114-15, 566 P.2d at 731.

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

HAW. REV. STAT. § 1-1 (2010); *see* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 132 (1998).

land."[60] After balancing the competing interests of the owner and the State, the court held that the avulsive littoral addition of new land resulting from a lava flow belonged to the State.[61] Aside from the holding itself, *Zimring* also stands for the proposition that "[w]hile the accretion doctrine is founded on the public policy that littoral access should be preserved where possible, the law in other jurisdictions makes it clear that the preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations."[62]

The Hawai'i Supreme Court directly addressed the issue of accretion in the 1992 case of *In re Banning*.[63] At issue was the land court's determination on whether the shoreline property owner could register title to accreted land, and whether public access on the accreted area was impliedly dedicated to the general public.[64] The *Banning* court noted that under the applicable statute, "[a]n applicant for registration of land by accretion shall *prove by a preponderance of the evidence that the accretion is natural and permanent. 'Permanent' means that the accretion has been in existence for at least twenty years*."[65] Although a neighboring landowner and the State argued that the registration should be denied because the "accreted" land did not satisfy the statutory requirements, the land court had determined that the accreted land was natural and permanent.[66] The land court had also "concluded that the general public had used the trustees' accreted land for recreation and access to the beach for at least twenty years with the acquiescence of the trustees, and therefore, it held that those areas were impliedly dedicated by the trustees to the general public for recreation and access."[67]

Relying on *Halstead*, the *Banning* court restated that "[l]and now above the high water mark, which has been formed by imperceptible accretion against the shore line of a grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor."[68] The court also relied on language from *Zimring* that "the

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[60] *Zimring*, 58 Haw. at 115, 566 P.2d at 731.

[61] *Id.* at 128, 566 P.2d at 739.

[62] *Id.* at 119, 566 P.2d at 734.

[63] 73 Haw. 297, 832 P.2d 724 (1992).

[64] *Id.*

[65] *Id.* at 302, 832 P.2d at 727.

[66] *Id.*

[67] *Id.* at 302, 832 P.2d at 727-28.

[68] Halstead v. Gay, 7 Haw. 587, 590 (1889) (quoted in *Banning*, 73 Haw. at 303, 832 P.2d at 728).

accretion doctrine is founded on the public policy that littoral access should be preserved where possible."[69] The court further stated that other

> reasons ordinarily given for th[is] general rule as to accretions are . . . that the loss or gain is so imperceptible that it is impossible to identify and follow the soil lost or to prove where it came from, that small portions of land between upland and water should not be allowed to lie idle and ownerless, or that, *since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action.*[70]

The court in *Banning* determined that the land court erred in holding "that rights to accreted land (as it was accreting) could be acquired by adverse public use under the theory of implied dedication."[71] In doing so, the court declined to adopt the theory of implied dedication as espoused by the California Supreme Court in *Gion v. City of Santa Cruz*.[72]

The *Banning* court restated *Sotomura I*'s acknowledgement "that public policy 'favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.'"[73] The court also reiterated that "[t]his interest must be balanced against the littoral landowner's right to the enjoyment of his land."[74] The court in *Banning* ultimately held that "[u]nder the facts of this case, public access to the beach can be preserved without infringing on the enjoyment of the littoral landowner in his accreted land."[75]

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[69] State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977) (quoted in *Banning*, 73 Haw. at 303, 832 P.2d at 728).

[70] *Banning*, 73 Haw. at 303-04, 832 P.2d at 728 (emphasis added) (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)).

[71] *Id.* at 304, 832 P.2d at 728.

[72] *Id; see Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970) (ignoring widespread public use of a property for more than five years resulted in implied dedication of the property to the public).

[73] *Banning*, 73 Haw. at 309, 832 P.2d at 731 (emphasis omitted) (quoting *Sotomura I*, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973)).

[74] *Id.* at 310, 832 P.2d at 731.

[75] *Id.* Under the facts of *Banning*,

> the easements which have been granted by the land court are not critical for public access to the beach. In fact, alongside the trustees' property, Lot 20-A, is a public access way, Lot 20-X, that leads to the beach. Because the public access way on Lot 20-X is not extended to include the accreted land just beyond it, public access to the beach will not be curtailed.

Id. (the court further stated that there were several other beach access points in the general proximity).

Most recently, in 2006, the Hawai'i Supreme Court readdressed Hawaii's shoreline definition in *Diamond v. State*.[76] Under section 205A-1, the Coastal Zone Management Act ("CZMA"),

> "Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.[77]

This statutory definition essentially mirrors the shoreline demarcation adopted in *Ashford*.[78] In certifying the makai boundary, however, the state Board of Land and Natural Resources ("BLNR") used the "stable vegetation line" in the property's shoreline certification, even though the artificially planted vegetation occurred seaward of the debris line.[79] In the end, the *Diamond* court looked to the plain meaning of section 205A-1, its legislative history, and *Sotomura I*'s public policy that "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible,"[80] and determined that the vegetation line cannot trump the debris line if the vegetation line is makai of the debris line.[81]

B. THE STATUTORY BACKGROUND

In 1985, the Hawai'i State Legislature passed House Bill No. 194, "A Bill for an Act Relating to Accretion," which was enacted as Act 221.[82] Among other things, Act 221 added a new section to Chapter 183 of the Hawai'i Revised Statutes, section 183-45.[83] Section 183-45 prohibited erecting structures or retaining walls, dredging, grading, or any other use of accreted lands that interferes or may interfere with the future natural course of the beach, including accretion and erosion, and imposed penalties for violations.

Act 221 also added a new section to Hawaii's Land Court Registration statute, Chapter 501, section 501-33, which required that an applicant for

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[76] 112 Haw. 161, 145 P.3d 704 (2006).

[77] HAW. REV. STAT. § 205A-1 (2010).

[78] *See In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[79] *Diamond*, 112 Haw. at 168, 145 P.3d at 711 (Vegetation that "is able to survive through the seasons over several year without human intervention provides a good indication of the location of the shoreline.").

[80] *Sotomura I*, 55 Haw. 176, 182-84, 517 P.2d 57, 61-62 (1973).

[81] *Diamond*, 112 Haw. at 175, 145 P.3d at 718 (the public-private shoreline boundary is evidence by the debris line or vegetation line—whichever is farthest mauka).

[82] 1985 Haw. Sess. Laws Act 221, §§ 1-3 at 401-02 (codified at HAW. REV. STAT. §§ 183-45, 501-33, 669-1(e)).

[83] 1985 Haw. Sess. Laws Act 221, § 1 at 401.

registration of accreted land prove by a preponderance of the evidence that the accreted land was natural and permanent. Section 501-33 further defined "permanent" as accreted land having been in existence for at least twenty years.[84] Similarly, Act 221 amended section 669-1, Hawaii's Quiet Title law, to require a claimant to show by a preponderance of the evidence that an accretion was natural and permanent, essentially mirroring the requirement for applications for registration of property in land court under section 501-33.[85]

In 2003, the Hawai'i State Legislature enacted Act 73, which amended sections 501-33, 669-1, 171-1, 171-2, and 343-3.[86] Prior to Act 73's passage, however, a nearly identical measure was introduced during the 2002 Regular Session in response "to pleas to expand the public beaches."[87] Although the then-governor vetoed the bill because of constitutional concerns,[88] a newly elected governor in 2003 was more in favor of the measure.[89] Act 73 began as House Bill No. 192 and was first heard by the House Committee on Water, Land Use, and Hawaiian Affairs, which concluded that, "the State must act decisively to protect the people's right to use and enjoy the state's beaches against those private property owners seeking to increase their original titled-lands by accretion."[90] The House Committee on Judiciary similarly emphasized that public beaches had to be protected from being transformed into private lands through accretion claims.[91]

After crossing over to the Senate, the Committees on Water, Land, and Agriculture, and Energy and Environment relied on the public trust doctrine to determine that, "this measure will stop the unlawful taking of public beach land under the guise of fulfilling a nonexistent littoral right

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[84] 1985 Haw. Sess. Laws Act 221, § 2 at 401-02.

[85] 1985 Haw. Sess. Laws Act 221, § 3 at 402 ("'Permanent' means that the accretion has been in existence for at least *twenty years*.") (emphasis added).

[86] 2003 Haw. Sess. Laws Act 73, §§ 1-8 at 128-29 (codified at HAW. REV. STAT. §§ 171-1, 171-2, 343-3, 501-33, 669-1).

[87] Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court at 4, Maunalua Bay Beach Ohana 28 v. State, 131 S. Ct. 529 (2010) (No. 10-331), 2010 WL 3518678, at *4.

[88] *Id.* at *5 (citing Statement of Objections to House Bill No. 2266 by Benjamin J. Cayetano, Governor of Hawai'i, April 26, 2002).

[89] *Id.*

[90] H. REP. NO. 369, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. HOUSE J. 1273, 1273 (Haw. 2003) ("The purpose of this bill is to effectuate the State's constitutional mandate, relating to accreted lands . . . that all public natural resources are held in trust by the State for the benefit of the people.").

[91] H. REP. NO. 626, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. HOUSE J. 1360, 1360 (Haw. 2003).

supposedly belonging to shorefront property owners."[92] The Senate Committee on Judiciary and Hawaiian Affairs similarly ascertained that the measure would "help protect Hawaii's public lands and fragile beaches by ensuring that coastal property owners do not inappropriately claim newly deposited lands makai of their property as their own."[93] After the Committee on Conference made minor amendments, Act 73 was enacted on May 20, 2003.[94]

Most notably, the amendment to section 501-33 "provided that *no applicant other than the State shall register land accreted along the ocean*, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion."[95] Similarly, the amendment to section 669-1 "provided that *no action shall be brought by any person other than the State to quiet title to land accreted along the ocean*, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion."[96] Act 73 also amended the definition of "public lands" in section 171-2 to include "accreted lands not otherwise awarded."[97] In addition, section 6 of Act 73 expressly provided that it would not apply to pending registrations of accretion and quiet title actions, but only to registrations and actions filed after the Act 73's effective date of May 20, 2003.[98]

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[92] S. REP. NO. 1147, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. SEN. J. 1503, 1503 (Haw. 2003) (although there was testimony in support of the measure, the BLNR requested a deferral at that juncture).

[93] S. REP. NO. 1224, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. SEN. J. 1546 (Haw. 2003).

[94] REP. NO. 2, 22d Sess. (Conf. Comm. 2003), *reprinted in* 2003 HAW. SEN. J. 729, 945-46 (Haw. 2003); measure history *available at* http://www.capitol.hawaii.gov/session2003/status/HB192.asp.

[95] 2003 Haw. Sess. Laws Act 73, § 4 at 129 (emphasis added).

[96] *Id.* § 5 at 130 (emphasis added) ("The accreted portion of land shall be state land except as otherwise provided in this section.").

[97] *Id.* § 2 at 128 (Act 73 also amended the definition section of chapter 171 to include a definition of "accreted lands," to be defined as "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces." *Id.* § 1 at 128).

[98] *Id.* § 6 at 130.

> Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

Id.

III. THE CONSTITUTIONALITY OF ACT 73: MAUNALUA BAY BEACH OHANA 28 V. STATE

A. Facts and Procedural History of the Case

In May 2005, homeowners of the Portlock region of O'ahu formed three non-profit entities, Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach Ohana 39 (collectively, "Plaintiffs"), and filed an inverse condemnation[99] class action lawsuit on behalf of themselves and all non-governmental owners of beachfront property in Hawai'i on and/or after May 19, 2003, challenging the constitutionality of Act 73.[100]

The Portlock beachfront lots were originally owned and developed in leasehold by Bishop Estate.[101] Each oceanfront lot lease agreement described the property by specific metes and bounds, but the leases did not include a narrow strip of land, or "beach-reserve lot," located between the lot and the ocean.[102] Although Bishop Estate sold its fee interest in the beachfront lots to the Portlock homeowners in the late 1980s or early 1990s, it reserved fee interest in the beach-reserve lots for itself.[103] Bishop Estate eventually sold Plaintiffs the beach reserve lots on May 6, 2005, but reserved utility and access easements for itself, along with the right to grant easements over the lots to public utilities and government agencies.[104] In addition, "[p]laintiffs *agreed to continue to allow the public to use the beach-reserve lots* 'for access, customary beach activities and related recreational and community purposes'; and Plaintiffs accepted numerous restrictive covenants that ran with the lots."[105]

In September 2006, the Circuit Court of the First Circuit ("circuit court") granted Plaintiffs' amended motion for partial summary judgment for declaratory relief, but no injunctive relief was granted.[106] In relevant part, the circuit court held that

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[99] *See* HAGMAN, *supra* note 11, at 328.

[100] Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 35-36, 222 P.3d 441, 442-43 (App. 2009).

[101] *Id.* at 35 n.1, 222 P.3d at 442 n.1; *see* Wong v. Cayetano, 111 Haw. 462, 466 n.3, 143 P.3d 1, 5 n.3 (2006) ("Although the Bishop Estate was subsequently renamed as Kamehameha Schools, it is referred to herein by its former name.").

[102] *Maunalua Bay*, 122 Haw. at 35 n.1, 222 P.3d at 442 n.1 (Bishop Estate reserved the beach-reserve lots for itself).

[103] *Id.*

[104] *Id.*

[105] *Id.* (emphasis added).

[106] *Id.* at 36, 222 P.3d at 443.

> Act 73 . . . *represented a sudden change in the common law and effected an uncompensated taking* of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [Hawaii Revised Statutes (HRS)] Chapter 501 and/or quieting title under [HRS] Chapter 669.[107]

After granting the State's interlocutory appeal, the ICA

> conclude[d] that (1) Plaintiffs and the class they represented *had no vested property rights to future accretions* to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions; and (2) Act 73 *effectuated a permanent taking of littoral owners' ownership rights to existing accretions* to the owners' oceanfront properties that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions.[108]

Accordingly, the ICA vacated the circuit court's conclusion "that Act 73 took from oceanfront owners their property rights in all future accretion that was not proven to be the restored portion of previously eroded land."[109]

B. Act 73, An Uncompensated Taking of Existing Accretion

On appeal to the ICA, the State categorized accreted lands into three classes: (1) Class I, pre-Act 221, i.e., before June 4, 1985; (2) Class II, after Act 221, but before Act 73, i.e., between June 4, 1985 and May 19, 2003; and (3) Class III, post Act 73, i.e., on or after May 20, 2003.[110] The State contended that although Act 221 and Act 73 did not affect Class I accreted land, Act 73 was enacted before Class II accreted land could become permanent under the twenty year standard.[111] As such, the State argued that Act 73 did not effect a taking of Class II and Class III accretions.[112]

The ICA, however, cited to the legislative history of Act 221, which expressly stated that, "the legislature did 'not intend to affect the existing

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[107] *Id.* (emphasis added).

[108] *Id.* at 57, 222 P.3d at 464 (emphasis added).

[109] *Id.* Plaintiffs' applications for a writ of certiorari to the Hawai'i Supreme Court and the U.S. Supreme Court were both denied. *See* Maunalua Bay Beach Ohana 28 v. State, No. 28175, 2010 WL 2329366 (Haw. June 9, 2010); 131 S. Ct. 529 (2010).

[110] *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

[111] *Id.* (Plaintiffs "just had a hope that sometime in the future they might be able to assert control and dominion over Class II accretions."); 1985 Haw. Sess. Laws Act 221, § 2 at 401-02 (codified at HAW. REV. STAT. § 501-33) (Applicants "shall prove by a *preponderance of the evidence* that the accretion is *natural and permanent*. 'Permanent' means that the accretion has been in existence at least *twenty years*.") (emphasis added).

[112] *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

law in regard to ownership of and other rights relating to land created by accretion.'"[113] Although Act 221 established "a burden of proof and clear standards for registering or quieting title to accreted lands . . . . Act 221 did not change the supreme court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached."[114] On that basis, the ICA concluded that Act 221 did not change the longstanding common law, and littoral owners could have ownership interests in Class II accretions when Act 73 was enacted.[115]

The ICA determined that "Act 73 clearly changed the common law . . . . Therefore, littoral owners who had such accreted lands when Act 73 became effective on May 20, 2003 had their ownership rights in their accreted lands taken from them by the passage of Act 73."[116] The court cited to *Loretto v. Teleprompter Manhattan CATV Corp.*, a case in which the U.S. Supreme Court held that "when the 'character of the governmental action,' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[117]

The ICA ultimately held that Act 73 effectuated an unconstitutional taking, because it "permanently divested a littoral owner of his or her ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of Act 73 or for which no application for registration or petition to quiet title was pending."[118] This part of the ICA's holding, however, was not determinative of whether Act 73 constituted a taking of future accretions.

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[113] *Id.* (citing H. REP. NO. 346, 13th Sess. (Standing Comm. 1985), *reprinted in* 1985 HAW. HOUSE J. 1142-43 (Haw. 1985)).

[114] *Id.* at 54, 222 P.3d at 461.

[115] *Id.* at 55, 222 P.3d at 462.

[116] *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[117] *Loretto*, 458 U.S. at 434-35 (internal citation omitted) (In a permanent physical taking, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."); *cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (identifying "several factors that have particular significance" when determining whether a regulatory taking has occurred: (1) economic impact on the claimant; (2) extent the regulation interfered with distinct investment-backed expectations; and (3) character of the governmental action); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

[118] *Maunalua Bay*, 122 Haw. at 55, 222 P.3d at 462.

C. Vested Property Rights in Future Accretions

On review of the circuit court's determination that Plaintiffs had vested property rights to future accretions to their littoral land, the ICA first noted that under Hawai'i common law, land accreted to beachfront property belongs to the beachfront property owner.[119] The court contrasted this common law doctrine with Act 73, which stated that, "all accreted lands (except those which restored eroded lands or were the subject of proceedings pending at the time Act 73 was enacted) now belong to the State."[120] Providing support to Act 73, the court relied on Hawaii's statutory common law exceptions under section 1-1, which allows departure from the common law where "expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage."[121]

The ICA further stated that, "the Hawai'i Supreme Court has held that 'our state legislature may, by legislative act, change or entirely abrogate common law rules through its exercise of the legislative power under the Hawaii State Constitution, but in the exercise of such power, the legislature *may not violate a constitutional provision.*'"[122] Plaintiffs asserted that Act 73 took their right to future accretion without just compensation, and thereby violated article I, section 20 of the Hawai'i State Constitution.[123] The ICA, however, reasoned that Plaintiffs' future accretion arguments were purely speculative, and that, "other courts have held that a riparian owner has no vested right to future accretions."[124]

The ICA rejected as "dictum," the U.S. Supreme Court's determination in *Cnty. of St. Clair v. Lovingston* that "[t]he riparian right to future *alluvion*[125] is a vested right . . . . The owner takes the chances of injury

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[119] *Id.* at 52, 222 P.3d at 459.

[120] *Id.*

[121] HAW. REV. STAT. § 1-1 (2010).

[122] *Maunalua Bay*, 122 Haw. at 52-53, 222 P.3d at 459-60 (emphasis added) (citing Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973)).

[123] HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."); *see* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation."); *see also* HAW. CONST. art. I, § 5 ("No person shall be deprived of . . . property without due process of law."); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law").

[124] *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460.

[125] 90 U.S. 46, 56 (1874) (At "common law, alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time."); BLACK'S LAW DICTIONARY 90 (9th ed. 2009) (Alluvion is the "addition of land caused by the buildup of deposits from

and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his."[126] The ICA relied on three federal cases in characterizing *Lovingston*'s language as dictum. First, in *Western Pacific Ry. Co. v. Southern Pac. Co.*, the Ninth Circuit Court of Appeals stated with regard to this language in *Lovingston*, "[w]e cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists."[127] Second, the ICA cited to a U.S. District Court decision, *Cohen v. United States*, which reasoned that "[t]he riparian owner has no vested right in future accretions. The riparian owner cannot have a present vested right to that which does not exist, and which may never have an existence."[128] Third, the court employed another U.S. District Court decision, *Latourette v. United States*, which ruled that the "plaintiff had no vested right in the continuance of future accretions to his property by way of sands carried by the winds and in turn washed by the sea upon his lands."[129]

In addition to these three federal cases, the ICA also relied on the Hawai'i Supreme Court case of *Damon v. Tsutsui*, a decision based on purported vested offshore fishing rights.[130] Described in *Maunalua Bay* as a "a somewhat similar situation," the *Damon* court reasoned that

> [r]ights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.[131]

Damon also stated that "[a] mere expectancy of the future benefit, or a contingent interest in property founded upon anticipated continuance of existing laws, is not a vested right, and such right may be enlarged or abridged or entirely taken away by legislative enactment."[132]

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running water.").

[126] *Lovingston*, 90 U.S. at 68-69 (emphasis added).

[127] 151 F. 376, 399 (9th Cir. 1907) ("Within that definition of vested rights, there can be no question, we think, that the right to future accretion could be divested by legislative action.") (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).

[128] 162 F. 364, 370 (N.D. Cal. 1908) (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).

[129] 150 F. Supp. 123, 126 (D. Or. 1957) (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).

[130] 31 Haw. 678, 693 (1930); *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460 (In *Damon*, "the Hawai'i Supreme Court held that it was not unconstitutional to terminate, by legislation, a statute that granted exclusive fishing rights in offshore fisheries to certain tenants of an ahupua'a.").

[131] *Damon*, 31 Haw. at 693 (citing 12 C.J. § 955).

[132] *Damon*, 31 Haw. at 693 (citing 6 A. & E. ENCY. L. 957).

Finally, the ICA relied on the public trust doctrine, as articulated in article XI, section 1 of the Hawai'i State Constitution, which mandates that

> [f]or the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.[133]

The court cited to the Hawai'i Supreme Court case of *In re Water Use Permit Applications*, which adopted "the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[134] Relying on the notion that "[t]he public trust is a dual concept of sovereign right and responsibility,"[135] the ICA in *Maunalua Bay* reasoned that the public trust doctrine "clearly diminishes any expectation that oceanfront owners in Hawai'i had and may have in future accretions to their property."[136] The court ultimately held that Plaintiffs had "no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation."[137]

IV. ANALYSIS

"Instead of honoring indisputable incidents of riparian ownership, the Hawai'i court - without any supporting precedent - effectively eliminated the right to an ambulatory boundary and accretion for the purpose of avoiding the duty to pay compensation."[138]

- Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court

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[133] HAW. CONST. art. XI, § 1 (emphasis added); *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

[134] 94 Haw. 97, 132, 9 P.3d 409, 444 (2000).

[135] *Id.* at 135, 9 P.3d at 447.

[136] *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

[137] *Id.*

[138] Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 87, at *18.

"The United States Supreme Court . . . and the Hawaii Supreme Court . . . both make very clear that expectant or contingent interests are not vested rights, and thus may be legislatively abolished." [139]

- Brief for State of Hawaii in Opposition to Petitioners' Application for a Writ of Certiorari to the Hawai'i Supreme Court

A. Did Act 73 Take Future Accretions?

The Plaintiffs in *Maunalua Bay* applied for a writ of certiorari to the Hawai'i Supreme Court[140] and inter alia, raised the question:

> Did the ICA commit grievous error and disregard controlling decisions from this Court when it held that the State can permanently fix the seaward boundary of oceanfront properties and deprive littoral property owners of future accretion without paying just compensation?[141]

Plaintiffs specifically argued that: (1) the cases relied on by the ICA to hold that Plaintiffs had no vested right to future accretions were inapplicable; and (2) other courts have held that the government may not "fix" the ambulatory shoreline boundary.[142]

Although the Hawai'i Supreme Court has held that the state legislature may abrogate common law rules, the exercise of such power "*may not violate a constitutional provision.*"[143] To prevail in their takings claim, Plaintiffs first had to establish that they had a constitutionally protected vested interest.[144] The court would then need to decide whether Act 73 constituted a taking under article I, section 20 of the Hawai'i State Constitution and the Fifth Amendment of the U.S. Constitution.[145]

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[139] Brief for State of Hawaii in Opposition to Petitioners' Application for a Writ of Certiorari to the Hawai'i Supreme Court at 1, Maunalua Bay Beach Ohana 28 v. State, 2010 WL 2329366 (Haw. June 9, 2010) (No. 28175).

[140] Plaintiffs' applications for a writ of certiorari to the Hawai'i Supreme Court and the U.S. Supreme Court were both denied; *see* Maunalua Bay Beach Ohana 28 v. State, No. 28175, 2010 WL 2329366 (Haw. June 9, 2010); 131 S. Ct. 529 (2010) (denying petitioners' application for a writ of certiorari).

[141] Brief for Petitioners for a Writ of Certiorari to the Hawai'i Supreme Court at 2, Maunalua Bay Beach Ohana 28 v. State, 2010 WL 2329366 (Haw. June 9, 2010) (No. 28175).

[142] *Id.*; *see* United States v. Milner, 583 F.3d 1174 (9th Cir. 2009) (holding that the riparian right to future accretion is a vested right).

[143] Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973) (emphasis added).

[144] Kepo'o v. Kane, 106 Haw. 270, 294, 103 P.3d 939, 963 (2005) (citing Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891, 894 (10th Cir. 1991)).

[145] *Id.*; *see* HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation"); U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *see also* HAW. CONST. art. I, § 5 ("No

While discussing whether Plaintiffs' rights were vested, the ICA dismissed as dictum, the U.S. Supreme Court's determination in *Lovingston* that, "*[t]he riparian right to future alluvion is a vested right.* It is an inherent and essential attribute of the original property."[146] In *Lovingston*, due to a river changing course, accreted land was formed along the landowner's property after the original land survey date.[147] The city argued that because of improvements to the waterway, the river's new course was not a natural change and that the city held title to the accreted land as a result of gaining title to lands previously held by the United States.[148] The evidence, however, showed that the defendants played no role in the improvements and that it was not clear whether the accreted land would have been formed by natural causes alone.[149] The Court reasoned that because the landowner would not have had a remedy if the river changed to his detriment, the landowner was entitled to the accretion where additional land was formed to his benefit.[150]

Despite the Court's holding in *Lovingston*, the ICA primarily relied on three federal cases concerning governmental development of submerged land to support the notion that future accretion is not a present, vested property right. Contrary to *Maunalua Bay*, all three of these federal cases[151] stand for the principle that riparian ownership is subject to the government's correlative rights to improve navigation and commerce and to

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person shall be deprived of . . . property without due process of law."); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law").

[146] Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68 (1874) (emphasis added).

[147] *Id.* at 46.

[148] *Id.* at 50 (through Acts of Congress and the Illinois legislature).

[149] *Id.*

[150] *Id.* at 69. In reaching the ultimate holding that the United States never had title to the accreted land in controversy and therefore could not transfer title to the city, the Court reasoned that

> [t]he title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "qui sentit onus debet sentire commodum" ["he who enjoys the benefit ought also to bear the burdens"] lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.

Id.

[151] Western Pac. Ry. Co. v. Southern Pac. Co., 151 F. 376 (9th Cir. 1907), Cohen v. United States, 162 F. 364 (N.D. Cal. 1908), Latourette v. United States, 150 F. Supp. 123 (D. Or. 1957).

develop its submerged lands, even if this interferes with future accretion or blocks riparian access.[152]

The ICA first relied on *Western Pacific*, a case in which the Ninth Circuit reasoned that there could not be a vested right in future accretion.[153] In *Western Pacific*, the plaintiff had an exclusive right to construct wharves on his littoral property.[154] Although land subsequently "accreted" to the plaintiff's property, "[t]he evidence show[ed] that the low-tide line of 1852 remained substantially unchanged until the year 1882, and that about that time changes in its position took place as the result of the deposit of material taken out of the channel."[155] The defendants later began dredging the newly formed land and when enjoined, contended that the added land was the result of dredging, not accretion.[156] Nonetheless, the court in *Western Pacific* stated that, "[t]he rights of littoral owners in adjacent navigable waters depend on the local laws of the several states, subject to the paramount authority of the United States to protect navigation and to make improvements in aid of the same."[157] In *Maunalua Bay*, however, the State did not assert any rights to develop its submerged lands.[158] Additionally, unlike Hawaii's 114 years of judicial recognition of the benefit of accretion and the burden of erosion,[159] there was no such common law right to wharf out to navigable waters in *Western Pacific*.[160]

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[152] *See, e.g.*, Gibson v. United States, 166 U.S. 269, 276 (1897) ("[R]iparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard."); *see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010); *see also* Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 87, at *14.

[153] *Western Pacific*, 151 F. at 399 (this case, however, was in the context of governmental dredging operations in a public harbor, not legislative "fixing" of shoreline boundaries).

[154] *Id.* at 390.

[155] *Id.* at 396 (a large amount of dredging and depositing was conducted under municipal authority).

[156] *Id.* at 397.

[157] *Id.* at 390.

[158] *See* Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 87, at *14.

[159] *See* Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 87, at *9 ("Nothing in Hawai'i law impeded movement of the seaward boundary in response to natural forces or limited littoral owners' rights to hold future accretion."); *see generally* Halstead v. Gay, 7 Haw. 587 (1889). *But see* Christensen Interview, *supra* note 15 (stating that Hawai'i courts have never recognized the right to future accretion, and that it was therefore a case of first impression); Brief for Hawaii's Thousand Friends as Amici Curiae Supporting Defendant-Appellant, *Maunalua Bay*, *supra* note 15, at 4.

[160] *Western Pacific*, 151 F. at 390.

Second, the ICA cited to the U.S. District Court case of *Cohen*, which involved diverting water from a creek that abutted the plaintiff's property for governmental improvements to the same public harbor that was at controversy in *Western Pacific*.[161] Although the creek diversion resulted in a loss of natural accretion to the plaintiff's land, it was unclear from the evidence whether the seasonal overflow of the creek had any irrigation, mineral, or soil enrichment value.[162] Further, the property owner in *Cohen* was not actually divested of her right to any future accretion.[163]

Finally, the ICA relied on the U.S. District Court case of *Latourette*, which concerned governmental jetty improvements built in aid of navigation that allegedly led to reduced accretion and consequential damages to the littoral owner's property.[164] Although the plaintiff argued that the jetty interfered with the normal drift of sand that would accrete and compensate for normal winter erosion, the claimant did not contend that the jetty itself caused any new washing or erosion of the plaintiff's property.[165] Nonetheless, the court further stated that "[t]he government is not liable to compensate riparian owners for consequential damages caused by improvement made upon navigable waterways in aid of navigation."[166]

Although decided after the U.S. Supreme Court rejected the *Maunalua Bay* Plaintiffs' application for a writ of certiorari, the Court's plurality opinion in *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.* restated that the government's right to develop its submerged lands can subvert riparian property rights.[167] In *Beach Renourishment*, the state undertook a beach expansion program to restore an eroded beach and create a state-owned artificial beach seaward of the existing beach.[168] The plaintiffs objected to the project, contending that Florida, and by extension the Florida Supreme Court took their right to accretions.[169] The Court,

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[161] Cohen v. United States, 162 F. 364, 370 (N.D. Cal. 1908) ("riparian owner has no vested right in future accretions").

[162] *Id.* at 369-71.

[163] *Id.* (although the creek was diverted, the property owner still had a right to accretion if the creek was restored).

[164] Latourette v. United States, 150 F. Supp. 123, 126 (D. Or. 1953) ("[P]laintiff had no vested right in the continuance of future accretions to his property by way of sands carried by the winds and in turn washed by the sea upon his lands.").

[165] *Id.* at 125-26.

[166] *Id.* at 125 (citing United States v. Willow River Power Co., 324 U.S. 499 (1945)).

[167] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 730-31 (2010).

[168] *Id.* at 711.

[169] *Id.* at 712, 713 (The Takings Clause of the Fifth Amendment "applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land."). Notably, the Court cited to *Lovingston* when defining accretion. *Id.* at 708 (no reference to

however, held that the renourishment project did not constitute a taking, reasoning that the project was no different from a natural avulsion.[170]

Similar to Hawai'i common law, avulsions in Florida belong to the state.[171] Although the plaintiffs' had a right to accretion, this right was subordinate to the state's right to fill its submerged land.[172] The Court stated that the Florida Supreme Court "did not abolish the Members' *right to future accretions*, but merely held that the right was not implicated by the beach-restoration project because of the doctrine of avulsion."[173] As such, it was unnecessary for the Court to address whether the right to future accretion is merely a contingent future interest.[174] Although the beach-restoration project was upheld in *Beach Renourishment*, it is still uncontroverted that "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property."[175]

Unlike the relevant laws at issue in *Beach Renourishment*, *Western Pacific*, *Cohen*, and *Latourette*, Act 73 was not enacted to improve navigation or to develop or fill state submerged lands.[176] Rather, Act 73 unambiguously redefined the long established ambulatory shoreline demarcation to a fixed shoreline definition. Act 73 and the ICA's decision both appear to be at odds with the Hawai'i Supreme Court's long standing recognition of a riparian owner's vested right to accreted land and the un-fixed nature of the shoreline boundary definition.[177]

Western Pacific, *Cohen*, or *Latourette*).

[170] *Id.* at 731-33.

[171] *Id.* at 731 ("The Florida Supreme Court decision before us is consistent with these background principles of state property law.") (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992)); *see* State *ex rel* Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).

[172] *Beach Renourishment*, 560 U.S. at 731.

[173] *Id.* (emphasis added); *see* Thomas, Murakami & Eyerly, *supra* note 29.

[174] *Beach Renourishment*, 560 U.S. at 713 n.5.

[175] *Id.* at 715.

[176] *See* 2003 Haw. Sess. Laws Act 73, §§ 1-8 at 128-29 (codified at HAW. REV. STAT. §§ 171-1, 171-2, 343-3, 501-33, 669-1 (2010)).

[177] *See* Halstead v. Gay, 7 Haw. 587, 589 (1889) ("[I]t follows that the plaintiff has the rights of a littoral proprietor, and that the accretion is his."); State *ex rel* Kobayashi v. Zimring, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977) ("When accretion is found, the owner of the contiguous land takes title to the accreted land."); *In re* Banning, 73 Haw. 297, 832 P.2d 724, 725 (1992) ("Land now above the high water mark, which has been formed by imperceptible accretion against the shore line of grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor.") (quoting *Halstead*, 7 Haw. at 588).

Other courts have ruled that the government may not redefine the ambulatory shoreline definition to a fixed boundary.[178] Most recently, the Ninth Circuit addressed this issue in *United States v. Milner*.[179] In *Milner*, littoral owners built seawalls to mitigate erosion, which limited the expansion of an Indian tribe's adjoining tidelands.[180] Relying on *Lovingston*'s determination that the "riparian right to future alluvion is a vested right,"[181] the court reasoned that "*both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains* that accrue from the movement of the boundary line."[182]

> The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.[183]

State courts have also addressed the issue of state attempts to reclassify longstanding common law shoreline definitions, and in at least three of those cases, the new boundaries constituted a taking or an unlawful exercise of police power.[184] In *Purdie v. Attorney General*, the littoral landowners brought an inverse condemnation suit in response to a recently enacted state statute that recognized the state's "public trust rights" in property up to the "high water mark."[185] This constituted a significant change from the state

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[178] *See* United States v. Milner, 583 F.3d 1174 (9th Cir. 2009); *see generally* Hughes v. Washington, 389 U.S. 290, 293 (1967); Purdie v. Attorney General, 732 A.2d 442, 447 (N.H. 1999); Bd. of Trs. v. Medeira Beach Nominee, Inc., 272 So.2d 209, 211-212 (Fla. Dist. Ct. App. 1973); Soo Sand & Gravel v. M. Sullivan Dredging, 244 N.W. 138, 140-141 (Mich. 1932).

[179] *Milner*, 583 F.3d 1174.

[180] *Id.*

[181] Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68 (1874).

[182] *Milner*, 583 F.3d at 1188 (emphasis added); *see* Nebraska v. Iowa, 143 U.S. 359, 360-61 (1892); Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973) ("Riparianness also encompasses the vested right to future alluvion . . . .") (overruled on other grounds by Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)).

[183] *Id.*

[184] *See, e.g.*, Purdie v. Attorney General, 732 A.2d 442, 447 (N.H. 1999); Bd. of Trs. v. Medeira Beach, 272 So.2d 209, 211-12 (Fla. Dist. Ct. App. 1973); *see* Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 87, at *14 n.9; *see also* Soo Sand & Gravel v. M. Sullivan Dredging, 244 N.W. 138, 140-41 (Mich. 1932) (unless there was a paramount public trust consideration, riparian rights could not be taken by the state without just compensation).

[185] *Purdie*, 732 A.2d at 444.

common law that limited public ownership of the beach to the "mean high water mark."[186] The New Hampshire Supreme Court held that the statute constituted a taking without just compensation, reasoning that, "the legislature *went beyond these common law limits by extending public trust rights* to the highest high water mark."[187] Similar to the case in *Maunalua Bay*, "[a]lthough it may be desirable for the State to expand public beaches to cope with increasing crowds, the State may not do so without compensating the affected landowners."[188]

In *Board of Trustees v. Medeira Beach Nominee, Inc.*, land accreted to an oceanfront landowner's property as a result of a governmental beach stabilization program.[189] The Florida Court of Appeals affirmed the judgment in favor of the landowner's action to quiet title to the accretion.[190] The court reasoned that, "[f]reezing the boundary at a point in time . . . as is suggested here by the state, not only does damage to all the considerations above but *renders the ordinary high water mark useless as a boundary line* clearly marking the riparian's rights and the sovereign's rights."[191] Similarly, *Maunalua Bay*'s fixed boundary line determination contravened *Ashford*'s seemingly clear highest wash of the waves demarcation.[192]

In rejecting fixed shoreline boundaries,[193] *Lovingston* and its progeny support the fundamental principle that littoral owners have vested rights to future accretion. This is consistent with the "access to water rationale" of

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[186] *Id.* at 444-48.

[187] *Id.* at 447 (emphasis added) ("Although the legislature has the power to change or redefine the common law to conform to current standards and public needs, property rights created by the common law may not be taken away legislatively without due process of law.") (internal citation omitted).

[188] *Id.* (the legislation had the same effect of expanding the public beach to the detriment of the oceanfront landowners without providing just compensation).

[189] *Medeira Beach*, 272 So.2d at 211-12.

[190] *Id.* (the landowner also sought to obtain a judicial shoreline determination).

[191] *Id.* at 213 (emphasis added). The court further reasoned that

> [p]ublic policy weighs heavily in this decision as well. The public today stands in danger of losing access to beaches entirely in many places. Yet, quieting title here in the state will not solve the access problem. Nor will quieting title in the upland owner result in any loss of public rights in the foreshore or beach which the public always has a right to use. The foreshore between the mean high and low tide lines is public property.
>
> It should be remembered that even beachfront property owners are members of the public. Their status as riparian owners, however, has historically entitled them to greater rights, with respect to the waters which border their land, than inure to the public generally.

Id. at 213-14.

[192] *See In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[193] *See supra* text accompanying note 188.

permitting a boundary to follow the changing shoreline to maintain "land as riparian that was riparian under earlier conditions, thus assuring the upland owners of access to the water along with the other advantages of such contiguity."[194]

In addition to *Western Pacific*, *Cohen*, and *Latourette*, the ICA relied on the Hawai'i Supreme Court case of *Damon* to support its determination that future accretion is not property. *Damon* is cited for the proposition that "[r]ights are vested when the right to enjoyment, *present or prospective*, has become the property of some particular person or persons as a present interest."[195] *Damon*'s definition of a vested right actually supported the Plaintiffs' position, because the right to future accretion is a "right to enjoyment, *present or prospective*" and became the property of the Plaintiffs as a present interest.[196] Although land may never accrete, Hawaii's common law has long recognized that if accretion occurs, the additional land becomes property of the littoral owner.[197]

Although the ICA characterized *Damon* as a case that presented a "somewhat similar situation" to *Maunalua Bay*, the issue in *Damon* was whether a lessee had vested offshore fishing rights that were originally granted to his predecessors in interest.[198] Relying on the Hawai'i Supreme Court case of *Haalelea v. Montgomery*,[199] the *Damon* court stated that Kamehameha III first granted fishing rights to the commoners and the landlords in 1839.[200] These fishing rights, however, were limited "only to the extent and with limitations expressed in the grant."[201] Shortly after the United States annexed Hawai'i in 1898,[202] the Hawai'i Organic Act of 1900 repealed these fishing laws.[203] Fishing rights were only "vested" for persons who became tenants by April 30, 1900, the Organic Act's date of

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[194] Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 38, 222 P.3d 441, 445 (App. 2009) (quoting POWELL, *supra* note 3 ("[t]he most persuasive and fundamental rationale")).

[195] Damon v. Tsutsui, 31 Haw. 678, 693 (1930) (emphasis added) ("On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.") (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).

[196] *See Damon*, 31 Haw. at 693 (emphasis added).

[197] *See* Halstead v. Gay, 7 Haw. 587 (1889).

[198] *Damon*, 31 Haw. at 679-82; *see* Brief for Pacific Legal Foundation as Amici Curiae Supporting Plaintiff-Petitioners at 6, Maunalua Bay Beach Ohana 28 v. State, 2010 WL 2329366 (Haw. June 9, 2010) (No. 28175).

[199] 2 Haw. 62 (1858) (during the Kingdom of Hawai'i).

[200] *Damon*, 31 Haw. at 682.

[201] *Id.* at 683, 689 (the fishing rights were originally defined and regulated by the law of 1839 until the Organic Acts of 1846).

[202] VAN DYKE, *supra* note 56, at 200.

[203] *Damon*, 31 Haw. at 691; *see* VAN DYKE, *supra* note 56 at 227.

passage.[204] On that basis, the lessee who became a tenant "in 1926, did not have any 'vested' rights within the meaning of the Organic Act and therefore the repealing clause was operative."[205] Although common law rights may be legislatively changed or abrogated in accordance with the constitution,[206] as seen in *Damon* and other cases, there is no vested property right in the continuance of an existing statute.[207] Repealing *exclusive* fishing rights through the 1900 Organic Act in *Damon* markedly differs from abolishing the common law right to accretion that was not created by a grant or statute.[208]

Up until Act 73 was enacted in 2003, littoral rights to accretion and an ambulatory shoreline boundary were firmly rooted in Hawai'i common law.[209] As discussed in the U.S. Supreme Court case of *PruneYard Shopping Center v. Robins*, "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish *'core' common-law rights*."[210] Riparian rights such as the right to accretion are "core" common law rights that have long been recognized by both the U.S. Supreme Court in *Lovingston*,[211] and the Hawai'i Supreme Court in *Halstead*. Although the Hawai'i Supreme Court has never explicitly discussed the right to future accretion, this analysis was unnecessary because there was never a distinction made between existing and future accretion rights.[212] What is clear is that the ambulatory shoreline definition

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[204] *Damon*, 31 Haw. at 692.

[205] *Id.* at 693.

[206] *See* Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973).

[207] *See* United States v. Darusmont, 449 U.S. 292, 298 (1981) (Holding that there is no "vested right in the rate of taxation, which may be retroactively changed at the will of Congress."); American Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1379 (Fed. Cir. 2004).

[208] *See* Brief for Pacific Legal Foundation as Amici Curiae Supporting Plaintiff-Petitioners, *supra* note 198, at 6.

[209] *See generally* Halstead v. Gay, 7 Haw. 587 (1889); *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968).

[210] PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) (emphasis added).

[211] Although the ICA largely disregarded Cnty. of St. Clair v. Lovingston, 90 U.S. 46 (1874), the case is still cited for its authority on accretion. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 708 (2010) (citing *Lovingston*).

[212] *See* Brief of Land Use Research Foundation of Hawaii as Amicus Curiae Supporting the Petitioners for a Writ of Certiorari to the U.S. Supreme Court at 9 n.3, Maunalua Bay Beach Ohana 28 v. State, 131 S. Ct. 529 (2010) (No. 10-331), 2010 WL 4035363, at *9 n.3 ("This should come as no surprise since only once land is actually accreted and becomes

has been a "core" common law right in Hawai'i from as early as 1866, as indicated in *Ashford*.[213]

The ICA correctly stated that, "the public trust doctrine [is] a fundamental principle of constitutional law in Hawai'i . . . [and] a dual concept of sovereign right and responsibility."[214] The court, however, was incorrect in concluding that that the public trust doctrine diminishes beachfront owners' expectations of future accretions. Although the public trust doctrine, as articulated in article XI, section 1, was adopted twenty-five years before the enactment of Act 73, the ICA's rationale is at odds with the U.S. Supreme Court's rejection of the "notice" defense in *Palazzolo v. Rhode Island*.[215] The theory underlying the notice defense argument is that because property rights are created by the state, prospective legislation "can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value."[216] Although Plaintiffs in *Maunalua Bay* purchased title to the beach reserve lots after Act 73 was enacted and likely had notice of the limitation,

> [t]he State may not put so potent a Hobbesian stick into the Lockean bundle . . . . 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.[217]

Palazzolo principally holds that even if Plaintiffs purchased land after a "taking," the landowners would still have the right to just compensation.

Although ignored by the ICA in *Maunalua Bay*, the U.S. Supreme Court has also held that certain contingent future interests are property that cannot be taken without just compensation.[218] In *Babbitt v. Youpee*, the U.S. Supreme Court invalidated a federal statute on takings grounds that allowed

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permanent would a property owner institute a judicial action to confirm title and ownership."). *But see supra* text accompanying note 159 (arguing that this was a case of first impression).

[213] *See Ashford*, 50 Haw. at 315-16, 440 P.2d at 77-78; *supra* text accompanying note 33; *see also* HANDBOOK, *supra* note 20.

[214] *Maunalua Bay* Beach Ohana 28 v. State, 122 Haw. 34, 54, 222 P.3d 441, 461 (App. 2009) (quoting *In re* Water Use Permit Applications, 94 Haw. 97, 132, 9 P.3d 409, 444 (2000)); HAW. CONST. art. XI, § 1.

[215] Palazzolo v. Rhode Island, 533 U.S. 606, 608-09 (2001); *see* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 (2002).

[216] *Palazzolo*, 533 U.S. at 626.

[217] *Id.* at 627.

[218] *See* Babbitt v. Youpee, 519 U.S. 234, 245 (1977); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 164 (1980).

small interests in Indian land to escheat to the tribe, but could not be passed to heirs by descent or devise.[219] Similarly, even though the interest had not yet accrued, the Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* concluded that a state statute claiming the potential future interest on monies litigants deposited in court was a taking.[220] Regardless of the ICA's reasoning, practical consequences have arisen.

B. Practical Consequences

Although Hawai'i is not alone in its departure from the common law,[221] *Maunalua Bay*'s holding further complicates Hawai'i shoreline boundary law by contradicting the *Ashford* standard. Under *Ashford*'s fairly straightforward shoreline definition, the "upper reaches of the wash of waves" demarcates the public/private boundary.[222] The *Diamond* court further defined the plain meaning of "upper" as "the highest—i.e., the furthest mauka—reach of the waves."[223] Although not perfect, the rule is in harmony with the ambulatory nature of the shoreline, which moves in accordance with accretion, erosion, and avulsion. One simply had to look for the "debris line" or the "vegetation line," and whichever was furthest mauka determined the public-private boundary.[224] The court in *Diamond* also clarified the issue to a certain extent, by holding that artificial vegetation cannot trump the debris line and extend littoral property farther makai.[225] Because the *Ashford* rule accounted for all changes to the shoreline, the standard consistently applied to cases of beach accretion or erosion.

Act 73 and the ICA's decision, however, fixed the farthest makai boundary for *private* landowners by barring any new land court applications or quiet title actions to register land accreted after May 19, 2003.[226] Now, the highest wash of the waves demarcation is only accurate in cases where

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[219] *Babbitt*, 519 U.S. at 245 (even though future interests that may not come into existence).

[220] *Webb's*, 449 U.S. 155, 161, 164 ("[A] State, by *ipse dixit*, [*he himself said it*] may not transform private property into public property without compensation.").

[221] *See* Simeon L. Vance & Richard J. Wallsgrove, *More Than a Line in the Sand: Defining the Shoreline in Hawai'i After Diamond v. State*, 29 U. HAW. L. REV. 521 (2007); *see also* Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 OCEAN & COASTAL L.J. 47 (2005/2006).

[222] *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[223] Diamond v. State, 112 Haw. 161, 172, 145 P.3d 704, 715 (2006).

[224] *Id.*

[225] *Id.* at 175, 145 P.3d at 718.

[226] *See generally* Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (App. 2009).

the beach has not changed, or in cases of beach erosion that would extend the state's boundary. In cases where there has been accretion to littoral property, however, the fixed private boundary would lay somewhere farther mauka from the highest wash of the waves. Both the ICA's decision and Act 73 effectively created unidentifiable state-owned strips of public beach where accretion has formed as of May 20, 2003. This adds further confusion to the notion that *Ashford*'s "seemingly clear definition may not be universally applicable."[227]

V. CONCLUSION

Although littoral owners' rights are subject to the State's rights to improve navigation and fill submerged lands, Act 73 fixed the shoreline boundary of Hawaii's ever-changing shoreline without just compensation. Contrary to longstanding Hawai'i common law, the ICA's decision created a new distinction between existing "vested" accretions and "unvested" future accretions to save Act 73 from total constitutional invalidity. *Maunalua Bay* ultimately stands for the proposition that Act 73 extinguished all private landowners' constitutional rights to gain title to any land accreted after May 19, 2003.

Of course the legislature may abrogate the common law, but the legislative action must still pass constitutional muster.[228] In support of the State's argument, the ICA rejected as dictum, U.S. Supreme Court precedent, and instead relied on dicta from distinguishable lower federal court cases.[229] The ICA also relied on the Hawai'i Supreme Court case of *Damon* that, if applicable, should have cut in favor of Plaintiffs.[230] Even though it was undisputed that Act 73 served a legitimate public purpose, the State's argument that the public trust doctrine diminished any expectations of future accretions was also at odds with U.S. Supreme Court precedent that rejected the "notice" theory.[231]

In the interest of balancing public and private rights, the ICA could have invalidated Act 73, with little or no harm to the public. The Plaintiffs in *Maunalua Bay* had their separately purchased abutting beach-reserve lots "taken" from them, even though the public was allowed to use the lots.[232]

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[227] Vance & Wallsgrove, *supra* note 221, at 535.

[228] Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973).

[229] *See* Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1879); *cf.* Western Pac. Ry. Co. v. Southern Pac. Co., 151 F. 376, 399 (9th Cir. 1907); Cohen v. United States, 162 F. 364, 370 (1908); Latourette v. United States, 150 F. Supp. 123, 126 (D. Or. 1957).

[230] Damon v. Tsutsui, 31 Haw. 678, 693 (1930).

[231] Palazzolo v. Rhode Island, 533 U.S. 606, 626-27 (2001).

[232] Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (App. 2009); *see*

Although there were likely other areas in Hawai'i where accreted lands did not have reservations for public use, as the *Banning* court illustrated, Act 221 already provided clear and difficult standards for landowners to register accreted property.[233] Although public policy favors public use and ownership of Hawaii's beaches, in this case, public access to the beach could have been preserved without changing the common law of accretion and further mystifying Hawaii's shoreline definition.[234]

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supra text accompanying note 191.

[233] *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992).

[234] *See id.* at 309, 832 P.2d at 731.

The Hawaiian Land Hui Movement: A Post-Māhele Counter-Revolution in Land Tenure and Community Resource Management

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I. INTRODUCTION

In 1869, seventy-one Hawaiians[1] joined together to purchase virtually the entire 15,000-acre ahupua'a[2] of Wainiha on the Island of Kaua'i.[3] Although they held title to the land as private property, they did so communally, sharing the use and management of the unoccupied and uncultivated portions of the ahupua'a including the near shore fishery.[4] Seventy-nine years later, in 1947, the Hui Kū'ai 'Āina o Wainiha[5] was forcibly broken apart in partition proceedings initiated by McBryde Sugar

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[1] In this instance, "Hawaiians" (referring generally to citizens of the Hawaiian Kingdom) has been used intentionally, rather than "Native Hawaiians" (indicating ethnic, full blooded Hawaiians or Kanaka Maoli) because not all of the founding members of the Hui Kū'ai 'Āina o Wainiha were Native Hawaiians. *See* MARY KAWENA PUKUI AND SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (1986 ed. 1957) (defining Kanaka Maoli). Throughout the remainder of this article the two terms are used intentionally, not interchangeably, to indicate precisely this distinction. For a more thorough discussion of the politics of the term "Native Hawaiian" *see* LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 342 n.7 (1992).

[2] An ahupua'a is "a land division usually extending from the uplands to the sea. . . . [S]ometimes in the sense of a tract of land held by the king or chief as a unit under the feudal system then obtaining." DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS 4 (Paul F. Nahoa Lucas ed., 1995).

[3] *See Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha* (Constitution of the Land Acquisition Association of Wainiha), Sept. 10, 1877, HUI KŪ'AI 'ĀINA O WAINIHA 1-3, (1877–1885) (on file with Hawai'i State Archives, file U-29) (translation from the original Hawaiian provided by Devin C. Forrest on file with author) [hereinafter *Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha*]. "Wainiha, 'hostile waters,' is the longest valley on Kaua'i, stretching some fourteen miles from its top to the sea. The headwaters of its river rise in the Alaka'i Swamp, and its name warns of the floods that occur during torrential rains. The river has formed a narrow, steep-sided valley whose cliffs rise abruptly to over 3,000 feet. The valley widens only a little near the sea to a bay . . . . There were lo'i far up into the valley, many of them displaying great ingenuity in their placement and the engineering of the ditches necessary to water the fields." FREDERICK B. WICKMAN, KAUA'I ANCIENT PLACE-NAMES AND THEIR STORIES 121-22 (1998).

[4] *See infra* Part V.E.

[5] Hui Kuai 'Āina o Wainiha translates as "The Land Acquisition Association of Wainiha." (Translation from Hawaiian by Devin C. Forrest). In general, a hui is "a union or association of persons designated for a common purpose." DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS 37 (Paul F. Nahoa Lucas ed., 1995).

Co.[6] The Wainiha Hui was only one of many Land Hui established and eventually destroyed during this period of Hawaiian history.[7]

During the life of the Wainiha Hui, the legal concept of land in Hawai'i underwent a dramatic evolution from the traditional and communal presumptions of the immediate post-Māhele period to an Americanized concept of private property much like that in existence today.[8] This article examines how this legal and philosophical evolution affected or may have facilitated the failure of the Wainiha Hui. To what extent were Western legal concepts of land tenure and law imposed upon the Hawaiian people and to what extent were they consciously adopted and adapted to a unique Native Hawaiian worldview?[9] Was the Hawaiian Hui movement doomed from its inception due to its adoption of Western legal concepts that were by definition antithetical to the communal goals of the Hui members, or was there interpretive space within the law that might have allowed for its

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[6] McBryde Sugar Co. was formed in 1899 by Benjamin F. Dillingham who "combined the McBryde Estate (which was itself a combination of Koloa Agricultural Company and Wahiawa Ranch) and Eleele Plantation . . . . McBryde had 20,000 acres in Kalaheo, Hanapepe, Eleele, Lawai, and Koloa." CAROL WILCOX, SUGAR WATER: HAWAII'S PLANTATION DITCHES 78-79 (1996). Today, McBryde Sugar Company Ltd. is owned by parent company Alexander and Baldwin Inc. Letter from U.S. Fish and Wildlife Service to the Nature Conservancy (Mar. 22, 2010), KAUA'I WATERSHED ALLIANCE C/O THE NATURE CONSERVANCY IN HAWAI'I, KAUA'I PROGRAM, FINAL ENVIRONMENTAL ASSESSMENT FOR WAINIHA CONSERVATION PROJECT, Exhibit M, May 23, 2010. Alexander and Baldwin still own 10,120 acres of upper Wainiha Valley including the Wainiha power plant. *See* Kaua'i County property tax records for TMK 4-5-8-001-001 (available at www.kauaipropertytax.com).

[7] *See infra* Appendix A; *see also* Leslie J. Watson, *Old Hawaiian Land Huis - Their Development and Dissolution* (1932) (typescript, originally published in Star-Bulletin) (discussing the "Hui movement" generally).

[8] Although property law in Hawai'i has "modernized" and largely adopted the tenets of American property law, it is neither legally or functionally synonymous. *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n ("PASH II"), 79 Haw. 425, 447 (1995) (Holding, "Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i. . . . In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property.").

[9] *See, e.g.*, Kamanamaikalani Beamer and T. Ka'eo Duarte, *Mapping the Hawaiian Kingdom: A Colonial Venture?* 2 HAWAIIAN J. OF LAW & POLITICS 34, 36 (2006) (asking whether the utilization of western map making technologies constituted the imposition of a western cultural form upon the "subjugated" Hawaiian or rather a conscious adoption and adaptation of a western technology to a Hawaiian mode of thinking and being). Beamer and Duarte conclude that it was a hybrid of both. *Id.* at 51.

success if the political power structure at the turn of the century had been otherwise aligned?[10]

Between 1882 and 1921, the Supreme Courts of both the Kingdom and Territory of Hawai'i, in a series of land Hui cases, specified how this "peculiar native institution" would be legally defined and dealt with.[11] The common law of England, subject to Hawaiian tradition and practice, was the law of the land.[12] In navigating the interplay between common law and Hawaiian tradition, there were choices to be made. The court's decisions shifted from supporting Hui members' rights to organize their communal lands, to giving primacy to the property rights of individual members.[13] This evolution paved the way for the forced partitioning of Hui lands into individual fee simple lots.[14] In effect, the court "solved" what had come to be viewed as the "Hui problem" making both Hui lands and their water resources available to sugar and pineapple plantations for both purchase and simple expropriation.[15]

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[10] *See infra* note 12 (discussing how the kingdom's adoption of English common law was not in conflict with Hawaiian tradition and practice). In practice, however, it was often American law and not the laws and customs of the Kingdom that shaped evolving legal parameters of land ownership. *See, e.g.*, Awa v. Horner, 5 Haw. 543, 544 (1886) (holding that American law should direct the court to define land Huis as tenancies in common rather than joint tenancies).

[11] *See infra* Parts V-VI (discussing the evolution of Hawai'i Supreme Court Hui cases); *see also* Foster v. Kaneohe Ranch Co., 12 Haw. 363, 364 (1900) (characterizing Hawaiian Hui as "peculiar native institutions").

[12] In 1892, the common law of England was formally adopted as the basis of law in Hawai'i subject to Hawaiian precedent and practice:

> The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution of laws, or fixed by the Hawaiian judicial precedent, or established by Hawaiian national usage, provided however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.

Chapter LVII, *An Act to Reorganize the Judiciary*, Section 5. LAWS OF HER MAJESTY LILIUOKALANI, QUEEN OF THE HAWAIIAN ISLANDS, PASSED BY THE LEGISLATIVE ASSEMBLY 90-91 (1892). An amended version of the law of 1892 is presently codified as Hawaii Revised Statutes § 1-1, (2009). Prior to the formal adoption of this statute in 1892, "the courts were authoried to decide according to reason and equity, and to adopt the principles of common law or the civil law when founded in justice and not contrary to Hawaiian law or usage." Walter F. Frear et al., REVISED LAWS OF HAWAII 83 (Hawaiian Gaxette co. eds., 1905).

[13] *See* discussion *infra* Parts VI-VII (analyzing the evolution of Hawai'i Supreme Court case law on Hui in detail).

[14] *See* discussion *infra* Part VII.B-C (analyzing Supreme Court cases leading to the Partition Act of 1923).

[15] Watson, *supra* note 8, at 15 (describing how Maui pineapple companies, eager to acquire additional land, sought to "do something about" the hui problem).

The principles and practices of communal land and resource management in Hawai'i, evidenced in Hawaiian Land Hui and their evolution, epitomizes the tension between private property rights and communal or community desires to shape common goals and outcomes.[16] Although this analysis of land tenure practices and law from the turn of the century may not provide concrete answers to contemporary problems, the lessons of the past provide invaluable insight to Hawaii's background principles of property law while also broadening the scope of what is possible in the present. Indeed, there are numerous contemporary efforts to recreate community land and resource systems that are strikingly similar to traditional Hui practices, including Community Based Subsistence Fishing Areas and the resurrection of Aha Moku (District Island Councils) to manage community natural resources.[17] Each of these efforts might gain from a more complete understanding of relatively recent historical precedents that sought and achieved similar outcomes.[18] Finally, an understanding of legal history, including the moral and political choices that give rise to that history, may counter the myopic view that the law of the present was or is somehow organically inevitable and is immune to change.

The nine parts of this article may be broadly grouped into four areas of discussion. Parts II-IV set the conceptual and historical framework for what is to follow. Part II provides a general overview of the Hawaiian Land Hui movement in light of differing perspectives on the Māhele, as well as a generic anatomy of the typical Hui. Part III steps back chronologically to discuss the pre-Māhele idea of land in Hawai'i to better understand the later impact of privatization. Part IV details the Māhele's mechanisms, results, and failings to complete the historical context for

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[16] *See* discussion *infra* Parts V-VI (describing the tensions between private property rights of individuals and Hui communal management).

[17] *See* HAW. REV. STAT. § 188-22.9 (creating the Hā'ena Community Based Subsistence Fishing Area); HAW. REV. STAT. § 188-22.6 (establishing the law and guidelines for establishing Community Based Subsistence Fishing Areas generally); Trevor Tamshiro, *Moloka'i: Resurrecting 'Aha Moku on the "Last Hawaiian Island,"* 12:1 ASIAN-PAC. L. & POL'Y J. 295 (discussing Act 212 of June 27, 2007. S.B. 1853, 2007 Leg., 24th Sess. (Haw. 2007) that provides the framework for the 'Aha Kiole Advisory Committee tasked with advising the State Legislature on "all matters regarding the management of the State's natural resources," and tasked with the restoration of a traditional 'Aha Moku natural resource management system). *See also* WINDWARD AHUPUA'A ALLIANCE, http://www.waa-hawaii.org (last visited Oct. 29, 2011) (a 501(c)(3) non-profit dedicated to community based planning and the restoration, preservation, and protection of public access to mountain lands on the windward side of O'ahu).

[18] *See* discussion *infra* Part V.E (discussing the successful resource management system of the Wainiha Hui).

understanding the Hui movement that arose in its wake. Part V is a case study of the Wainiha Hui based primarily on the original records of the Hui from 1877 until 1885, which describes the formation and practices of the Wainiha Hui and comprises the core of this article.[19] Parts VI and VII analyze the evolution of Hawai'i law through a line of Hawai'i Supreme Court Hui cases. Part VI discusses early cases in which the court largely defers to Huis and accords them an array of legal powers and rights. In Part VII, a new Supreme Court, in the post-overthrow[20] era of Hawaiian history, goes against its own established precedent to undermine Hui as viable institutions leading to legislation enabling the demise of Hawaiian Land Hui generally. Part VIII describes the particular demise of the Wainiha Hui in 1947 via partition proceedings initiated by McBryde Sugar Co. Part IX concludes the article, and describes Wainiha today.

II. THE HUI CONCEPT: MELDING HAWAIIAN TRADITION AND PRIVATE PROPERTY

The prevailing historical view of land tenure in Hawai'i presents the Māhele of 1845-1855 as the proverbial death knell of traditional Hawaiian communal land tenure.[21] This period of land privatization was a turning point at which practical forms of ownership were forever changed and people's relationship to the land took a turn toward viewing land as pure commodity.[22] It is also the beginning point for a process of Native Hawaiian dispossession that continues today.[23]

Some historical accounts of the Māhele present the Native Hawaiian people as hapless victims unable to cope with or comprehend the changes imposed upon them; victims of progress.[24] Others paint a picture of collusion between Native Hawaiian elites and haole plantation owners operating to the detriment of the maka'āinana.[25] Recent scholarship has

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[19] *See supra* note 4.

[20] On Jan. 17, 1893, members of the Annexation Club's Committee of Safety, backed by marines from the U.S. naval vessel *Boston* took possession of Government buildings and overthrew Queen Liliuokalani. *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 162-64 (2008).

[21] *See* KAME'ELEIHIWA, *supra* note 2 at 15.

[22] *Id.*

[23] *Id.* at 15-16; *see also* Donovan Preza, *The Empirical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848*, 1-2, (May 2010) (unpublished M.A. thesis, University of Hawai'i) (on file with the author).

[24] *See, e.g.*, KAME'ELEIHIWA, *supra* note 2, at 11. ("The vast majority of Native Hawaiians simply did not understand the capitalist uses of private ownership of Āina.").

[25] Haole means "Foreign; belonging to another country." DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS, *supra* note 3, at 25. Maka'āinana means "Commoner, populace,

argued that while the Māhele carried with it the potential to dispossess the Native Hawaiians from their land, the overthrow of the Hawaiian Kingdom in 1893 "is a better explanation for dispossession than the creation of the institution of private property."[26] In other words, it was not private property per se that lead to the dispossession of the Native Hawaiian people, but rather political disenfranchisement associated with the overthrow. In each view, however, the Māhele period of 1845-1855, was a moment of quantum change in which both capitalistic individualism and the dispossession of the maka'āinana began a march toward the present.[27]

In his book *Kahana: How the Land Was Lost*, Robert Stauffer presents the Hawaiian Land Hui movement as a conscious counter-revolution to the dramatic changes brought on by the Māhele's imposition of fee-simple private ownership.[28] Rather than hapless childlike victims who did not understand the concept of private property, Stauffer suggests that many Native Hawaiians knew, or quickly came to know, precisely what was happening to their world and they organized to fight against it.[29] According to Stauffer, between the 1860s and 1920 Native Hawaiians resisted the fragmentation of traditional, communal land tenure and ways of living both to preserve what remained of their indigenous culture or to recreate communities that had been destroyed.[30]

A typical land Hui was created by a group of members who joined together to purchase a block of land, often an entire ahupua'a, and held it in common.[31] Although each individual owner might be designated a house lot or small plot as nominally "theirs," the remainder of the land was held

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people in general; citizen, subject. . . *Lit.*, people that attend the land." PUKUI ET AL., *supra* note 2, at 224. Stuart Banner argues that the legal and cultural revolution of the Māhele was not a story of colonization and resistance involving imposition of foreign (American) law and culture. Stuart Banner, *Preparing to be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawai'i*, 39 LAW & SOC'Y REV. 273, 307-308 (June 2005). "Rather it is a story in which indigenous elites anticipated the land tenure changes that were coming and figured out how to position themselves for those changes." *Id.* at 308. According to Banner, "the Māhele was a means by which the Hawaiian elite hoped to preserve its eliteness under colonial rule, by holding on to its land." *Id.* at 307. Under Banner's interpretation of the Māhele, it is unsurprising that the conclusion of the Māhele process left the common people largely disenfranchised because the entire project was designed to serve the ali'i class. *Id.* at 307.

[26] Preza, *supra* note 24, at 7.

[27] *See* Preza, *supra* note 24, at 11-13 (summarizing the preeminent scholarship of the broad Māhele period of Hawaiian history as a scholarship of dispossession).

[28] Robert H. Stauffer, Kahana: How the Land Was Lost 125 (University of Hawai'i Press ed., 2004).

[29] *Id.* at 2.

[30] *Id.*

[31] *See* Watson, *supra* note 8, at 13.

for the benefit of the group as a whole.[32] The ownership and governance structure of a Hui was typically based upon holding shares in the Hui.[33] Central to the Hui's purpose was the maintenance of traditional irrigation networks of 'auwai that by definition required community cooperation.[34] Without communally maintained 'auwai, wetland kalo[35] cultivation that was both a dietary and cultural core of traditional Native Hawaiian society could not survive.[36] In addition to a network of 'auwai, the typical Hui maintained communal pasturelands for livestock and may have leased out surplus Hui land to produce income that was shared among the members and/or used to pay land taxes.[37]

A Hui was generally organized around a written constitution establishing the rules of self-government for the members and their land.[38] A central theme within these constitutions was a conscious effort to prevent the fragmentation of the Hui by prohibiting sales of Hui shares to outsiders.[39] If a member wished to leave the Hui, they were often required by the original Hui constitution to sell their share(s) back to the Hui itself.[40]

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[32] *See id.* at 13-14.

[33] *See id.* at 13-14; *see also* STAUFFER, *supra* note 29, at 131-33.

[34] An 'auwai is an "[a]rtificial ditch or stream of water for irrigating land." DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS, *supra* note 3, at 14; *see also infra* notes 49-50 and 97 and accompanying text (describing the necessity of cooperative communal organization to maintain 'auwai networks that by definition extended beyond any individuals land holdings).

[35] Kalo is also known as "taro (*Colocasia esculenta*), a kind of aroid cultivated since ancient times for food, spreading widely from the tropics of the Old World. In Hawai'i, taro has been the staple from earliest times to the present, and here its culture developed greatly, including more than 300 forms. All parts of the plant are eaten, its starchy root principally as poi, and its leaves as lū'au." PUKUI ET AL., *supra* note 1, at 123. Beyond its purely biological importance as a food staple, kalo is cosmologically or spiritually connected to the Native Hawaiian People. "The first Hāloa [naka], born to Wākea [Widespread-sky] and Ho'ohōkūkalani [daughter of Papa, the Earth, and mate of Wākea] became the taro plant. His younger brother, also named Hāloa, became the ancestor of the people. In this way, taro was the older brother and man the younger- both being children of the same parents." TARO: MAUKA TO MAKAI, 17-8 (Dale Evans ed., 2d ed. 2008).

[36] *See supra* note 36.

[37] *See* STAUFFER, *supra* note 29, at 131; *see also* Watson, *supra* note 8, at 13; *see also* discussion *supra* Part IV(D) (discussing management of communal resources by the Wainiha Hui).

[38] *See* Watson, *supra* note 8, at 13.

[39] *See* STAUFFER, *supra* note 29, at 131; *see also infra* note 131 and accompanying text.

[40] *See* STAUFFER, *supra* note 29, at 131.

III. PRE-MĀHELE UNDERSTANDING OF PROPERTY

Prior to the Māhele, private land "ownership" did not exist in Hawai'i and indeed there was no word in the Hawaiian language synonymous with the concept of ownership.[41] What did exist was a system of "reciprocal obligation" and understanding between ali'i and maka'āinana.[42] In a legal context, these two primary social classes held "different but undivided interest in the land;" the land was held in common.[43] As Professor Mavian Lam acknowledges, the first Constitution of the Hawaiian Kingdom in 1840 explicitly recognized that traditional land tenure was "in common: 'Kamehameha I was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common.'"[44] Under this unique system of land tenure, the ali'i held broad rights to an ahupua'a's "land and resources and to the labor and surplus product" of its maka'āinana occupants.[45] With these ali'i or konohiki[46] responsibilities came the duty of overseeing or coordinating the communal activities within the ahupua'a such as supervising the construction of 'auwai networks or regulating seasonal fishing practices.[47] "The building and maintenance of flooded terraces (lo'i) and of the irrigation ditches ('auwai) were communal procedures. This type of work would certainly never have been achieved had the old Hawaiians done their farming on an individualistic basis, without planning and direction of proprietary chiefs (ali'i)."[48] "The maka'āinana, in turn enjoyed liberal rights to the resources of the ahupua'a in which they resided," including the right to cultivate areas for themselves, the use of common irrigation systems, and the right to fish and to gather

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[41] KAME'ELEIHIWA, *supra* note 2, at 9.

[42] *Id.* at 10. Ali'i means "[c]hief, chiefess, officer, ruler, monarch, peer, headman, noble, aristocrat, king, queen, commander; royal, regal, aristocratic, kingly; to rule or act as a chief, govern, reign." PUKUI ET AL., *supra* note 2, at 20.

[43] Mavian Lam, *The Imposition of Anglo-American Land Tenure Law on Hawaiians*, 23 J. OF LEGAL PLURALISM & UNOFFICIAL L. 103, 104 (1985).

[44] *Id.* (citation omitted).

[45] *Id.* at 106; *see also* E.S. CRAIGHILL HANDY, ELIZABETH HANDY, & MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAI'I THEIR LIFE, LORE, AND ENVIRONMENT, 48 (Bishop Museum Press ed., Revised ed., 1991) (describing that "from the point of view of the maka'āinana on the land, the [pre-Māhele] system was one of share cropping rather than taxation, and this sharing between chief and tenant was comprehensive and reciprocal in benefits").

[46] Konohiki means "[h]eadman of an ahupua'a land division under the chief." PUKUI ET AL., *supra* note 2, at 166.

[47] Lam, *supra* note 44, at 106.

[48] HANDY ET AL., *supra* note 46, at 58.

resources as needed from common land outside of the intensely cultivated areas.[49] "The 1848 Māhele was the legal mechanism by which the model of private ownership of 'Āina replaced that of traditional Hawaiian system of sharing control and use of 'Āina." [50]

IV. HOW THE MĀHELE RESTRUCTURED THE RELATIONSHIP OF MAKA'ĀINANA TO THE LAND.[51]

The regime of fee simple private property in Hawai'i began with the creation of the Board of Land Commissioners in 1845 by King Kauikeaouli (Kamehameha III).[52] During its first several years of activity, the Commission focused primarily on settling land claims of foreigners in and around Honolulu.[53] It was not until the Māhele that the division of the Kingdom as a whole occurred.[54] In theory, the Māhele sought to reserve the King's lands as his individual property and divide the remainder in thirds, one-third as Government land, one-third to the chiefs or konohikis, and one-third to the tenants of the land, the maka'āinana.[55]

In the first actual division of land, Kauikeaouli divided the lands of the kingdom between himself and the chiefs and konohikis.[56] In conjunction with this first division of land, Kauikeaouli separated his lands into his personal property, later referred to as Crown Lands, and lands to support the national government.[57]

To transform their Māhele claims into actual land titles, the konohikis were required to pay a commutation fee to the government.[58] By the summer of 1850, most of the chiefs paid this commutation by transferring approximately one third of their lands to the government.[59] Thus, by

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[49] Lam, *supra* note 44, at 106.

[50] *See* KAME'ELEIHIWA, *supra* note 2, at 137.

[51] Portions of this section previously appeared in Adam Roversi, *Kuleana Property Tax Exemption Handbook: Mitigating the Continued Dispossession of Native Hawaiian Landowners*, (Hawai'i Community Stewardship Network 2010) (on file with the author).

[52] *See* VAN DYKE, *supra* note 21, at 28-29.

[53] W.D. Alexander, A Brief History of Land Titles in the Hawaiian Kingdom, Interior Department Appendix to Surveyor General's Report, 1882, (reprinted in HAWAIIAN J. OF L. & POLITICS: Vol. 2, 175, 181 (Summer 2006)).

[54] *See* VAN DYKE, *supra* note 21, at 41.

[55] Alexander, *supra* note 54, at 182 (citing rules of the Privy Council of Dec. 18, 1847); *see also* VAN DYKE, *supra* note 21, at 41, 44-45 (citing the *Principles Adopted by the Land Commission* recorded in the Privy Council Records and how those principles were later understood).

[56] *See* VAN DYKE, *supra* note 21, at 41-42.

[57] *See* VAN DYKE, *supra* note 21, at 43.

[58] Alexander, *supra* note 54, at 183.

[59] VAN DYKE, *supra* note 21, at 44. In order to receive actual title to land in the form a

mid-1850 the King had created three new ownership classifications: Konohiki lands; Crown lands; and Government lands.[60] These lands were all "subject to the rights of native tenants."[61] However, there were initially no formal protections in place to safeguard these rights and nothing to stop a konohiki or the government from selling land occupied by maka'āinana.[62] As Keoni Ana, then Minister of the Interior, wrote in 1847, "at the present time . . . the lower classes of the people are stretching forth their hands to us in consequence of their suffering by being unjustly driven from their lands."[63]

Although maka'āinana had in theory been urged to submit claims to land during the early years of the Land Commission (1846-48), under the original principle that one third of the land would be reserved for the common people, the Commission did not act upon these claims for several years.[64] In response to concerns over the rights of native tenants, the "Kuleana Act" of August 6th, 1850 and the later amendment of July 11th, 1851 authorized the Land Commission to grant fee-simple title to all native tenants for their cultivated lands and house lots.[65]

Under the Kuleana Act of 1850 there were two distinct methods by which maka'āinana could secure private title to land, by claim or by purchase.[66] Under the more widely studied method, a native tenant could file a claim for the lands where they currently lived and farmed.[67] In order

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Royal Patent, a "commutation fee of one-third of the unimproved value of the land at the date of the award" had to be paid to the Minister of the Interior. *Id.*

[60] *See* VAN DYKE, *supra* note 21, at 42.

[61] JON J. CHINEN, ORIGINAL LAND TITLES IN HAWAI'I, 15-16 (1961). "Subject to the rights of native tenants" is the generally accepted translation of "Koe na Kuleana o Kanaka." *See* Alexander, *supra* note 55, at 185.

[62] JON J. CHINEN, THEY CRIED FOR HELP: THE HAWAIIAN LAND REVOLUTION OF THE 1840S & 1850S, 38 (2002) [hereinafter THEY CRIED] ("There was no law passed granting the Land Commission the power and authority to punish the chiefs and konohiki who dispossessed the hoa'āina without just cause.").

[63] *Id.* at 37 (quoting Keoni Ana, Minister of the Interior's April 3, 1847 report to the Legislature concerning the Land Commission).

[64] *See* VAN DYKE, *supra* note 21, at 44-46.

[65] The term "kuleana" does not appear in the original laws of 1850 and 1851, but was later used to describe the law and form of property. CHINEN, *supra* note 62, at 16 n.8.

[66] *See* An Act Confirming Certain Resolutions of the King and Privy Council, Passed on the 21st day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges (Kuleana Act), 1850 Haw. Sess. Laws 202 (Aug. 6, 1850) [hereinafter Kuleana Act].

[67] Melody MacKenzie, *Native Hawaiian Lands and Sovereignty: Historical Background*, NATIVE HAWAIIAN RIGHTS HANDBOOK, 8 (Melody MacKenzie ed., Native Hawaiian Legal Corp. 1991); *see also* VAN DYKE, *supra* note 21, at 46 n.117 (describing how the requirement under the Kuleana Act that land be "really cultivated," and its

to secure this type of kuleana award, legally a Land Commission Award ("LCA"), a tenant was usually required to pay for a survey of the land and bring two witnesses before the Land Commission to testify that he or she was the lawful occupant of the land.[68] If a tenant's claim was approved, the tennant would receive a LCA and usually a Royal Patent ("RP") to the land granting formal title.[69] In practice, kuleanas could be anywhere from one to forty acres, but averaged 2.57 acres each and might be in one piece or separated into multiple sections or āpana.[70]

The Land Commission received claims and testimony until it was dissolved on March 31, 1855.[71] Although the legislature passed numerous acts extending the period of time provided for ali'i and konohiki to register land titles, extending registration until almost 1900, no such leniency was shown for the registration of land claims by maka'āinana.[72] Of the 8,205 Land Commission Awards given out, approximately 7,500 were kuleana lands distributed to maka'āinana, the remainder were awards to foreigners and konohikis.[73] While the King had originally intended that the maka'āinana receive one-third of the land of Hawai'i, only about 28,600 acres, or less than one percent of the land, was actually distributed to maka'āinana by the Land Commission.[74] Kaua'i received the second lowest distribution of kuleana awards by acreage after Lānai. The reported distribution of awards by island was:

Hawai'i	9,412.87 acres
Maui	7,379.74 acres
O'ahu	7,311.17 acres
Moloka'i	2,288.87 acres
Kaua'i	1,824.17 acres
Lāna'i	441.97 acres[75]

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interpretation by the land commission, ignored the traditional practice of fallowing portions of one's farmland and therefore restricted the size of Kuleana awards to less than what had previously been utilized for subsistence).

[68] VAN DYKE, *supra* note 21, at 46.

[69] Alexander, *supra* note 54, at 186-87.

[70] VAN DYKE, *supra* note 21, at 48; *see also* Alexander, *supra* note 54, at 193.

[71] Alexander, *supra* note 54, at 179.

[72] VAN DYKE, *supra* note 21, at 47 n.123.

[73] MacKenzie, *supra* note 68, at 8.

[74] At the dissolution of the Land Commission in 1855, approximately 1.5 million acres had been distributed to konohiki, 1.5 million acres had been set aside as government lands, and 1 million acres were retained by the king. *Id.* at 9.

[75] VAN DYKE, *supra* note 21, at 48 n.131.

The second, lesser known method by which maka'āinana could secure land, under section four of the Kuleana Act of 1850, was to purchase government lands that were specifically set aside for the common people.[76] The law provided that residents could purchase between one and fifty acres for the minimum price of fifty cents per acre.[77] This purchase method of securing land was established because even in 1850, the government was aware that the kuleana claim process was failing to adequately distribute land to maka'āinana.[78] In 1851, the government passed a second law to encourage the purchase of land by establishing a network of government agents on the outer islands to facilitate sales.[79] Titles to these purchased lands were conveyed in the form of Royal Patent Grants ("RPG"), not to be confused with Royal Patents issued along with Land Commission Awards.[80] Between 1846 and 1860, nearly 400,000 acres of government land were sold as grants.[81] Precisely how much of this land was sold to maka'āinana as compared to foreign residents is still debated.[82] The majority of individuals listed in the *Index of All Grants and Patents Land Sales*, have Hawaiian names but most of the larger sales are recorded to people with non-Hawaiian names.[83] Neil M. Levy reported that, "[a]s of 1864, 320,000 acres had been sold to 213 foreigners, as compared to 90,000 acres that were sold to 333 Native Hawaiians."[84] More recent research by Native Hawaiian Scholar Donovan Preza contends that through 1893, 652,521 acres were sold with 167,290 acres (twenty-six percent) purchased by Native Hawaiians and 485,230 acres (seventy-four percent) purchased by Non-Hawaiians.[85]

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[76] Kuleana Act, *supra* note 67, § 4 ("That a certain portion of the government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed of in lots of from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre").

[77] *Id.*

[78] RILEY MOFFIT AND GARY L. FITZPATRICK, SURVEYING THE MAHELE 50 (1995). In the Feb. 16, 1850 edition of *The Polynesian*, Land Commissioner William Little Lee wrote an editorial noting that the claim process was failing to sufficiently provide for the common people and suggesting that the king would help to solve this problem by making lands available for sale. *Id.*

[79] *See* An Act to Provide for the Appointment of Agents to Sell Government Lands to the People, Laws of His Majesty Kamehameha III, 52 (1851).

[80] Preza, *supra* note 24, at 115.

[81] Moffit, *supra* note 79, at 50.

[82] *Id.*

[83] *Id.*

[84] VAN DYKE, *supra* note 21, at 57 n.23 (citing Neil M. Levy, *Native Hawaiian Land Rights*, 63 Calif. L. Rev. 848, 859 n.73 (1975)).

[85] Preza, *supra* note 24, at 138.

Samuel Mānaiakalani Kamakau, however, offered a less optimistic, contemporaneous view of the Māhele:

> This law (the Kuleana Act) would have been better had the time for registering titles been extended for twenty years. Very few of the people living in the country were educated and knew how to apply for their titles. . . . It would have been better moreover if, when the law made the sale of government lands available, these could have been sold reasonably, to the descendants of Kamehameha alone, that his toil and blood might not have been in vain. His children do not get the milk; his adopted children have grasped the nipples and sucked the breasts dry.[86]

For those that had managed to acquire a Kuleana, the Kuleana Act of 1850 had promised to preserve some of the communal rights previously enjoyed by maka'āinana.[87] As the King had noted, "a little bit of land, even with an allodial title, if the people were cut off from all other privileges, would be of very little value."[88] These rights to the land beyond one's private Kuleana were quite limited, however, and began to erode almost as soon as they had been granted.[89] "Lacking access to previously shared grazing and cultivation areas, native farmers were unable to earn a subsistence living on their small plots of land."[90] Additionally, "[w]ithout the shared labor to maintain irrigation systems, it became more difficult, if not impossible, to gain sufficient water for taro cultivation."[91]

As limited as Kuleana rights were, only a fraction of the maka'āinana actually received a kuleana award with any associated rights.[92] The remainder of the population continued to occupy the land purely at the will of their new fee simple landlords, subject to dispossession at any time.[93] In

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[86] THEY CRIED, *supra* note 62, at 144 (quoting Hawaiian historian and scholar Samuel Manaiākalani Kamakau (Oct. 29, 1815–Sept. 5, 1876)).

[87] *See supra* note 67. Section 7 of the Kuleana Act, provided that, "[w]hen the landlords have taken allodial title to their lands, the people on each of their lands, shall not be be deprived of the rights to take firewood, house timber, aho cord, thatch, or ti leaf from the land on which they live . . . ."

[88] THEY CRIED, *supra* note 62, at 70 (citing the Privy Council Records, Vol. 3-B, p.741).

[89] *See* MacKenzie, *supra* note 68, at 8 ("However, an early Hawai'i case, Oni v. Meek (1858), held that the rights enumerated in the *Kuleana* Act . . . did not allow the maka'āinana to exercise other traditional rights, such as the right to grow crops and pasture animals on unoccupied portions of the *ahupua'a*. The court's interpretation of the act prevented tenants from making traditional use of commonly cultivated land, so essential to the continued residency on *Kuleana*.").

[90] MacKenzie, *supra* note 68, at 9.

[91] *Id.*

[92] *Id.* at 8 (describing that only twenty-six percent of the adult male native population received Kuleana lands).

[93] *See* VAN DYKE, *supra* note 21, at 45.

the ahupua'a of Wainiha for example, there were only thirty-one separate Kuleana awards, of a few acres each, issued by the Land Commission.[94]

For those left out of the Kuleana award process, the purchase of land was the remaining option. Many chose to combine their efforts by creating Huis rather than go it alone.[95] Just a partial list of Hawaiian Land Hui demonstrates that the acquired Hui lands far exceeded the total acreage of Kuleana awards issued to Native Hawaiians by the Land Commission.[96] In fact, the Wainiha Hui alone encompassed approximately 15,000 acres of land compared to the roughly 28,600 acres of land granted to Native Hawaiians across the entire Kingdom of Hawai'i under the Kuleana Act or the only 1,824 acres granted on the Island of Kaua'i.[97]

V. FIGHTING BACK: THE HUI MOVEMENT AND THE PRESERVATION OF KULEANA RIGHTS

Leslie J. Watson and Robert Stauffer present two alternate views of the Hawaiian Hui movement.[98] Watson considered Hui an important vehicle for "adjusting the thought and customs of Hawaiians to a modern system of land tenure."[99] It was an intermediate form of land tenure between the traditional and the new, necessary to ease the Hawaiian people into the modern world.[100] "The communal ideas, which had been developed through the course of centuries, were so deeply a part of the life of the Hawaiians as to make it but natural that the urge to continue such ideas should manifest itself, - so shortly after 1850 the Hawaiian Land Hui was born."[101] The "ownership of an undivided interest in a large tract of land was far more adaptable to the Hawaiians' needs and background than ownership in entirety of small parcels."[102] In Watson's view, the Hawaiians learned what they needed to learn and by the 1920's there was no longer any reason for Huis to exist.[103] Hawaiians were ready to embrace private

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[94] *See infra* Appendix C for a detailed summary of the Kuleana awards in the ahupua'a of Wainiha.

[95] *See infra* Appendix A; Partial Summary of Hawaiian Land Huis.

[96] *Id.*

[97] *See* Bill for Partition, Equity Proceeding No. 109, 12 (Nov. 21, 1947) [hereinafter *Wainiha Hui Partition*] (describing total acreage owned by Wainiha Hui); *see also supra* note 76 and accompanying text (discussing total distribution of Kuleana awards); *see also supra* note 77 and accompanying text (providing Kuleana award summary for Kaua'i).

[98] Watson, *supra* note 8; STAUFFER, *supra* note 29, at 2-3.

[99] Watson, *supra* note 8, at 36.

[100] *Id.*

[101] *Id.* at 9.

[102] *Id.*

[103] *Id.* at 14.

property and forgo communal claims to the land.[104] Watson concluded, "[t]he conditions that brought about the need for [H]uis do not now exist and, to make it possible for all to enjoy to the utmost their interests in [H]ui lands, all such lands in Hawai[']i should be partitioned wherever it is practically possible to do so."[105]

Although Stauffer might ultimately agree that the Hawaiian Hui occupied a transitional space between traditional communal land tenure and atomized, "modern" fee simple private property, he takes a much more anti-colonial view in describing both their conscious creation and their active erosion by Supreme Court precedent, large scale development interests, and perhaps by Hui members themselves who choose short-term profit over long-term survival.[106] For Stauffer, the Hui movement is a story of purposeful, "widespread, intelligent resistance" actively counter-attacked over time by Western culture and interests.[107] Stauffer's version of this story is contrary to both a narrative of victimhood and Watson's tale of quaint inevitability.

A. The Formation of the Wainiha Hui

In his 1913 article, "The Affairs of the Wainiha Hui," the Reverend John L. Lydgate describes how Kekau'ōnohi, ali'i kāne and the original grantee of the ahupua'a of Wainiha during the Māhele, "made a personal visit to Wainiha" and called his people before him to present them with the proposition of purchasing "this land on which they had lived so long, and to which they were so deeply attached."[108] Kekau'ōnohi was supposedly motivated both by his need to pay off debts to Aldrich & Company of Honolulu associated with a failed sandalwood expedition to China, as well as a genuine love for his people.[109] In Lydgate's story, Kekau'ōnohi "greatly desired to see them an independent and prosperous colony, owning all the resources of life, and so wanted to sell to them this noble land stretching from the sea to the top of Waialeale, with all its varied possibilities."[110] In this paternalistic narrative, the reported purchase price of $9,000 was an almost insurmountable barrier for the "simple people of Wainiha," but they eventually prevailed and were able to acquire the land

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[104] *See id.* at 16.

[105] *Id.* at 37.

[106] *See* STAUFFER, *supra* note 29, at 2-3.

[107] *Id.*

[108] Rev. John M. Lydgate, in *The Affairs of the Wainiha Hui*, HAWAIIAN ALMANAC AND ANNUAL FOR 1913 128 (Thomas G. Thrum ed., 1913).

[109] *Id.*

[110] *Id.* at 129.

for $7,000 in cash and $2,000 of debt.[111] According to Lydgate's narrative, as soon as they prevailed, however, the new owners were beset with intolerance and rapacity, fighting amongst themselves over the spoils; defrauded by their chosen leaders; and lamenting the debt they now found themselves subject to. They had sought but never reached the "Land of Promise."[112]

The Reverend Lydgate, one of the only observers of his time to address the Wainiha Hui in print, weaves a compelling tale that is cited by later authors.[113] It appears, however, that most of Lydgate's principle facts are simply false, calling into question the validity of his entire narrative.[114] Contrary to Lydgate's story of the noble ali'i convincing his humble people to purchase his land for their own good, the ahupua'a of Wainiha fell out of Hawaiian ownership due to debt and was later purchased by the people of Wainiha from a group of haole investors.[115] The ali'i Māhele awardee lost Wainiha and the maka'āinana organized to get their land back.[116]

M. Kekau'ōnohi was indeed the original ali'i awardee of the ahupua'a of Wainiha.[117] Mikahela Kekau'ōnohi, the great-granddaughter of King Kekaulike of Maui and the largest recipient of land during the Māhele after King Kamehameha III, was, however, an ali'i wahine (female), not an ali'i kāne (male).[118] Kekau'ōnohi was also certainly not the driving force behind the creation of the Wainiha Hui, because she died on June 23, 1849, some twenty-eight years before the formation of Hui Kū'ai 'Āina o

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[111] *Id.* at 129-32.

[112] *Id.* at 132-34.

[113] Kekapala Dye & Thomas Dye, *An Archaeological Survey for Animal Control Fencing in the Wainiha Preserve, Wainiha Valley, Kaua'i* 6 (Jan. 20, 2010), in FINAL ENVIRONMENTAL ASSESSMENT FOR WAINIHA CONSERVATION PROJECT, (The Nature Conservancy ed., 2010), *available at* http://hawaii.gov/health/environmental/environmental/oeqc/index.html. Both Watson, *supra* note 8, and STAUFFER, *supra* note 29, at 200, cite Lydgate as an authority on the Wainiha Hui.

[114] In addition to the inconsistencies described in the text of this article, Lydgate states that Kekau'ōnohi's financial difficulties were triggered by the sinking of the ship *Manuokawai* along with a load of sandalwood destined for Shanghai. In fact the *Manuokawai* did not sink but was still in use for interisland transport until 1883. Moreover, the sandalwood trade had effectively ended in the 1840's, many years before the formation of the Wainiha Hui. Dye et al., *supra* note 114 at 6.

[115] *See infra* notes 123, 127 and accompanying text.

[116] *See infra* notes 128-129 and accompanying text.

[117] Indices of Awards Made By the Board of Commissioners to Quiet Land Titles in the Hawaiian Islands 68 (Star-Bulletin Press ed., 1929) [hereinafter Indices].

[118] Dye et al., *supra* note 114; INDICES, *supra* note 118, at 68-70 (M. Kekau'ōnohi received tens of thousands of acres on every island under Land Commission Award 11216); *see also* PUKUI ET AL., *supra* note 2, at 128, 377.

Wainiha.[119] Upon her death, her estate went to her husband Levi Ha'alelea, who also died prior to the formation of the Hui Kū'ai 'Āina o Wainiha.[120] After his death, much of Ha'alelea's estate was auctioned off to pay debts of about $40,000.[121] The ahupua'a of Wainiha was purchased at probate auction on May 16, 1866 for $3,200 by J.H. Morse, John de Fries, & J. Halstead.[122] Thus, all of Wainiha, save the original Kuleana awards still held by Hawaiians, had fallen out of Hawaiian ownership less than twenty years after the Māhele.

John de Fries subsequently sold his share of Wainiha to Castle & Cooke[123] in April of 1871.[124] Morse, who died some time prior to 1877,

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[119] INDICES, *supra* note 118, at 68. An alternative authority places M. Kekau'ōnohi's death in 1851. Dye et al., *supra* note 114, at at 5. *See also* Kame'eleihiwa, *supra* note 2 at 307(placing Kekau'ōnohi's death in 1851).

[120] There are conflicting accounts of the death of Levi Ha'alelea. The *Indices* record his date of death as June 2, 1851. INDICES, *supra* note 118, at 68. The Dyes' archeological survey of Wainiha contends that Ha'alelea died in 1864. Dye et al., *supra* note 114, at 6.

[121] Dye et al., *supra* note 114, at 5. According to the Dyes, Ha'alelea's debt of $40,000 was the present day equivalent of approximately $565,000. The alienation of the Kekau'ōnohi's Ali'i Nui 'Āina (estate) is more fully chronicled by Lilikalā Kame'eleihiwa.

> Ha'alelea died in 1864 at the age of forty-two, leaving $40,000 worth of debts, part of which he owed to Bishop & Co. In the probate of his estate and to pay off creditors, the court auctioned a great deal of his 'Āina at minimal prices. Several pieces of real estate in Honolulu were sold for only $2,000. Twenty-six parcels of Māui 'Āina were sold for a total of $2,965. Almost all of this 'Āina was purchased by foreigners . . . . The ahupua'a of Hakalau and Pāpa'ikou in Hilo, and Honokōhau and Hōnaunau in Kona, as well as 'Āina on Moloka'i and Kaua'i, were auctioned off to foreigners for a total of $12,660 . . . . [T]hese auctioned 'Āina were a steal and an excellent example of how the rigors of probate could be made to benefit foreigners.

KAME'ELEIHIWA, *supra* note 2, at 307-8 (citing Probate 2415, 1st Cir. Court, available at Hawai'i State Archives).).

[122] Deed of Conveyance from Estate of Levi Ha'alelea to J.H. Morse, Book 21, pp. 242-43, May 16, 1866 (on file with State of Hawai'i Bureau of Conveyance).

[123] Castle & Cooke was founded in 1851 as a partnership between Samuel Northrup Castle and Amos Star Cooke as a department store that sold farm tools, sewing equipment, and medicine. *History*, CASTLE & COOKE, http://www.castlecooke.net/about/history.aspx (last visited Feb. 8, 2012); After 1910, Castle & Cooke was integral in forming Matson Navigation, owned Dole Pineapple, and owned virtually the entire island of Lanai. *See Castle & Cooke: Company History & Profile*, FUNDING UNIVERSE, available at http://www.fundinguniverse.com /company-histories/Castle-amp;-Cooke-Inc-Company-History.html. Present day Castle & Cooke is a real estate development company spun off from Dole Foods in 1993, and repurchased by Dole in 1994. *Company News: Dole Food Completes Tender Offer for Castle & Cooke*, NEW YORK TIMES (December 1, 1994).

[124] Deed of Conveyance from J. de Fries to Castle & Cooke, Book 33, 15-16, April 1871 (available at State of Hawai'i Bureau of Conveyance). Castle & Cooke was a business owned by Samuel Castle, J.B. Atherton, J.P. Cooke. *See* Deed of Conveyance from Castle & Cooke to L. Leka and Others, Book 50, 160-62, May 3, 1877 (on file with State of Hawai'i Bureau of Conveyance).

devised her share of Wainiha to Castle & Cooke who then sold the entirety of the ahupua'a to the Hui Kū'ai 'Āina o Wainiha on May 3, 1877 for $5,500.[125] The deed conveying Wainiha to the Hui Kū'ai 'Āina o Wainiha notes L. Leka as the principle grantee but also lists all seventy-one members of the Hui in the body of the deed, granting

> [u]nto said parties . . . their heirs and assigns all of that certain tract or parcel of land on said Island of Kauai situated in the District of Halelea, and known as the ahupuaa of Wainiha together with all the rights privileges and appurtenances and hereditaments to the same belonging or in any way appertaining.[126]

With this deed, the maka'āinana residents of the 15,000-plus-acre ahupua'a of Wainiha reclaimed for themselves as private property, the lands that their ali'i landlord had managed to lose in a period of less than twenty years after the Māhele. According to the original records of the Hui Kū'ai 'Āina o Wainiha, the group began organizing themselves to purchase the ahupua'a in early 1869, prior to the involvement of Castle & Cooke, and took eight years to finalize the purchase.[127]

B. The Wainiha Hui Constitution of 1877

On September 10, 1877, the members of Hui Kū'ai 'Āina o Wainiha convened to ratify the Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha ("The Constitution of the Land Acquisition Association of Wainiha").[128] It mandates:

> Section 1. A group of Hawaiian subjects have come together to purchase the land known as Wainiha for the amount of $5,500. The sale of which began in January 1869 A.D.
>
> Section 2. The name of this group will be The Land Acquisition Association of Wainiha.
>
> Section 3. This association has chosen an overseer, treasure[r] and a secretary who will oversee the workings of this association.

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[125] Deed of Conveyance from Castle & Cooke to L. Leka and Others, Book 50, 160-62, May 3, 1877 (on file with State of Hawai'i Bureau of Conveyance). There is no reference in the deeds or earlier records as to what became of J. Halstead's interest. *See* Dye et al., *supra* note 115, at 6.

[126] Deed of Conveyance from Castle & Cooke to L. Leka and Others, Book 50, 160-62, May 3, 1877 (on file with State of Hawai'i Bureau of Conveyance). *See infra* Appendix B for a list of the seventy-one founding members of the Hui Kū'ai 'Āina o Wainiha.

[127] *See* Kumukanawai o ka Hui Kuai 'Āina o Wainiha, *supra* note 4.

[128] *Id.*

Section 4. By consensus of this association D. Nu'uhiwa has been chosen as [Luna nui] of the land, and [Z]. Seta as Treasurer as well as secretary.

Section 5. Five acres of land will be appropriated for each kuleana and given to every member of this association.

Amendment of Section 5: Members of this association will not be allowed to use the lands stated above except for use as a residence or a garden. Those who go against this section will be fined one hundred dollars.

Section 6. The duties of the Luna nui are to care for, and keep the peace of the land as well as the assets that are a part of the association.

Section 7. The duties of the treasurer are to maintain the monies of the association and to present the amount of money he/she has at every meeting.

Section 8. The duties of the secretary are to maintain the records of the association, as well as its documents and also to write down the minutes of all the things that are done at every meeting and record them in the association records.

Section 9. This association will meet twice every year on the last Saturday of January and the last Saturday of July. However, these meetings can be changed if that is the will of the majority of the association in attendance at a meeting.

Section 10. All members of the association shall attend every meeting, except for those who have good reason (real problem) that is presented to the association and approved by the association.

Section 11. As for the place in which this association will meet, that will be where the [Luna nui] decides, notification however, must be given one month prior to the meeting of the association.

Section 12. If one or more owners desire to sell their parcels (Kuleana) within Wainiha, no sale will be allowed to people from other areas. But, they may sell to the owners of the association.

Section 13. If one or more owners want to appoint a proxy for their kuleana(s) while they are going to be in another place. No more than two proxies will be allowed and they must present themselves to the overseer of the association.

Section 14. If a problem arises between one or more owners or between the [Luna nui] of the lands, this conflict will be presented to the association before going to the district courts.

Section 15. No more than ten animals per owner will be allowed to be set loose in Wainiha.

> Section 16. These will become the regulations for all members of this association that was approved by this association on this day September 10, 1877. Along with our signatures below.[129]

The 1877 Constitution establishes several important principles. First, the members chose an elected Luna nui to oversee the management of the association.[130] Any conflicts among members or between members and the Luna nui were to be resolved internally with the district court being a venue of last resort.[131] This system recreated, in a formalized manner, the pre-Māhele konohiki-like system of land management subject to democratic control of the members.[132] Second, the Hui opted to allot individual 5-acre parcels to each Hui member for their personal use, creating areas of private use within the communal holding.[133] These individual allotments generally coincided with the land on which the members and their families already lived and farmed.[134] In effect, the residents of Wainiha Valley undertook to parcel out Kuleana lots to themselves where the Kuleana Act had failed to adequately provide for the distribution of land titles to maka'āinana.[135] Third, the Hui initially established a policy barring the sale of any member's allotment or share to outsiders, thus striving to maintain the

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[129] *Id.*

[130] *See id.* at Sections 4 and 6. Luna nui refers to a "general manager, chief officer or foreman, especially head overseer of a sugar plantation." A DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS 69 (Paul F. Nahoa Lucas ed., 1995).

[131] *See* Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Section 14, *supra* Part V.B.

[132] *See supra* notes 45-49 and accompanying text (describing the traditional konohiki land management system).

[133] *See* Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Section 5, *supra* Part V.B.

[134] *See* HUI KŪ'AI 'ĀINA O WAINIHA 10 (on file with Hawai'i State Archives). Hui members presented a description of their home and farm lot either by name or in relation to other landmarks or other individual's properties and the Luna nui signed the claim in confirmation. *Id.* The Hui's record book describes each member's claim and subsequent allotment in much the same way that maka'āinana testimony is recorded in the records of the Land Commission. *Compare e.g.*, FOREIGN TESTIMONY PRESENTED TO THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES, vol. 12, p.80 (on file with the Hawai'i State Archives; containing the testimony presented in conjunction with Kowelo's Kuleana claim, LCA 11063, describing the physical location, boundaries, history and use of the parcel of land), *with* HUI KŪ'AI 'ĀINA O WAINIHA 7 (on file with Hawai'i State Archives) (translation from the original Hawaiian by Leinani Cagulada):

> On the 9th of November 1877, Z. Seta requested of the president and the secretary of the Land-purchasing Company of Wainiha for Kamaalewa. The boundaries are as follows: to the North is the Wainiha stream, to the East is D.N. Kaohule's place, to the South is Kaunupepeiao, a hill, to the West is the irrigated terrace of Umi and the road. This is for a house lot, [and] two irrigated terraces of Kapaeli, just inland of the bridge of Umi. Z. Seta Secretary of the Wainiha hui. Witness D. Nuuhiwa. The hui has granted this proposal. Witness: D. Nuuhiwa, Luapuu).

[135] *Compare* Appendix C *with* Appendix B.

integrity of the ahupua'a.[136] Fourth, the bulk of the land was not allotted to individual members and was instead set aside for controlled communal grazing and use.[137] This fourth element speaks to the maintenance and expansion of the limited communal rights enumerated and guaranteed under Section 7 of the Kuleana Act of 1850.[138]

The members tested and refined each of these principles during the first decade of the Hui's existence.[139] In the ensuing years, the Hawai'i Supreme Court would also weigh in by first supporting these tenets of Hui self-governance, and later dismantling them.[140]

C. The Allotment of the Communal Lands

After the ratification of the Constitution, the first order of business addressed by the Hui was the allotment of individual parcels to the membership.[141] Generally, the allotment process entailed the individual Hui member describing to the Luna nui the location of the member's claim, which typically centered upon their current residence and farm lot.[142] As the Hui records indicate, however, the Hui members were in no particular hurry to formalize specific allotment claims. During the almost seven months between September 10, 1877 and March 4, 1878 only twenty-two of the seventy-one members approached the Luna nui for approval of an

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[136] *See* Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Section 12, *supra* Part V.B.

[137] *See* Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Section 15, *supra* Part V.B; *see also* discussion *infra* Part V.E.

[138] *Kuleana Act*, *supra* note 67 (reprinted in VAN DYKE, *supra* note 21, at 422-23). Section 7 of the Kuleana Act provided:

> When the landlords have taken 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 ti leaf, from the lands on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. . . . The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them on all lands granted in fee-simple: Provided that this shall not be applicable in wells and water courses which individuals have made for their own use.

The Kuleana Act of of 1850 is currently codified as Haw. Rev. Stat. § 7-1. The section cited above has remained unchanged since its enactment in 1851.

[139] *See* discussion *infra* Part V.C-F.

[140] *See* discussion *infra* Part VII.A-B.

[141] *See* HUI KŪ'AI 'ĀINA O WAINIHA 7 (original on file with Hawai'i State Archives, U-290 (translation from Hawaiian by Leinani Cagulada and Puakea Nogelmeier, on file with author) (The first items of business recorded in the Hui record book after the Constitution were the recordation and approval of claims to specific allotments of land by members D. Nuuhiwa and Makaikai respectively).

[142] *See, e.g.*, *id.*

allotment.[143] By June of 1879, just over two-years after the first allotment was recorded, forty-two more members had presented claims to specific parcels.[144]

To mediate disputes over individual claims, the Hui appointed a committee of seven member judges who would rule on such matters.[145] Between the ratification of the Constitution on September 10, 1877 and the meeting of February 7, 1880, only three disputes over boundaries or allotment claims were brought before the committee of judges or raised at a general membership meeting.[146] From the Hui's own records, there were no significant disputes over the allotment process.[147] Later testimony provided by Kanehe in the 1896 court proceedings in *Lui v. Kaleikini*, however, suggests that some of the original Hui members disputed the issuance of allotments and stated that "some are living on the land without having received formal allotments."[148]

D. Protecting the Integrity of the Communal Land Base

The Hui demonstrated a clear and conscious effort to maintain and even expand their collective land base, while at the same time occasionally practicing a less restrictive policy of regulating sales by members than is suggested by the plain language of Section 12 of the Constitution.[149] Less than three months after the Hui finalized their governing constitution and eight months after taking title to the Wainiha ahupua'a, D. Kaukaha, a

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[143] *See id.* at 7-13.

[144] *See id.* at 13-23.

[145] *See Meeting Minutes of March 4, 1878,* HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 13.

[146] *See id.* ("We have decided to divide the land into a lo'i konohiki for Pueueu and eleven lo'i for Pueo. . . . We have decided to divide evenly the land called Kapā'eli for Kukui [the upland section] and the seaward part for Kanahele."); *see also Meeting Minutes of March 17,* HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 25 (ejecting James Robinson from lo'i allotted to Pueo).

[147] *See supra* notes 144-147 and accompanying text (indicating that over a two and a half year period, during which almost all of the seventy-one members of the Hui submitted requests for allotments, there were only three minor disputes recorded, each of which was disposed of by the chosen Hui committee in the meetings of March 4 and 17, 1878).

[148] *Clerks Minutes and Notes of Proceedings* at 4, Lui et al. v. W. Kaleikini, (Circuit Court of the Fifth Circuit, March 17, 1896) (available in the case file of Lui v. Kaleikini, 10 Haw. 391 (1896)) (on file with the Hawai'i State Archives). It is unclear from Kanehe's testimony whether some members disputed the need to issue formal allotments generally or whether they disputed the specific grants that were made. *Id.*

[149] *Compare Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha,* Section 12, *supra* Part V.B, *with infra* notes 154-156 and accompanying text (discussing divergence from the letter of the Hui Constitution).

resident of Wainiha who was not recorded as a member of the Hui, died without heirs.[150] C. Berttlemann, the executor of the estate, auctioned off Kaukaha's Wainiha land.[151] At auction, Z. Seta, a Hui member and then-secretary of the Hui, purchased Kaukaha's property at auction for the Hui for $66.[152] Although this seems to suggest that there was a conscious effort to consolidate the Hui's title to the ahupua'a's lands, a series of sales by Hui members in 1878 calls into question how stringently the Hui enforced its policy of non-alienation of land to outsiders.[153] On September 23, 1878, the sale of four of the seventy-one Hui shares was recorded with the Bureau of Conveyance.[154] W.C. Jones, acting as an agent for Charles Kana'ina, the father of the recently deceased King Lunalilo, purchased all four shares.[155] It is unclear whether the sales to Kana'ina were a special case associated with his high status as Lunalilo's father, or if they represented a general policy of permissive sales to outsiders at the time.

On March 22, 1879, the Hui convened a special meeting to consider amendments to their constitution. There, Lahaina explicitly challenged the policy against sales to outsiders and motioned that Section 12 of the Hui's constitution be amended to allow the sale of land to foreigners.[156] Although the committee voted down Lahaina's proposal, they did opt to amend Section 12 to read: "If an owner(s) desires to sell their parcel (kuleana) within Wainiha, no sale will be allowed to foreigners. They may however sell their land to other owners of the association or to a subject of the Hawaiian kingdom."[157] The expansion of possible purchasers to subjects of the Hawaiian kingdom may have simply reflected the reality of the Hui's practice, as demonstrated by the 1878 sale to Kana'ina; or may have been related to a debate during the meeting over the identity of the Hui members

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[150] Presumably, Kaukaha either owned a kuleana issued by the Land Commission or held land by a locally recognized claim of right outside of either the Hui or the māhele Kuleana awards. He is not listed as an original L.C.A. awardee but may have been the heir of one. Neither is he listed as a member of the hui. *See infra* Appendixes B and C for names of Kuleana awardees and founding members of the Wainiha Hui.

[151] *Record of Dec. 15, 1877*, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 5.

[152] *Id.*

[153] *See* Deeds of Conveyance from J.W. Loka & wife (1/71 share), S.W. Kaleo & wife (1/71 share), and A. Pali (2/71 shares) respectively to W.C. Jones, recorded on Sept. 23, 1878 (on file with the State of Hawai'i Bureau of Conveyance).

[154] *Id.*

[155] *See id.*

[156] Second Meeting of the Committee Established to Amend the Constitution, March 22, 1879, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 28.

[157] Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Jan. 1877 amended in 1883, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 424.

themselves.[158] The meeting began with a motion to strike the phrase "Hawai'i Pono'ī" (translated as "Hawaiian subjects") from Section 1 of the constitution and replace it with the names of the seventy-one founding members.[159] There appeared to be disagreement as to whether Hawai'i Pono'ī, describing the identity of the Hui's founders, encompassed naturalized foreigners or referred to Native Hawaiians only.[160] There was, after all, at least one non-Hawaiian founding member of the Hui, James Robinson, who was identified in the Hui records as non-Hawaiian.[161] D. Nu'uhiwa, the acting Luna nui, explained that the phrase referred to Hawaiians and foreigners who have been naturalized.[162] After his explanation, the committee opted to leave Section 1 as it read and subsequently amended Section 12 to include all subjects of the Hawaiian Kingdom.[163] This openness to selling land to outsiders was short-lived, however. When the constitution was revised again in 1889, the clause regulating sales was amended to read: "No share-holder can sell his 'Kuleana' to another person, except to his own blood relative, and if he has no blood relative, to sell again to the [Hui]. But he must first report to the manager. He shall sell to the [Hui] for just what it cost him."[164] Ultimately, this key element of the Hui's constitution, the inalienability of Hui land, would be challenged in and resolved by the Hawai'i Supreme Court.[165]

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[158] *See supra* note 156 and accompanying text (describing purchase by Kana'ina) and *infra* notes 161-165 and accompanying text (discussing non-Native Hawaiian members and debate over how the Hui would define itself).

[159] Second Meeting of the Committee Established to Amend the Constitution, Mar. 22, 1879, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 27.

[160] *Id.* Section 12 of the 1877 Constitution, relating to the sale of land or shares, provides that members may only sell to "nā Kanaka o nā 'Āina," *lit.*, people of the land. *Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Sept. 10, 1877*, *supra* note 158. *Compare* PUKUI ET AL., *supra* note 2, at 127 (kanaka, defined as "human being, man, person, individual, party, mankind, population"), *with* PUKUI ET AL., *supra* note 2, at 127 (kanaka maoli, defined as full-blooded Hawaiian person).

[161] *See First Special Meeting on March 17, 1879,* HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 25 (referring to "the haole James Robinson").

[162] Second Meeting of the Committee established to Amend the Constitution, Mar. 22, 1879, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 27.

[163] *Id.*

[164] Translation of the Constitution of the Land Purchasing Association of Wainiha, 1889, Exhibit C, Bill for Partition, Equity Proceeding No. 109, Filed Mar. 25, 1942, at C-6 (available on microfilm at the Fifth Circuit Court, Kaua'i, Hawai'i).

[165] *See* discussion *infra* Part VII.B.

E. Communal Resource Management

Aside from reconsidering the Hui's rules on land sales, the other principle changes made to the constitution in 1879 and 1883 revolved around the regulation of communal grazing.[166] The original 1877 constitution established that each owner would be allowed to set loose a maximum of ten animals in the ahupua'a.[167] The common practice at the time was to simply allow one's horses and cattle to roam freely in the valley, each branded with the owner's mark.[168] Periodic round-ups would be organized to properly brand recently born animals.[169] However, judging from the minutes of the Hui's meetings and the constitutional amendments enacted in 1879 and 1883, these roaming cattle were getting out of control: invading and damaging residents' farm lots; multiplying beyond the ten animal per owner limit that had been previously established; and causing conflict over who owned which animals.[170] Conflict could have arisen both in instances where people claimed animals that did not belong to them and in instances where owners sought to avoid having to pay damages when their livestock invaded their neighbor's farm plots.[171] The 1883 constitutional amendments established an array of rules to deal with the cattle problem.[172] Perhaps recognizing the ten cattle per owner limit was not working, Sections 14 and 15 established a new limit of forty animals each, and required owners to pay $10 for each animal over that limit.[173] If the owner could not pay the $10 fee, the Hui was granted ownership of the animals and would presumably remove them from the valley.[174] Additionally, Section 15 provided that roundups and branding would be

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[166] *See* discussion *infra* Part V.E.

[167] *See* Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Sept. 10, 1877, Section 15.

[168] Carlos Andrade, Hā'ena: Through the Eyes of the Ancestors 127 (2008).

[169] *Id.* at 129.

[170] *See Minutes of Hui Meeting, April 14 1879*, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 28-29.

[171] *Id.* (The minutes describe a motion that each owner should be required to fence off their house lot and farm plot to prevent animals from causing damage. The motion further calls for those who fail to fence off their land to be precluded from seeking compensation damages in the future from the owners of marauding animals).

[172] *See infra* notes 174-176 and accompanying text.

[173] *Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Jan. 1877* (amended *1883*), HUI KUAI 'ĀINA O WAINIHA 424 (on file with the Hawai'i State Archives) (translation from Hawaiian by Devin C Forrest, on file with author).

[174] *Id.*; *see also* Minutes of the Meeting on April 14, 1879, HUI KUAI 'ĀINA O WAINIHA, *supra* note 135, at 28-29.

allowed under the supervision of the Luna nui only and that anyone branding animals without authorization would be fined $10.[175]

The Hui also addressed a host of natural resource management issues beyond communal grazing. In the 1889 Constitution, the Hui established a kapu[176] on the cutting of the "famous hala trees on the plains of Naue."[177] The 1904 Bylaws of the Hui expanded the regulation of tree cutting beyond Naue, stating: "[T]he cutting of the famous puhala trees of Naue and other valuable woods within the boundaries of the Hui is prohibited excepting when they are intended for the Hui's purposes as fence posts, house building, firewood, or other requirements of the Hui."[178]

In addition to managing the harvesting of wood on the communal land, the Hui also regulated fishing practices in both the ocean and the Wainiha River.[179] Each Hui member was given one throw net for use in the ocean and one kahe'o'opu (fish trap) that would have been used primarily in the river.[180] The Hui later granted exclusive he'e (octopus) fishing rights to a group of women in exchange for $1 annual payments to the Hui, and regulated the times of year that the he'e fishery would be opened and closed.[181] From the same meeting during which the Hui discussed the restriction on he'e, it is clear that the Hui members also coordinated the

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[175] Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Jan. 1877 (amended 1883), HUI KUAI 'ĀINA O WAINIHA 424

[176] Kapu means: "Taboo, prohibition; special privilege or exemption from ordinary taboo; sacredness; prohibited; forbidden; sacred, holy, consecrated; no trespassing, keep out." PUKUI ET AL., *supra* note 2, at 132.

[177] *Translation of the Constitution of the Land Purchasing Association of Wainiha, 1889*, Exhibit C, Bill for Partition, Equity Proceeding No. 109, Filed Mar. 25, 1942, at C-7 (available on microfilm at the Fifth Circuit Court, Kaua'i, Hawai'i). The hala tree (*Pandanus tectorious*) is of great cultural, health, and economic importance throughout the Pacific, used particularly for weaving as well as for food and construction material. Lex A.J. Thomson, Lois Englberger, Luigi Guarino, R.R. Thaman, and Craig R. Elevitch, *Species Profiles for Pacific Island Agroforestry* (April 2006) (*http://www.agroforestry.nett/tti/P.tectorius-pandanus.pdf*). Nauē is a coastal point on the boundary between the ahupua'a of Wainiha and Hā'ena. The hala grove there was famous for its "emotional and mythic properties" and also for the "practical resources" it provided. CARLOS ANDRADE, HĀ'ENA: THROUGH THE EYES OF THE ANCESTORS 41-42 (2008).

[178] *Translation of the By-Laws of the Land Purchasing Company of Wainiha, 1904*, Bill for Partition, Equity Proceeding No. 109, Filed March 25, 1942, Exhibit D, Section 21 at D-15 (available on microfilm at the Fifth Circuit Court, Kaua'i, Hawai'i).

[179] *See infra* notes 182-186 and accompanying text.

[180] *First Special Meeting, Mar. 17, 1879*, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 25.

[181] *Meeting Minutes of Apr. 17, 1880*, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 39-42 (translation from Hawaiian by Leinani Cagulada & Puakea Nogelmeier, on file with author).

harvesting of akule[182]; operated communal kahe (fish traps) and the appropriate times for opening and closing them; and practiced an array of other fishing restriction or regulations not specifically enumerated in the meeting records.[183]

The most important moment for the Hui, involving communal resource management and the Hui's future, may have been the 1903 decision to lease water rights to McBryde Sugar Co. for the construction of a hydroelectric plant.[184] As noted earlier, McBryde operated sugar plantations on approximately 20,000 acres on the south side of the island.[185] For irrigation, the company was highly dependent on ground water and therefore needed to operate irrigation pumps.[186] To reduce the costs of running coal powered steam pumps, McBryde sent William E. Rowell to negotiate a water lease with the Wainiha Hui in order to construct a hydroelectric plant that would provide electricity for the irrigation pumps on the south shore.[187] Rowell's bid to the Hui consisted of a fifty-year lease with annual payments of $1,500, and was purportedly supported by then-Hui president and Hanalei district court judge, Kakina. Kakina organized a meeting to consider the offer.[188] Despite warnings from "bitter haole hater" Willie Walaau that "once you let the haole get a foothold it is good-bye to your independence," the membership ultimately approved Rowell's proposed lease.[189] The lease went into effect on March 3, 1903, and in 1906 the power plant went online utilizing a primary water intake at the 700 foot elevation that collected up to 65 million gallons a day that were delivered to the power plant through a pressurizing pipe before being returned to the Wainiha River downstream of the plant.[190] Although the

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[182] Big-eyed or goggle-eyed scad fish, *Trachurops crumenoph-thalmus*. PUKUI ET AL., *supra* note 2, at 16

[183] *See* HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 30 (referring to the construction of a community kahe); *see also Meeting Minutes of Jan. 30, 1880*, HUI KŪ'AI 'ĀINA O WAINIHA, *supra* note 135, at 35.

[184] *See infra* notes 188-193 and accompanying text.

[185] *See* Wilcox, *supra* note 76.

[186] *Id.* at 78-79.

[187] *The Wainiha Water Rights Lease*, HAWAIIAN ALMANAC AND ANNUAL 161 (Thomas G. Thrum, ed., 1946-47) (reprinted from the 1924 Hawaiian Annual) [hereinafter *Wainiha Water Rights Lease*]; *see* WILCOX, *supra* note 7, at 78-79.

[188] The Wainiha Water Rights Lease, *supra* note 189, at 161-63.

[189] *Id.* at 164-65. Wala'au literally translates to "talk, speak, converse; formerly, to talk loudly, shout." PUKUI ET AL., *supra* note 2, at 381. Given that wala'au means to talk loudly and that the cook in Thrum's story about the negotiations between the Hui and Rowell is named Kalua (kālua meaning literally to bake) one can only wonder if Thrum's tale is historically accurate, possibly intentionally modified not to reveal actual names, or perhaps more of a metaphorical invention mixed with factual events.

[190] WILCOX, *supra* note 7, at 79-80.

lease payments—distributed to the Hui members in the form of dividends—were likely welcomed, the approaching expiration of McBryde's lease rights in 1953 most likely triggered the Company's legal efforts to break apart the Hui and take ownership of most of the ahupua'a in 1947.[191]

F. Hui Management and the Role of the Luna Nui

Underlying each of the unique elements of the Wainiha Hui described above was the Luna nui system of day-to-day management of the Hui lands. This system recreated, in a formalized manner, much of the pre-Māhele konohiki system of land management, subject to democratic control of the Hui membership.[192] The community of Hui owners selected this new konohiki rather than having him imposed from above based upon royal prerogative and genealogy.[193] Stauffer describes the Luna nui as a "new ali'i" filling the traditional konohiki role of managing the affairs of the ahupua'a.[194] As with the Wainiha Hui, the Luna of the Kahana Hui on O'ahu was tasked with allotting lands to the members, settling disputes, and managing grazing lands and the adjoining fishery.[195] In addition to general administration of the Hui's lands, any conflicts among members or between members and the Luna nui were to be resolved internally, with the district court being a venue of last resort.[196] Under the 1904 Bylaws of the Wainiha Hui, the manager (Luna) was granted a $500 annual salary. The 1904 Bylaws also explicitly stated that the Luna nui "shall sue for and in the name of the Hui and upon him shall legal service of process be made in case of any suit against the Hui."[197] The Hawai'i Supreme Court would later undermine the Luna nui's legal authority, even after actively recognizing such authority for nearly thirty years.[198]

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[191] *See* Short Form of Final Decree in Partition, McBryde Sugar Company Ltd. v. William P. Aarona et al. Equity No. 109, 1947.

[192] *See supra* notes 46-51 and accompanying text (describing the traditional konohiki land management system).

[193] *Compare* Sections 3,4, and 6, *Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha*, September 10, 1877, HUI KŪ'AI 'ĀINA O WAINIHA 1-3, *with supra* notes 46-51 and accompanying text (discussing the traditional Hawaiian konohiki system).

[194] STAUFFER, *supra* note 29, at 128-29.

[195] *Id.*

[196] *See* Kumukanawai o ka Hui Kū'ai 'Āina o Wainiha, Section 14.

[197] Translation of By-Laws of the Land Purchasing Company of Wainiha, Exhibit D, D-13, Bill for Partition, Eq. No. 109, Mar. 25, 1942.

[198] *See generally* discussion *infra* Parts VII.A, B; *see also* discussion *infra* Part VII.B. (analyzing the decision in J.K. Smythe et al. v. J. Takara et al., 26 Haw. 69 (1921).

VI. EARLY SUPREME COURT CASES: BALANCING PRIVATE PROPERTY RIGHTS AND HUI COMMUNAL SELF-GOVERNANCE.

The Wainiha Hui, as isolated as it was on the remote north shore of Kaua'i, did not exist in a vacuum. It was ultimately affected by and a part of the evolving legal fabric of the Kingdom of Hawai'i and subject to the pronouncements of law emanating from the Hawai'i Supreme Court, a world away in Honolulu.[199]

The first two Hui cases to reach the Hawai'i Supreme Court each dealt with the tension between the property rights of individual members and the communal power of the Hui to regulate its members based on their Constitution.[200] The first Hui case in 1882, *Burrows v. Paaluhi,* involved a conflict between a member and the Luna of the Mānoa Hui on the Island of Oahu.[201] The Hui member, Kanui, leased his Hui pasturage interest to Burrows for $15 a year.[202] Burrows subsequently placed twelve head of cattle on the Hui's land.[203] The Luna nui, Paahuli, then seized the cattle, claiming that Kanui had violated Rule 18 of the Hui Constitution that members would not rent out the right of pasturage on the common land without the Luna's consent.[204] At the trial court below, Judge M. McCully ruled in favor of Burrows, holding that as tenants in common a member cannot be prevented "from selling his rights and title therein" and that the Hui rules cannot make a lease to a third party void, unless the lease was in violation of the deed to the land itself.[205]

The Supreme Court, led by Chief Justice Albert Francis Judd, ultimately affirmed the lower court's decision in favor of Burrows.[206] Justice Judd's opinion, however, was far more solicitous of the Hui and its power of self-government.[207] Judd held that "the Constitution of this Hui is to be

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[199] *See infra* Part VII (discussing the Supreme Court cases and subsequent legislation that enabled McBryde Sugar to dissolve the Wainiha Hui and legally force the partition of Wainiha into fee simple lots).

[200] *See* J. Burrows v. Paaluhi, 4 Haw. 464 (1882) and Mahoe v. Puka and J.N. Paikuli, 4 Haw. 485 (1882).

[201] *Burrows*, 4 Haw. at 464.

[202] *Id.*

[203] *Id.* at 465.

[204] *Id.*

[205] J. Burrows v. Paaluhi (Hawai'i, First Circuit Intermediate Court, 1880) (available in the case file of *Burrows*, 4 Haw. 464 (1882) on file with Hawai'i State archives).

[206] J.Burrows v. Paaluhi, 4 Haw. 464, 465 (1882)

[207] *See infra* notes 210-213 and accompanying text. Albert Francis Judd served as Attorney General in 1873 under King Lunalilio. *See*, THE STORY OF HAWAI'I AND ITS BUILDERS (George F. Nellist, ed., Honolulu Star Bulletin Ltd. 1925, *available at* http://files.usgwarchives.org/hi/statewide/bios/judd36bs.txt. In 1874, Judd was appointed to

regarded as a mutual agreement which bound the tenants."[208] While the Supreme Court acknowledged generally that tenants in common, as the Hui members were held to be, had the right to alienate or lease their respective undivided share of the common property, this right was superseded by the restrictions laid out in the Hui's constitution.[209] The problem was not that the Hui was powerless to enforce its constitution in the face of a private property right as McCully had held; rather, the legal issue was that the Luna, Paahuli, had refused to endorse Kanui's lease arbitrarily.[210] Kanui's lease did not violate the maximum numbers of cattle allowed per member and Kanui had offered to pay the required management commission to the Luna.[211] The Hui had the power to enforce its constitution and the Court had the power to ensure that in doing so the Hui fairly applied that constitution.

In *Mahoe v. Puka,* the second Hui case to reach the Supreme Court just two months later, Judd expanded upon the legal strength of Hui constitutions:[212]

> We are of the opinion that where parties owning land enter into written agreements as to the management of their property, whether these take the form of articles of co-partnership of a constitution and by-laws, as in this case, these should be upheld and enforced by the Courts as far as possible to do so. If these agreements are found to work disadvantageously they can be amended, and if they should be found to be oppressive or subversive of the right of the minority, the Courts would relieve them.[213]

Although the substance of *Mahoe*—the resolution of a conflict between the newly elected Luna and the outgoing leadership of the Waikāne Hui on O'ahu—is not historically important, the pro-Hui language of Judd's opinion would be recalled in later cases where the stakes were higher.[214]

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the Hawaii Supreme Court, becoming chief justice in 1881. *Id.* He served on the court for twenty-six years until his death in 1900. *Id.* This time period covered the reigns of King Kalakaua, Queen Liliuokalani, the Provisional Government established after the overthrow of Liliuokalani, and the Republic of Hawai'i. *Id.* An enigmatic figure, Judd protested that the imposition of the 1887 "Bayonet Constitution," which drastically reduced the political power of Native Hawaiians while increasing the power of wealthy haoles, was an illegal act at the same time he helped to revise it. *See* RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, VOL. III, 1874-1893: THE KALAKAUA DYNASTY, 370-72 (1967).

[208] *Burrows*, 4 Haw. at 465.

[209] *Id.* at 465.

[210] *Id.* at 465.

[211] *Id.*

[212] Mahoe v. Puka, 4 Haw. 485 (1882).

[213] *Id.* at 486.

[214] *See* Opening Brief for Petitioner-Appellants at 5, J.K. Smythe v. Takara, 26 Haw. 69 (1921) (on file with Hawaii Supreme Court).

A. Tenancy in Common, Possessory Rights, and the Origin of the "Hui Problem".

In the next two Hui cases to reach the Supreme Court, the justices were called on to more clearly define precisely what a Hui was within Hawaii's emerging common law.[215] What pre-existing legal box could this "peculiar native institution" be squeezed into? In *Awa v. J.M. Horner*, the court considered whether two members of a Hui in Hāmākua on the Island of Hawai'i held 112 acres as tenants in common or as joint tenants.[216] If the Hui was a tenancy in common, the share(s) of a deceased member would descend to their heirs.[217] If it was defined as a joint tenancy, the share(s) of the deceased would revert to the surviving shareholders.[218] Although *Awa* dealt with which of two individuals would take title to a piece of land, the court's decision would determine more generally whether Hui interests or shares would be fragmented or diluted over time, or kept intact.

Using the Wainiha Hui as an example, the original seventy-one founding members each received 1/71 share in the ahupua'a, entitling each shareholder to a five-acre allotment of land and shared use of the remaining common lands.[219] Under the doctrine of tenancy in common and assuming the simplistic formula of two children per generation, within two generations of inheritance, the 1/71 share in the Hui would devolve into four individuals each holding a 1/284 share in the Hui.[220] This fragmentation of interests raised questions regarding what later shareholders are entitled to and presented practical difficulties in governance. Most importantly, however, the complexity of legal title created by so many fractional owners made it impossible for plantations or other interests to purchase or otherwise acquire clear title to Hui lands and resources.[221] This is exactly what Watson was referring to when he described the "Hui problem" that the Maui pineapple industry sought to "do something about" in later court proceedings and legislation.[222] This barrier

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[215] *See* Awa v. J. M. Horner, 5 Haw. 543 (1886) and Lui Kua v. Kaleikini, 10 Haw. 391 (1896).

[216] *Awa*, 5 Haw. at 543.

[217] *Id.* at 544.

[218] *Id.*

[219] *See supra* note 128 and accompanying text; *see also supra* Part V.C.

[220] After the first generation, each child of the original 1/71 shareholder would have a 1/142 share. At the third generation, each of the four grandchildren of the original 1/71 shareholder would have 1/284 shares in the Hui.

[221] Watson, *supra* note 8, at 14-15.

[222] *Id.* at 15.

to acquisition allowed Huis to survive intact for as long as they did, but also was a trigger for their ultimate dissolution.[223]

Although the choice of law might seem obvious within the realm of property law today, it was not as clear in the Hawaiian Kingdom in 1886 because the concept of private property was only forty years old.[224] As Chief Justice Judd explained, "It is somewhat remarkable that a question so important as this . . . should not have been earlier presented to the Court for adjudication."[225] If the court adopted the common law of England, when two or more persons held property, a joint tenancy would exist.[226] The Court held, however, that for English common law to be adopted, "we must be satisfied that the principle to be adopted is 'founded in justice, and not in conflict with the laws and customs of this Kingdom.'"[227] The Court noted that the English practice was rooted in the desire to keep feudal estates intact. But because there were no feudal tenures in Hawai'i at the time, there was no underlying reason to adhere to such a doctrine.[228] More relevant was "the policy of the American law [that] is opposed to the notion of survivorship, and therefore regards such estates as tenancies in common."[229] The Court further held: "We believe it to be true also that such conveyances have been generally understood and treated in this Kingdom as creating estates of tenancies in common, and we ought to hold for the protection and peace of land titles that such is the law of the country."[230]

The records and practices of the Wainiha Hui appear to bear this out, as was demonstrated in testimony presented in *Lui v. Kaleikini*, a Hawai'i Supreme Court case involving the Wainiha Hui.[231] There, Kaeha, a Hui member, presented sworn testimony that it was the understanding of those having allotments that "such allotments descended to their heirs."[232]

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[223] *See id.* (Because of the diverse fractional ownership of Hui lands, it was practically impossible for the Hui to appear as a defendant in a partition lawsuit because all members had to be present and some were unknown).

[224] Frear, *supra* note 13, at 83.

[225] Awa v. Horner, 5 Haw. 543 (1886). This statement by Judd apparently ignores the fact that the Court had considered Hui to be tenanacies in common in *Burrows* only four years earlier. *Burrows*, 4 Haw. at 464; *see also supra* note 211 and accompanying text.

[226] *Awa*, 5 Haw. at 544.

[227] *Id.*; *see also supra* note 227.

[228] *Awa*, 5 Haw. at 544.

[229] *Id.*

[230] *Id.*

[231] Lui v. Kaleikini, 10 Haw. 391, 393 (1896).

[232] *Clerks Minutes and Notes of Proceedings, Lui et al v. W. Kaleikini*, Circuit Court, Fifth Circuit, March 17, 1896. (In case file of *Lui*, 10 Haw. 391) (on file with Hawai'i State Archives).

B. The Enforceability of Hui Allotments: Empowering Hui Self-Governance and Planting the Seed of Their Demise.

The underlying claim in *Lui* involved the inheritance of the Hui interest of Kilauano by his four children based upon the doctrine of tenancy in common, as it was established three years earlier in *Awa*.[233] The question before the Court was not the inheritance per se, but rather what exactly was inherited when the children acquired Kilauano's Hui share.[234] The children's guardian, David Kua, argued that the children rightfully inherited the specific parcel of land that had been allotted to their grandfather and subsequently deeded to their father.[235] The defendant, William Kaleikini, who had occupied and farmed Kilauano's allotment after it had been abandoned, contended that the children inherited a general communal interest to the Hui lands but no legal interest to a specific allotment.[236] Essentially, Kaleikini challenged the legal enforceability of the Hui's internal allotment system.[237] According to the Court, at issue was whether a co-tenant had a right to "bring ejectment against another co-tenant for a portion of the common estate."[238] As a matter of common law, each tenant had the right of possession of the entire parcel of land.[239] As Chief Justice Judd queried, should the Hui constitution and allotments granted under that constitution be "sufficient in law to give a right of action to the tenant to whom it was set off to recover its possession from another co-tenant[?]"[240]

In response to his own question, Chief Justice Judd referred back to his earlier ruling in *Burrows v. Paaluhi* that supported the power of Huis to establish their own rules to regulate and manage their land, and held that "such an agreement made as this one is for the common benefit of the owners of the land, to secure harmony and to avoid expense, should be respected by the court."[241] The Court chose to treat the Hui allotments, to the extent that the members had agreed to them, as if they were formal

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233 *Lui*, 10 Haw. at 393.

234 *Id.*

235 *Lui*, 10 Haw. at 392 (Kilauano was the son of founding Hui member Kumahakaua, who was allotted the parcel in question by D. Nuuhiwa in 1878).

236 *Lui*, 10 Haw. at 392-93.

237 *Id.* (Kaleikini argued that Hui allotments do not constitute legal partition in severalty of the common land to the individual members. In other words, allotments were not legal divisions of Hui property and all members continued to hold an undivided interest in the entire body of land).

238 *Id.* at 393.

239 *Id.*

240 *Id.*

241 *Id.* at 393-94.

deeds.[242] By doing so, the Court not only empowered the Hui in the collective management of its land but also elevated the status of the individual member's holdings in the eyes of the law, foreshadowing future court action that would bury the Hui under the legal rights of individual Hui members.[243] This ruling was the last time that the Hawai'i Supreme Court accorded Hawaiian Land Huis deference in determining how they would communally manage their lands.[244]

VII. THE PLANTATION NEEDS YOUR LAND: PROPERTY RIGHTS AND THE JUDICIAL EROSION OF LAND HUIS.

As detailed in Part VI.A above, and according to Leslie Watson who worked as an engineer for a large landowner, plantation interests perceived Hawaiian Land Huis as a problem because the plantations coveted access to Hui agricultural lands and the complex structure of Hui ownership acted as a barrier to appropriation.[245] This is not to suggest, however, that the legal erosion of Hui followed a linear path or that sinister forces necessarily drove this trend. Some of the Court's decisions that ultimately ate away at the collective legal authority of Huis arose because Hui members themselves became increasingly involved in the growing plantation economy by selling and/or leasing out their land and water rights, as in the case of the Wainiha Hui.[246] It might be argued that the Hui collectively, or at least the practices of some of the individual members, invited their own demise.[247]

For example, in 1900, when the Hawai'i Supreme Court heard *Foster v. Kaneohe Ranch Company*, nearly half of the shares of the Kahana Hui on O'ahu had been sold to either Mary Foster or the Kaneohe Ranch Company, both outside investors.[248] The case itself was essentially a battle

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[242] *Id.* at 394.

[243] *See* discussion *infra* Part VII.B.

[244] *See* discussion *infra* Part VII.

[245] *See supra* notes 224-225 and accompanying text; *see also* STAUFFER, *supra* note 29, at 125 (discussing Watson's point of view in relation to his employment as an engineer for a plantation interest).

[246] *See supra* notes 188-194 and accompanying text (discussing the Hui's lease of water rights to McBryde Sugar).

[247] *See infra* notes 244-287 and accompanying text (describing the suit between a Hui member and the officers of the Hui that led to the final demise of Hui as legal entities capable of regulating their communal land holdings).

[248] Foster v. Kaneohe Ranch Co., 12 Haw. 363 (1900); *see also* STAUFFER, *supra* note 29, at 168-73 (describing that of 115 total shares in the Kahana Hui, Mary Foster owned thirty-one and the Kaneohe Ranch Company, owned by the Castle Family, held eighteen and leased one).

for control over the ahupua'a of Kahana.[249] The Ranch claimed it had acquired a pasturage lease to thousands of acres of the Hui land.[250] Foster contested the validity of the lease on the grounds that the Hui meeting authorizing the lease had not been legally conducted.[251] The Supreme Court of the Republic of Hawaii remanded the issue to the circuit court for the joinder of additional parties—including the Hui itself through its officers—in order to determine if a valid meeting had been held. The case ultimately settled out of court, with Foster buying out the Ranch and canceling the lease before any further proceedings were held.[252] Nonetheless, the Court made several pronouncements supporting the legal powers of a Hui. Reiterating its holding in *Burrows* eighteen years earlier, the Court held that a Hui "pursuant to its rules and customs" had "certain powers as an association, which do not belong to its members individually as tenants in common."[253] "This power, analogous to that of a partnership and not incident to tenancy in common, has been recognized in principle by the Court."[254] Although a Hui was not formally a partnership or a corporation under the law, when it came to the power to bind its members and form contracts, the same "principle of equity and natural justice" should apply.[255]

Foster v. Kaneohe Ranch Company highlighted the growing financial value of Hui lands as well as the looming political and legal pressures brought to bear in pursuit of their control. *Foster v. Kaneohe Ranch Company* also foreshadowed a second case involving the Kahana Hui that ran directly contrary to prior holdings, and could be deemed the first nail in the coffin of the Land Hui as an institution.[256] *Foster v. Kaneohe Ranch* would also be the last Hui case heard by the Judd Court.[257]

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[249] STAUFFER, *supra* note 28, at 172.

[250] *Id.* at 171.

[251] *Foster*, 12 Haw. at 363.

[252] *Id.* at 365; *see also* STAUFFER, *supra* note 29, at 173.

[253] *Foster*, 12 Haw. at 364.

[254] *Id.*

[255] *Id.*

[256] Stauffer contends that the lease between Kaneohe Ranch and the Kahana Hui had a value of nearly $1 million annually when adjusted to reflect currency values in the year 2000. STAUFFER, *supra* note 29, at 171 (2004). The "second case involving the Kahana Hui," *In Re Assessment of Taxes, Hui of Kahana*, 21 Haw. 676 (1913), involved water rights valued at $400,000 even in 1913. *See* discussion *infra* Part VII.A.

[257] In *Foster*, although E.P. Dole sat in place of Judd, who died on May 20, 1900 just sixteen days after the decision, the other two justices, Frear and Whiting had been on the Court with Judd for the earlier case of *Lui v. Kaleikini*. *See Foster*, 12 Haw. at 363; Lui v. Keleikini, 10 Haw. 391 (1896). In 1913, when the next Hui case, *In Re Taxes of Kahana*, was heard, three new justices, Robertson, Perry, and Bolt, all appointed after the overthrow of the Hawaiian Kingdom, sat on the Court. *See* In Re Assessment of Taxes, Hui of Kahana,

A. Hui Do Not Have Standing: Reversing Thirty Years of Hawai'i Supreme Court Precedent

Prior to 1913 and the case *In Re Assessment of Taxes, Hui of Kahana,* the Kahana Hui on O'ahu—with Foster's consent—leased out water rights for "surplus water" above the 774 foot elevation to the Waiāhole Water Company for a period of fifty years at $40,000 per year.[258] At issue before the court was the 1913 tax assessment against the Hui of Kahana.[259] The contested assessment involved the valuation of $400,000 placed on this "surplus water" by the Territory of Hawai'i.[260] Rather than rule on the validity of the assessment itself, the Court held that the tax assessment was invalid because "[t]he 'Hui of Kahana' as such is not a legal entity. It is neither a corporation nor a partnership. The title to its lands is not in a trustee for its use and benefit but is held in undivided interests by the members themselves as tenants in common."[261] Because Hui were not affirmatively corporations or partnerships—both of which are concepts of American and English common-law—they were, from a legal perspective, nothing but a collection of individuals.[262] Although the Judiciary Act of 1892, as well as common practice prior to 1892, had established that the common law of England applied in Hawai'i except "as otherwise provided by the Hawaiian judicial precedent, or established by Hawaiian national usage," the Court chose to ignore decades of accepted Hawaiian common practice as expressed in Huis throughout Hawai'i.[263] With this simple pronouncement, the Court undermined the deference that had previously been demonstrated in *Burrows, Mahoe, Awa,* and *Lui.* Not only was the Court's ruling a stark departure from its own precedent, but it was also contrary to the established practice of issuing collective tax assessments

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21 Haw. 676 (1913).

[258] *In Re Taxes of Kahana*, 21 Haw. at 677-78. For specific information on the water lease *See infra* Part VII.B (discussing Foster v. Waiahole Water Co., 25 Haw. 726 (1921). "Surplus waters" refers to amounts of water beyond what is necessary for irrigation and domestic purposes. *See Foster*, 25 Haw. at 731-32. The later irrigation and domestic water are deemed an entitlement connected, or appurtenant, to the ownership of the land. *Id.* The surplus water was by definition considered "extra" water and therefore available for sale, lease, or simple expropriation by upstream parties. *Id. See also* D. KAPUA'ALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI'I 13 (2009). Under Hawaii's current framework for water resource management, surplus water rights no longer exist. *Id.*

[259] *In Re Taxes of Kahana*, 21 Haw. at 677.

[260] *Id.*

[261] *Id.* at 678.

[262] *See id.*

[263] *See supra* note 12.

that were paid out of Hui treasuries.[264] The Kahana tax decision delegitimized the Hui as an organizational entity, and laid the groundwork for two subsequent cases that further undermined any powers of self-management remaining in those Hui that still persisted.[265]

B. Downplaying Contract Rights Underlying Hui Agreements In Favor of Individual Property Rights.

In 1921, two cases, *Foster v. Waiahole Water Co.* and *Smythe v. Takara*, followed each other in close succession and established, respectively, that Hui members had no power to prevent or regulate another member's sale of their Hui interest; and that the elected Hui leadership had no legal standing to sue to enforce a Hui's constitution or bylaws.[266] Both cases relied on *In Re Taxes of Kahana* as an analytical starting point.[267]

As noted in Part VII.A, *supra*, Foster and the Kahana Hui had agreed on December 21, 1912 to lease the "surplus water" of the ahupua'a, above the 774-foot elevation, to the Waiāhole Water Company for a period of fifty years for $40,000 per year.[268] The water was subsequently transferred by tunnels and flumes to the dry and expansive Ewa plain on the south side of the Ko'olau Mountain range for sugar production.[269] Aware that there was significant additional water below the 774-foot elevation in Kahana, Lincoln L. McCandless began buying shares in the Kahana Hui as well as land in the neighboring ahupua'a of Waiāhole and Waikāne.[270] On December 30, 1912, McCandless and his Waikāne Water Company sold his share of the water above the 450-foot elevation in all three ahupua'a to the Waiāhole Water Company.[271] Thus, the Waiāhole Water Company gained

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[264] Watson, *supra* note 8, at 5 (1932) (typescript, originally published in Star-Bulletin). *See also* Meeting Minutes of Sept., 15, 188, HUI KŪAI 'ĀINA O WAINIHA, *supra* note 135, at 111-113 (translation from Hawaiian by Ka'ano'i Walk and Puakea Nogelmeier, on file with author) (listing the members and amounts contributed to the Hui's collective tax in 1883).

[265] *See infra* Part VII.B (discussing what were, substantively and chronologically, the final two Hawaiian Land Hui cases decided by the Hawai'i Supreme Court).

[266] Foster v. Waiahole Water Co., 25 Haw. 726 (1921); Smythe v. Takara, 26 Haw. 69 (1921) [hereinafter *Maalo*].

[267] *See Foster*, 25 Haw. at 730; *Maalo*, 26 Haw. at 71 (citing *In Re Taxes of Kahana* for the proposition that Hui are not legal entities).

[268] *Foster*, 25 Haw. at 727.

[269] STAUFFER, *supra* note 29, at 190-91; *see also* WILCOX, *supra* note 6, at 105-08 (describing in detail the construction and annual flow of the Waiāhole Water Company's ditch and tunnel system).

[270] STAUFFER, *supra* note 29, at 190.

[271] *Foster*, 25 Haw. at 728. The court records indicate McCandless sold his water interests for $257,500. *Id.*

access to additional water beyond what was entailed in its first 1912 lease from the Kahana Hui.[272]

In *Foster v. Waiahole*, Foster, who owned 9/10ths of the shares of the Kahana Hui, sought to invalidate McCandless's sale to Waiāhole on the grounds that a co-tenant cannot convey an easement with respect to the lands of the co-tenancy.[273] This rule was invoked on the grounds that a cotenant may not transfer an interest that interferes with the rights of other co-tenants and that such a conveyance "is an attempt to set aside and partition a part of the common property of the cotenancy and is thus an encroachment upon the rights of the other cotenants."[274] The court held that it could not comprehend how Foster and other cotenants had been detrimentally affected by McCandless's sale of his water rights since it involved "surplus water" only, completely removed from prescriptive or riparian waters connected to the lands of the ahupua'a.[275] Without a showing of harm, Foster had no grounds to challenge McCandless's sale because

> [i]t is settled law that one cotenant may transfer his undivided interest [or any part thereof] to a third person and it is the modern rule . . . of this jurisdiction that one of the cotenants may by metes and bounds convey a specific part of the common property . . . voidable by the nonassenting tenants in common to the extent only that the conveyance may impair or vary their rights.[276]

Because there was no "impairment of or, encroachment upon," Mrs. Foster's rights, it would have been "inequitable and fundamentally wrong" to "take away from the [water] company valuable property rights which it has acquired in good faith and for which it has paid a very substantial consideration."[277] Putting aside the dubious assertion that there was no harm to Mrs. Foster or the Kahana Hui's other remaining co-tenants,[278] the most salient feature of the Court's ruling with respect to the Hui was the absence of any actual respect for the Hui in the Court's opinion. The Court held, based upon *In Re Taxes of Kahana*, that a Hui had no legal existence;

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[272] *Id.*

[273] *Id.* at 730. At the time of the lawsuit, McCandless claimed to control 1/16th of the Kahana Hui shares. *Id.* at 727.

[274] *Id.* at 733.

[275] *Id.* at 734.

[276] *Id. at* 736.

[277] *Id.* at 737.

[278] The extraction of water associated with the Waiāhole Water Company tunnel system has virtually destroyed the freshwater hydrology of Kahana, leaving streams and 'auwai dry during certain times of year and flow drastically reduced. *See* STAUFFER, *supra* note 29, at 192.

that it was simply a synonym for tenancy in common; and that the court need only deal with the property rights of individual tenants.[279]

The final case before the Supreme Court that sealed the fate of land Hui as legal and cultural institutions came just five months after *Foster v. Waiahole*.[280] On Maui, G. M. Maalo, the owner of several shares in the Hui Kū'ai 'Āina o Peahi, executed a lease for sixty-three acres of common land to J. Takara.[281] This was part of the "wild scramble" for pineapple lands described by Leslie J. Watson.[282] Maalo's lease not only exceed what Maalo had been allotted; it was also executed without the knowledge or consent of the other Hui members, in direct violation of the Hui's constitution, which required that any lease of the Hui's lands be carried out by the executive committee and with the approval of two-thirds of the members.[283] William Smythe, the acting Luna of the Peahi Hui at the time, and the other Hui officers filed suit to invalidate Takara's lease.[284] Again citing *In Re Taxes of Kahana*, the Court held first that the Peahi Hui had no legal status and therefore the officers of the Hui had no standing to either sue or be sued on behalf of the Hui.[285] Although two-thirds of the Hui membership had voted to authorize Smythe and the other officers to bring this specific suit on their behalf, this attempt "to clothe the petitioners with authority to proceed against the respondent" was insufficient as a matter of law to bind all the Hui members to the Court's decision.[286]

In Smythe's opening brief, his attorneys reasoned:

> Under Hawaiian law, Huis and rules and regulations thereunder are regarded with peculiar favor. The Hui is [a] Hawaiian institution, honored by age and custom, and sanctioned by the Law, and as [a] Hawaiian institution, it is invested with special rights and privileges. Decisions in Hui cases by the Hawaiian courts all point to this conclusion. It has been established law in the Territory for many years that the contractual rights created by the Constitution and Rules of Huis are enforceable.[287]

In support of this argument, they cited *Burrows, Lui, Foster v. Kaneohe,* and *Mahoe*, which recognized the legal power of a Hui to enforce its

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[279] *See Foster*, 25 Haw. at 730.

[280] *See Maalo*, 26 Haw. 69 (1921). This case was described by contemporary observers as the "death knell" of Hawaiian Hui lands. Watson, *supra* note 8, at 15.

[281] *Maalo*, 26 Haw. at 71.

[282] Watson, *supra* note 8, at 15.

[283] *Maalo*, 26 Haw. at 71.

[284] *Id.*

[285] *Id.* at 71-72.

[286] *Id.* at 72.

[287] Opening Brief for Petitioner-Appellants at 5, *Maalo*, 26 Haw. 69 (No. 1314) (on file with the Hawai'i Supreme Court).

Constitution and bylaws, specify allotments to its members, and manage its common lands.[288] The arguments fell on deaf ears. The Court followed *Foster v. Waiahole's* ruling that "[t]he law is a progressive science and while the views of courts, judges and text writers are entitled to respect a strict adherence to precedent would prevent all progress in the law."[289] Evidently, "progress" required that land and water be taken from Hui and made available to plantations.

The "Hui problem" of complex, culturally-based multiparty titles managed by internal constitutions and bylaws adverse to the free alienability of land stood in the way of progress—defined as plantation development of Hui lands and water resources.[290] The law had also evolved in a manner that rendered Hui organizational entities of dubious worth to their members, leaving them unable to defend any semblance of communal rights to Hui lands and leaving their individual interest in a tenuous situation if the Court was prepared to ignore its prior precedent and allow any member to sell off or lease out specific sections of the common tenancy.[291]

C. The Partition Act of 1923

Ironically, the statute that provided the legal vehicle to end the Hui movement in Hawai'i was developed in a defensive attempt to preserve the remaining rights of Hui members.[292] The law firm of Smith, Warren, Stanley, and Vitousek, who had represented Smythe and the Peahi Hui in *Maalo* and had helped Foster in her Hui work, authored a study of the status of Hawaiian Land Hui.[293] This study ultimately resulted in the "Partition Act" of 1923.[294]

The Act provided generally for suits of partition "[w]hen two or more persons hold or are in possession of real property as joint tenants or as tenants in common . . . a suit in equity may be brought by any one or more of them in circuit court."[295] Partition was not new. It does appear,

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[288] *Id.* at 5-7 (citing *Burrows*, 4 Haw. at 465; *Lui*, 10 Haw. at 393; *Foster* 12 Haw. at 364; *Mahoe*, 4 Haw. at 486); *see also* Scott v. Pilipo, 22 Haw. 174, 180 (1914) (recognizing the legal competency of internal Hui agreements).

[289] Foster v. Waiahole, 25 Haw. 726, 736 (1921).

[290] *See* Watson, *supra* note 8, at 14-15.

[291] *See* STAUFFER, *supra* note 29, at 201-02.

[292] *Id.* at 202.

[293] *Id.* at 202; Watson, *supra* note 8, at 16.

[294] An Act to Provide for the Partition of Real Estate, 1923 Haw. Sess. Laws 216; *see also* Watson, *supra* note 8, at 16 (describing the roles of Smith, Warren, Stanley, and Vitousek).

[295] 1923 Haw. Sess. Laws 216.

however, that prior to the Partition Act of 1923, it was a complex process subject to litigation and frustration.[296] In addition to streamlining the process, the 1923 Act contained several elements specifically designed to protect Hui members whose property interests might not otherwise have been recognized by a court.[297] Perhaps in recognition of the less than clear title of a Hui share passed down over several generations, section two defined the parties both necessary and eligible to join any suit of partition very broadly to include "[a]ny person having or claiming to have any legal or equitable estate, right or interest in the property or any part thereof."[298] Likewise, sections five and nine, respectively, required actual notice to all known parties and mandated that the court account for and preserve the rights of all unknown or unserved parties.[299] Finally, section ten addressed the validity of Hui allotments where the "legal title of a claimant to any particular share or interest" may be lacking "but the claimant has color of title" and should be treated as a legal owner to a particular share or parcel.[300]

According to Watson, several of the larger Huis that occupied valuable agricultural land such as the Peahi and Mailepai Huis on Maui and the Moloa'a Hui on Kaua'i, were subject to partition proceedings fairly quickly after the passage of the 1923 Act.[301] The Wainiha Hui, however, persisted for another twenty-five years until McBryde Sugar Co. initiated a suit for partition to acquire even more rights to the Wainiha Hui's water and almost two-thirds of the Hui's land base.

VIII. WAINIHA HUI AND THE PARTITION OF 1947

In 1921, McBryde Sugar Company began buying up shares of the Wainiha Hui. Although there is no direct evidence in this regard, one hypothesis regarding why McBryde began accumulating shares in 1921, eighteen years after signing a fifty-year lease to certain water rights in Wainiha, is that the Supreme Court's ruling in *Foster v. Waiāhole* had just determined that a Hui could not control the sale or lease of water rights by a Hui member. Regardless of the underlying motivation, in March of 1942,

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[296] *See* Pilipo v. Scott, 21 Haw..609, 617 (1913) ("[P]laintiff-in error contends that the 'tying up [of] the partition proceedings' by the defendant-in-error has prevented his client from obtaining the beneficial use of the premises to which the lease entitled her.").

[297] *See infra* notes 301-303 and accompanying text (describing the elements of the Partition Act).

[298] 1923 Haw. Sess. Laws 216.

[299] 1923 Haw. Sess. Laws 217-19.

[300] 1923 Haw. Sess. Laws 220.

[301] Watson, *supra* note 8, at 16.

when the attorneys of Stanley, Vitousek, Pratt, and Winn filed a Bill for Partition for Wainiha on behalf of McBryde, the company claimed an ownership of 47.7656/71 interest in the Hui lands of Wainiha.[302] McBryde acquired slightly over ten shares in the Hui in two transactions in 1922, purchasing just under three shares from A. Menefoglio and just over seven shares from the estate of A. Wilcox.[303] The additional accumulation of Hui shares between 1921 and 1942 was facilitated by an "allotment guarantee" system created by the law firm of Smith Warren, Stanley, and Vitousek.[304] "Under the 'allotment guarantee' system, parties desiring to retain their allotments but willing to otherwise convey" their common interest in the ahupua'a to McBryde received a deed from the company effectively ensuring that they would receive ownership of their allotment in the event of a future partition of the Hui lands.[305] In effect, Hui members sold McBryde any common interest they had in the ahupua'a in exchange for a guarantee that they would be able to retain their individual house and/or farm lot in any future partition.[306] A review of McBryde's purchases between 1922 and 1930 shows that the average going price for one of the seventy-one existing shares of the Wainiha Hui was approximately $1,000.[307]

In the resulting Final Decree of Partition issued on September 1, 1947, some 250 distinct lots were created in the lower valley.[308] In some instances a single awardee received multiple lots; in others, a single lot was

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[302] Bill for Partition, Equity Proceeding No. 109, Filed March 25, 1942, at 17 (on file with the Hawai'i Fifth Circuit Court) [hereinafter *Bill for Partition*]. At the time McBryde filed for Partition, the company had also acquired eight separate kuleana parcels in the valley. *Id.* at 9-12.

[303] *See* Deed of Conveyance from A. Menefoglio to McBryde Sugar, Oct. 1, 1922, Book 653, Page 447 (conveying 2.915 shares for $2000) (on file with State of Hawai'i Bureau of Conveyance); Deed of Conveyance from A. Wilcox Estate to McBryde Sugar, Dec. 11, 1922, Book 666, Page 174 (conveying 7.26 shares for $4,732) (on file with State of Hawai'i Bureau of Conveyance).

[304] Watson, *supra* note 8, at 34.

[305] *Id.*

[306] *Id.*

[307] *See, e.g.*, Deed of Conveyance from James K. Lota & Wife to McBryde Sugar, Nov. 25, 1927, Book 911, Page 293 (transfering 1/2 of share no. 13, originally held by Kawaanui, for $500); Deed of Conveyance from Augustus F. Knudsen (trustee) to McBryde Sugar, June 9, 1928, Book 946, Page 312 (transferring share no. 15, originally held by Kumahakaua for $1000); Deed of Conveyance from May T. Pa to McBryde Sugar, Nov. 27, 1929, Book 1041, Page 415 (transferring share no. 23 originally held by Kealaula for $1000) (all records on file with the State of Hawai'i Bureau of Conveyance).

[308] Short Form of Final Decree in Partition, McBryde Sugar Co. v. Arona, Eq. No. 109, 3-10 (Circuit Court of the Fifth Circuit, Sept. 1, 1947).

awarded to twenty or more individuals in fractional shares.[309] In order to secure any lot, however, all claimants or parties were required to pay a proportional share of the $22,831 in costs incurred by McBryde in carrying out the partition proceedings.[310] If payment was not made within sixty-days, the lot in question would revert to McBryde and the defaulting awardee would receive the difference between costs owed to McBryde and the assessed value of the lot.[311]

Aylmer and Sinclair Robinson were collectively the second largest recipients of land, awarded just less than 240 acres.[312] The big winner, unsurprisingly, was McBryde, which received over 10,000 acres or the upper two-thirds of the entire ahupua'a based upon their ownership of 47.7656/71 Hui shares at the time of partition.[313] The court determined, as McBryde requested in the Bill for Partition, that to maintain the full value of the petitioner's water rights the "upper forest and watershed together with use rights, rights of way for aqueducts, roads, trails and power transmission lines and the site for the powerhouse on the lower lands" should be kept intact "and set aside in partition unto their present lessee and user[.]"[314] With this decree, and as a result of its accumulation of just over sixty-seven percent of the seventy-one Hui shares, McBryde acquired ownership of the upper Wainiha Valley and its water six years before its 1903 lease for Wainiha water rights was set to expire.[315]

To McBryde's credit, its bill to the court requested that the court protect the extensive 'auwai network that still existed in the valley,

> That upon the lower lands on which are situated all of the allotted lands, are certain irrigation ditches which were constructed many years ago and which have been continuously in use for many years past in diverting a portion of the water of said Wainiha River for the purpose of irrigating said lower lands; that the continuation of the right to such use of a portion of the water in said

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[309] *See, e.g., id.* at 3 (awarding seven separate lots to Lily Kanehe Ako and a single lot to multiple members of the Bailey-Hoe family).

[310] Report of Commissioners, McBryde Sugar Co. v. Aarona, Exhibit G, Eq. No. 109 (Cir. Crt., Fifth Cir., Terr. of Haw., May 24, 1947); *see also* Short form Final Decree in Partition, McBryde Sugar Company v. Arona, Eq. No 109, 11 (Circuit Court of the Fifth Circuit, Sept. 1, 1947).

[311] Report of Commissioners, *supra* note 313, at 11-12.

[312] *Id.* at 9.

[313] *Id.* at 8.

[314] *Bill for Partition*, *supra* note 305, at 36.

[315] *Compare* McBryde's fifty-year water rights lease signed in 1903, *supra* notes 192-193, *with* Final Decree in Partition, McBryde Sugar Co. v. Arona, Eq. No. 109 (Cir. Court of the Fifth Judicial Cir. Terr. of Haw., Nov. 21, 1947).

> Wainiha River will enhance the value of said allotted lands and such rights should be made appurtenant to said allotted lands.[316]

The court agreed and subsequent deeds contain the language "subject further to the free flowage of waters in all 'auwais, ditches and streams in favor of all those entitled thereto."[317] Additionally, McBryde requested and the court agreed that the Wainiha River should be retained as a common fishery open to all residents of the ahupua'a.[318]

The court records contain only seven responses to McBryde's Bill for Partition submitted by other interested parties.[319] Based upon these submissions only, it appears that there was no general objection or outcry to the partition from the community.[320] The responses are generally limited to contesting, on three occasions, the boundaries of specific lots and separate complaints by Robinson and Rice that allotments should receive water rights in 'auwai based only upon their established use.[321] Whether this lack of broader community involvement indicates approval of, simple acquiescence to, or disenfranchisement from the partition process is uncertain. The sole response to McBryde's Bill for Partition that spoke to traditional Hawaiian uses of the communal lands of Wainiha came from Robert Kanealii.[322] According to the court record, Kanealii inquired as to fishing and hunting in the upper valley.[323] He was told he would now require the permission of the new landowners to access what had previously been open to all.[324]

Based upon the approximate value of $1000 per share, McBryde Sugar was able to judicially acquire over 10,000 acres of Wainiha valley for roughly $48,000.[325] According to the Bureau of Labor Statistics, this $48,000 "purchase" price, adjusted for inflation since 1923 when McBryde began accumulating shares, is the equivalent of approximately $627,276 today.[326] To grasp the relative bargain of McBryde's land acquisition in

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316 *Bill for Partition, supra* note 305, at 49-50.

317 Exhibit "A" to a deed conveying Lot 253 of the Wainiha Hui Partition, being also a portion of R.P. 7194, L.C. Aw. 11216, Apana 5 to M. Kekauonohi. This stipulation has not, however, prevented the loss over time of virtually all of the once extensive 'auwai system in Wainiha. *See infra* note 332.

318 *Bill for Partition, supra* note 305, at 51.

319 *See* Bill for Partition Answers, Equity Proceeding No. 109, Filed March 25, 1942 (on file with the Hawai'i Fifth Circuit Court).

320 *See id.*

321 *See id.* at 172.

322 *See id.* at 173.

323 *Id.*

324 *Id.*

325 *See supra* note 310.

326 *Consumer Price Index Inflation Calculator*, UNITED STATES DEPARTMENT OF LABOR,

current context and purely financial terms, in April of 2011 six separate pieces of vacant land, of roughly 2.5 acres each, were for sale in Wainiha Valley.[327] The asking prices for these parcels ranged from $369,000 to $800,000.[328] Thus, McBryde acquired over 10,000 acres of land, with associated water rights, for the rough, present day equivalent cost of a 2.5-acre lot.

IX. CONCLUSION & WAINIHA TODAY

Wainiha valley today contains only three remaining areas with functioning 'auwai and kalo cultivation totaling around only twelve acres.[329] Old-time Hawaiian families still own all three areas.[330] In a sense, they are each miniature family land Hui, protected or cursed depending on one's point of view, by complex webs of fractional ownership by large family groups. The larger of the two areas, at the makai (ocean)[331] end of the valley, is currently struggling against foreclosure proceedings, instituted by the county of Kaua'i, for back property taxes and may possibly be lost to foreclosure.[332] The second five-acre farm further up the valley tenuously

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BUREAU OF LABOR STATISTICS http://stats.bls.gov/data/ inflation_calculator.htm (last visited April 25, 2011). Adjusting the same $48,000 "purchase" price from 1947, the year of partition, gives a present "purchase" value of $481,005. *Id.* These comparative values adjusted for inflation are offered only as broad indicators and may not precisely mirror the appreciation of real estate values.

[327] *See* HAWAII LIFE, http://www.hawaiilife.com (last visited April 20, 2011). Properties listed for sale on Apr. 20, 2011 as Multiple Listing Service ("MLS") 235525, Tax Map Key ("TMK") 4-5-8-007-012, 2.8 ac. for $800,000; MLS 200634, TMK 4-5-8-005-023, 2.5 ac. for $795,000; MLS 230717, TMK 4-5-8-006-019, 2.6 ac. for $525,000; MLS 231756, TMK 4-5-8-007-021, 2.2 ac. for $429,000; MLS 244227, TMK 4-5-8-005-027, 2.5 ac. for $369,900.

[328] *Id.*

[329] Telephone interview with Chandler Arthur Forrest, resident of Wainiha and descendant of Mahuiki, one of the original members of the Wainiha Hui (Apr. 21, 2011). The remaining cultivated areas with functioning 'auwai correspond roughly with Lot Nos. 267, 280/245, 255 created by McBryde's 1947 partition proceedings.

[330] *Id.*

[331] PUKUI ET AL., *supra* note 2, at 225.

[332] *See supra* note 332. Tax law played an integral part in the demise of Hawaiian Land Hui just as it continues today to play a role in the dispossession of Hawaiians from their traditional lands. *See* discussion *supra* Part VI.A (addressing *In Re Taxes of Kahana*). *See also* Adam Roversi, *Kuleana Property Tax Exemption Handbook: Mitigating the Continued Dispossession of Native Hawaiian Landowners* 10 (Hawai'i Community Stewardship Network 2010) (describing the adoption by every county in Hawai'i of tax exemption ordinances to reduce property tax on traditional Kuleana property based on the finding that "[m]any Hawaiian families living on kuleana land face loss of their land, and possible homelessness, because they cannot afford the real property tax payments.") (on file with the

persists, but has had intermittent conflicts with an upstream owner of a vacation rental property who has interfered with the traditional flow of water in the property's 'auwai.[333] The third smaller lo'i area has had similar water problems with an upstream property owner, who disrupted the 'auwai in order to build decorative ponds and water features for a luxury home site.[334] Just as Robert Kanealii feared in 1947, barbed wire and no trespassing signs block community access to the undeveloped upper valley areas, preventing hunting, fishing, and the exercise of any traditional or customary gathering rights. These areas are still owned by Robinson and McBryde.[335]

If "the conventional wisdom has been that the [Native Hawaiian] people" lost their lands "rapidly—indeed almost immediately [post-Māhele]—through ignorance of Western law and the sharp practices of Haole (whites)," the history of the Wainiha Hui runs counter to the conventional wisdom.[336] The Hawaiian and Native Hawaiian people of Wainiha managed to adapt and adopt new forms of law to maintain their community for almost one hundred years after the Māhele. The privatization of land did not in and of itself doom the maka'āinana of Wainiha even though it quickly led to the dispossession of the original ali'i awardee. The Native Hawaiian and Hawaiian residents of Wainiha came together to shape their own future rather than have it imposed upon them. Although the Hui Kū'ai 'Āina o Wainiha ultimately failed, its legacy continued by ensuring that even in partition the members of the community would retain title to their individual house and farm lots. Wainiha remains one of the few communities on the north shore of Kaua'i with a large Native Hawaiian population.

Between *Burrows* in 1882 and *Maalo* in 1921, the Hawai'i Supreme Court had numerous occasions to consider how it would balance Hawaiian tradition and custom with the common law. Ultimately, with respect to Hawaiian Land Hui and communal control of land, American common law was given precedence and Hawaiian tradition was pushed to the wayside despite the legal requirements that Hawaiian law and tradition be accorded respect within the evolving modern system. These traditions, however, are not completely dead, and the efforts of the members of the Hui Kū'ai 'Āina o Wainiha contain some lessons for modern Hawai'i.

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author).

[333] *See supra* note 332.

[334] *See* Summary Disposition Order at 18, Young v. Lee (Haw. Ct. App. 2010) (No. 28392), *available at* http://www.courts.state.hi.us/docs/opin_ord/ica/2010/apr/ica28392sdoada.pdf.

[335] *See supra* note 332.

[336] STAUFFER, *supra* note 29, at 1-2.

Communal or community control of land and resources is not ancient history. It was the practice of the remaining Land Hui, even after World War II, and, in the case of the Hā'ena Hui neighboring Wainiha, until 1965.[337] Property law in Hawai'i only recently evolved to largely exclude the traditional values expressed by Land Hui. With the continued failure of statewide bureaucracies to deal adequately with the protection of fisheries, water quality, the preservation of open space, and issues of zoning and development, it is perhaps not inconceivable that property law might continue to evolve to re-encompass some of these values.

[337] *See* ANDRADE, *supra* note 170, at 116-17.

APPENDICES

Appendix A: Partial Summary of Hawaiian Land Huis

Though not a complete list, some prominent Hawaiian land Hui covering at least 40,000 acres included:

Hui Name	Location	Acreage	Source
Peahi	Maui	2000	1
Mailepai	Maui	2825	1
Huelo	Maui	1500	1
Ulumalu	Maui	1500	1
Pa'uwela	Maui	210	1
Moloa'a	Kaua'i	1500+	1
Hamakuapoko	Maui	929	1
Wainiha	Kaua'i	15,173	2
Hā'ena	Kaua'i	2500	3
Kahana	O'ahu	5,050	4
Waikāne	O'ahu	?	5
Mānoa	O'ahu	?	6
Hōlualoa	Hawai'i	7,330	7
Kalii & Pauwalu-mauka	O'ahu	115	8
Paauwalu-makai	O'ahu	151.65	8
Paehala	O'ahu	43.5	8
Total Acreage		40,827.15	

Sources:

1. Leslie J. Watson, *Old Hawaiian Land Huis- Their Development and Dissolution* 20-30 (1932) (typescript, originally published in Star-Bulletin). Watson does not provide precise acreage for the Moloaa hui stating it was "in the 1500 to 2500 acre range."

2. *Bill for Partition*, Equity Proceeding No. 109, "Wainiha Hui Partition," 12 (May 25, 1942).

3. CARLOS ANDRADE, HĀ'ENA; THROUGH THE EYES OF THE ANCESTORS 106 (2008).

4. *In Re Assessment of Taxes, Hui of Kahana,* 21 Haw. 676, 677 (1913).

5. *Mahoe v. Puka*, 4 Haw. 485 (1882).

6. *Burrows v. Paaluhi*, 4 Haw. 464 (1882)

7. *Pilipo v. Scott*, 21 Haw. 609, 611 (1913).

8. Jocelyn Linnekin, *The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Māhele*, 92 THE JOURNAL OF THE POLYNESIAN SOCIETY 169, 182 (1983).

Appendix B: Founding Members of the Hui Kū'ai 'Āina o Wainiha

Transcribed from a handwritten copy of the deed of conveyance from Castle & Cooke to L. Leka and Others (1877) (on file with the State of Hawai'i Bureau of Conveyance, Book 50, Page 160-62).

1. L. Leka
2. W. Hodge
3. D. Nuuhiwa
4. N. Kauhule
5. Pueo
6. E. Kahuai
7. Makaikai
8. Kulauahia
9. Kuehuehu
10. Kaai
11. Lauki
12. Luhaina
13. Kawaunui
14. Kahakai
15. Kauei
16. Kanehe
17. Ninauhia
18. B. Kukui
19. Lonouea
20. Kekiko
21. Kaukai
22. Kanohi
23. Kealaula
24. Kahawaii
25. J. Kalima
26. Julias Titcomb
27. Mahuiki
28. Kaui
29. A. Pali
30. Kapua
31. Paulike
32. K. Kauealoha
33. W. Wahinehaole
34. Pukoula
35. Maka-huki
36. Kahui
37. Puupea
38. James Lewis
39. Pueueu
40. Chulon Bo
41. A.J. Wilcox
42. James Robinson
43. Peter Hanson
44. Kahea
45. J. Kaikaina
46. Kelekoma
47. M. Kalili
48. Onaona
49. Palaole
50. Lon Haena
51. Kauka II
52. Komaikeano (w)
53. Makalii
54. Kanohuku
55. Keohi
56. Auhea
57. J.W. Lota
58. Kahahele
59. Kumahakaua
60. Kalehua
61. Puuhaalulu
62. Kiui Kamaama
63. Josiah Lauakeae
64. Wahineokapu
65. E. Pahuwai
66. Koka
67. Kalei
68. Waialeale
69. Kalaeloa
70. J. Nuelepo
71. Lonolihue

Appendix C: Kuleana Awardees in the Wainiha Ahupua'a, Halele'a District of Kaua'i[338]

	Awardee	LCA	Size
1.	Kanohi	9801	2 ac.
			2 ac., 30 rods
2.	Kaninui	9076	1 ac., 20 rods
3.	Kaio	9268	1 rood, 9 rods
4.	Kamoolehua	9184	1 ac., 34 rods
5.	Kiwaa	9270	1 rood, 28 rods
			1 rood, 14 rods
6.	Pumaia	9267	1 ac., 2 roods, 2 rods
7.	Kealai	9169	1 ac., 31 rods
8.	Naoi	11053-5	29 rods
			5 ac., 1 rood
9.	Ninaulia	9803	1.5 ac., 20 rods
10.	Kaulahea	9805	1.17 ac.
11.	Keaka	9171	1 ac., 23 rods
			1 ac., 2 roods, 26 rods
			2 ac., 3 roods, 17 rods
			2 ac., 1 rood, 33 rods
12.	Kaioe	11062	2 ac., 3 roods, 7 rods
13.	Kenoi	9796	3 roods, 22 rods
14.	Kimo	11031	38 rods
			1 ac., 2 roods
15.	Kowelo	11063	2 ac.
16.	Lolaiki	9798	2 roods, 14 rods
17.	Nahiniula	3894/10329	1.5 ac., 20 rods
18.	Peiho	10586	2 roods, 14 rods
			3 roods, 39 rods
19.	Kaahu	9215	1 ac.
20.	Kalaepaa	9207	1.25 ac., 37 rods
21.	Piiahiki	10697	1 ac., 1 rood
22.	Auhea	11069	2.5 ac., 22 rods
23.	Napea	9802	1.75 ac., 27 rods
24.	Kapua	9804	3 roods, 32 rods
25.	Kupihea	9170	3.5 ac., 20 rods
26.	Keikinui	9266	1 ac., 15 rods

[338] Taken From INDICES OF AWARDS MADE BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES IN THE HAWAIIAN ISLANDS, 507-08 (Star-Bulletin Press, 1929) (compiled from 1881 index prepared by the Land Commission). One rood =1/4 acre, one rod = 1/160 acre.

27.	Kaohi	9117	1.92 ac.
28.	Kaau	9117-B	3 roods
29.	Kapuumaka	9271	2.25 ac.
30.	Kauhi	9269	2.25 ac.
31.	Naauole	10334	2 roods, 27 rods

Kanahele v. Han: Economic Sufferings Legally Implies Non-Economic Sufferings

Jordyn Toba

I. INTRODUCTION

The theory behind awarding compensatory damages is to restore the person wronged to the position he would be in if the wrong had not been committed.[1] Damages awards in personal injury cases are often subcategorized into special and general damages.[2] Courts also refer to general and special damages as non-economic and economic damages, respectively.[3]

In a personal injury case, it seems logical that a defendant, by his negligent actions, should be responsible not only for the medical expenses the plaintiff incurred, but also for the pain and suffering caused by the defendant. The juries of Hawai'i, however, have not always followed this line of reasoning.[4] In *Kanahele v. Han*,[5] the Supreme Court of Hawai'i made it clear that, in the context of personal injury cases, a jury that awards a plaintiff special damages but no general damages has produced a legally inconsistent verdict.[6] The court in *Kanahele* further held that after a question on general damages has been resubmitted to the jury, an award of one dollar is the "symbolic equivalent" to no award at all.[7] The Supreme Court of Hawai'i also concluded that, in this instance, the trial court did not abuse its discretion in denying plaintiff Kanahele's motions for a new trial when the jury had initially awarded zero general damages, and after it had returned an award of one dollar after being reinstructed.[8]

This note asserts that, although the Supreme Court of Hawai'i was correct in holding that an award for special damages, but only one dollar in general damages is still an inconsistent verdict, it should have held that the

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[1] Tabieros v. Clark Equip. Co., 85 Haw. 336, 389, 944 P.2d 1279, 1332 (1997) (citations omitted).

[2] *See, e.g.*, Bynum v. Magno, 106 Haw. 81, 85-86, 101 P.3d 1149, 1153-54 (2004) (citing Ellis v. Crockett, 51 Haw. 45, 50, 451 P.2d 814, 891 (1969)).

[3] Kienker v. Bauer, 110 Haw. 97, 102, 129 P.3d 1125, 1130 (2006), *superseded by statute*, HAW. REV. STAT. §§ 663-10.5, 10.9, *as recognized in* Kaho'ohanohano v. Dept. of Human Servs., State of Haw., 117 Haw. 262, 309-10, 178 P.3d 538, 585-86 (2008).

[4] *E.g.*, Dunbar v. Thompson, 79 Haw. App. 306, 901 P.2d 1285 (1995).

[5] 125 Haw. 446, 263 P.3d 726 (2011).

[6] *Id.*

[7] *Id.* at 449, 263 P.3d at 729.

[8] *Id.* at 448-49, 263 P.3d at 728-29.

trial court abused its discretion in denying Kanahele's second motion for a new trial. Part II discusses the facts and procedural posture. Part III explains the law regarding inconsistent awards of special and general damages in Hawai'i before *Kanahele*. Part IV discusses the Hawai'i Supreme Court's analysis of *Kanahele* and its implications for future cases. Part V examines the Supreme Court of Hawaii's holding to affirm the trial court's decision to deny Kanahele's motion for a new trial after the jury had spoken. Finally, Part VI proposes jury instructions that will objectively inform the jury of the relationship between special and general damages in order to further promote judicial fairness and efficiency.

II. BACKGROUND

A. The Accident

On the morning of December 16, 2003, Gregory Kanahele, Jr. ("Kanahele"), a minor, was pushing his motor scooter through a crosswalk when he was struck by a vehicle driven by James Han ("Han").[9] The impact left a crack that extended across Han's windshield and caused the handlebar of Kanahele's scooter to go through his cheek.[10]

Dr. Timothy McLaughlin ("Dr. McLaughlin") "consulted, evaluated, and managed [Kanahele's] injury and saw [him] after the incident."[11] Among Kanahele's multiple injuries was a "'complex laceration' of his cheek" and a two-inch laceration that "went through the mandible and up [his] cheek."[12] "There was also ripping of the 'buccal mucosa'[13] and gums, that caused a 'gaping wound' inside the mouth."[14] In order to treat this wound, "Dr. McLaughlin stated that he performed a complex closure with an advancement flap[,]" a two-hour procedure in which "he used dozens of sutures."[15] Kanahele received treatment for his injuries from December 16, 2003 to September 3, 2004, and ultimately incurred a total of $12,280.41 in accident-related medical expenses.[16]

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[9] *Id.* at 449, 263 P.3d at 729.

[10] *Id.*

[11] *Id.* (internal quotations omitted).

[12] *Id.* (internal footnotes omitted).

[13] *Id.* "Dr. McLaughlin explained that the buccal mucosa refers to the lining of the inside of the mouth." *Id.* at 449 n.4, 263 P.3d at 729 n.4.

[14] *Id.* at 449, 263 P.3d at 729.

[15] *Id.* (internal quotation marks and brackets omitted).

[16] *Id.* at 450, 263 P.3d at 730.

B. Procedural Posture

In April 2006, Kanahele filed a complaint against Han alleging that Han's negligent conduct had caused the accident from which Kanahele sustained "severe physical injuries, pain, suffering, serious emotional distress, and loss of enjoyment of life."[17] During the jury trial, Kanahele played the videotaped deposition of Dr. McLaughlin and, according to Dr. McLaughlin, "when [Kanahele] arrived at the hospital, he was in 'mild to moderate distress' and in 'pain.'"[18]

On March 3, 2008, the court gave the following instructions to the jury:

> [G]eneral damages are those damages which fairly and adequately compensate plaintiff(s) for any past, present, and reasonably probable future disability, pain, and emotional distress caused by the injuries sustained, whereas special damages are those that can be calculated precisely or can be determined . . . with reasonable certainty from the evidence . . . . [P]ain is subjective, and medical science may or may not be able to determine whether pain actually exists, but the jury was to decide, considering all the evidence, whether pain did, does and will exist.[19]

The court provided a special verdict form and also instructed the jury that if it found Han liable, then Kanahele was "entitled" to damages that would "fairly and adequately compensate [him] for the injuries [he] suffered."[20]

The jury's special verdict determined that, *inter alia*, Han was liable for his negligent acts,[21] which had resulted in Kanahele's "injury, damage, or loss," and that "[Kanahele] suffered $12,280.41 in special damages but $0 in general damages."[22] Both parties agreed that the verdict was "defective," so the court requested supplemental briefing by the parties and instructed the jury to return two days later, on March 5, 2008, to possibly continue deliberations.[23]

On March 4, 2008, Han filed his supplemental memorandum asserting that the defective verdict could be "rectified" because "(1) the defect was discovered prior to the acceptance of the verdict, entry of judgment, and release of the jurors, and (2) the court had the power to resubmit a

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[17] *Id.* at 449, 263 P.3d at 729.

[18] *Id.*

[19] *Id.* at 450, 263 P.3d at 730 (internal quotation marks and brackets omitted).

[20] *Id.* (internal quotation marks omitted).

[21] *Id.* at 449, 451, 263 P.3d at 729, 731 (The jury determined that Han and Kanahele were both forty-five percent at fault for Kanahele's injuries. Kanahele's father, who was also a witness to the Accident and a party to this suit, was determined to be ten percent at fault).

[22] *Id.* at 451, 263 P.3d at 731.

[23] *Id.*

potentially inconsistent verdict to the jury."[24] Of the three options he proffered to the court, Han requested that the court "send the jury back into deliberation for consideration of the question regarding general damages with a further instruction explaining that some general damages must be awarded if special damages are awarded, and if the jurors cannot agree on an amount, nominal damages would suffice."[25]

On March 5, 2008, Kanahele filed a motion for a mistrial and/or new trial ("March 5 Motion") pursuant to Rules 7[26] and 59[27] of the Hawai'i Rules of Civil Procedure ("HRCP").[28] Kanahele argued that the jury's improper award of special damages but no general damages could not be remedied by additional instruction because "the jury ha[d] spoken and the court [could not] direct them [sic] to change their [sic] mind."[29]

The court denied Kanahele's motion for a new trial, explaining that because the verdict had not been accepted and the jury was still available, a new trial was not an appropriate action and that the court would instead provide the jury with further instructions and a supplemental special verdict form.[30] At 8:36 a.m. on March 5, 2008, the court provided the following additional instructions to the jury:

> As it now stands, your answer . . . on the special verdict form regarding special and general damages of [Kanahele] is inconsistent under the law of this state. That is because you have found personal injury and have accordingly awarded special damages to a party, the law reasons that there must also be some degree of compensable general damages to that party. The degree and amount of such compensable damages is for you to decide.[31]

The supplemental special verdict form given to the jury asked, "What are the total special and general damages of [Kanahele]?"[32] The form had two spaces: one for general damages to be filled out by the jury, and one for

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[24] *Id.*

[25] *Id.*

[26] Haw. R. Civ. P. 7(b) (2008) (Rule 7 describes the forms that motions submitted to the court must comply with).

[27] HAW. R. CIV. P. 59(a)(1)(2008) (provides in relevant part: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State[.]").

[28] *Kanahele*, 125 Haw. at 451, 263 P.3d at 731.

[29] *Id.*

[30] *Id.* at 451-52, 263 P.3d at 731-32.

[31] *Id.* at 452, 263 P.3d at 732.

[32] *Id.*

special damages, the latter of which had already been filled with the jury's previous answer of $12,280.41.[33]

At 9:03 a.m., the jury made the following communication to the court:

> The jury has read the instructions and request [sic] the following clarification. With respect to general damages for [Kanahele], what is the range the law allows? *What is the minimum under the law?*[34]

"By agreement of counsel, the court responded, 'As you have been instructed, the amount of general damages is for you to decide.'"[35]

The jury continued its deliberations and returned at 9:35 a.m. with general damages award of one dollar, an amount that eleven of the twelve jurors had agreed upon.[36] Kanahele filed another motion for a new trial on April 5, 2008 ("April 5 Motion"), but it was denied and judgment was entered in favor of Han against Kanahele on June 30, 2008.[37]

On April 7, 2011, the Intermediate Court of Appeals ("ICA") affirmed the circuit court's ruling, dismissing Kanahele's assertions that the circuit court abused its discretion when it denied [his]:

> [March 5 Motion] for a mistrial and/or a new trial in which [Kanahele] argued that the court should not have issued a supplemental instruction directing it change its verdict to comply with Hawai'i law and award an amount of general damages;
>
> [April 3 Motion] for a new trial in which [Kanahele] argued that the verdict was inconsistent because there was sufficient evidence to award damages for pain and suffering.[38]

The ICA disagreed with Kanahele's first point because "[w]hen an ambiguous or improper verdict is returned by the jury, the court should permit the jury to correct its mistake before it is discharged. . . ."[39] The ICA explained that because the jury had not yet been discharged and was still available, the circuit court did not err in resubmitting the inconsistent verdict, and that doing so actually "best comports with the fair and efficient administration of justice."[40] The ICA also pointed out, "[i]t is a 'well-settled principle in this jurisdiction that the proper amount of damages to be

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[33] Kanahele v. Han, No. SCWC 298, 2011 WL 4842570, at *4 (Haw. Oct. 12, 2011).

[34] *Kanahele*, 125 Haw. at 452, 263 P.3d at 732.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 453, 263 P.3d at 733.

[38] *Id.*

[39] *Id.* (quoting Dias v. Vanek, 67 Haw. 114, 117, 679 P.2d 133, 135 (1984)).

[40] Kanahele v. Han, 125 Haw. 18, *3, 250 P.3d 281, *3 (Haw. App. 2011) (quoting Duk v. MGM Grand Hotel, Inc., 320 F.2d 1052, 1058 (9th Cir. 2003)).

awarded is within the exclusive province of the jury, since jurors are the sole judges of all disputed questions of fact.'"[41]

As to Kanahele's second point on appeal, the ICA concluded that it was not "in a position to determine if the award of $1.00 is inconsistent" because of an "insufficient basis on which to conclude that the jury's award was inconsistent with the evidence."[42] Thus the ICA concluded that the circuit court was acting within its authority by providing a supplemental jury instruction and verdict form so that the jury could correct the inconsistency of its first verdict, and that it was within the province of the jury to decide the amount of general damages to be awarded to Kanahele.[43]

III. HAWAI'I LAW REGARDING THE RELATIONSHIP BETWEEN SPECIAL AND GENERAL DAMAGES BEFORE *KANAHELE V. HAN*

Because the issues set forth in *Kanahele* were that of first impressions for the Supreme Court of Hawai'i, the court relied heavily on the ICA's previous holdings in *Dunbar v. Thompson*[44] and *Walsh v. Chan*.[45]

A. Dunbar v. Thompson

In *Dunbar v. Thompson*, the plaintiff, Elaine Dunbar, was a customer that brought action against a restaurant operator and another customer for injuries sustained in a fight that broke out in the restaurant.[46] At trial, evidence that Dunbar sustained injuries during the fight, including a large laceration to her head that required stitches, was undisputed.[47] After the jury awarded Dunbar $7,000 in special damages but no general damages, she filed a motion for a new trial based on the fact that the jury's finding of the defendant's liability and the awarded damages were "irreconcilably inconsistent."[48] The trial court denied the motion and entered a judgment consistent with the jury's verdict.

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[41] *Id.* at *2, 250 P.3d at *2 (quoting Kato v. Funari, 118 Haw. 375, 381, 191 P.3d 1052, 1058 (2008) (citation omitted) (internal quotation marks, brackets, and ellipsis omitted)).

[42] *Id.* at *3, 250 P.3d at *3 (citation omitted).

[43] *Id.*

[44] 79 Haw. App. 306, 901 P.2d 1285 (1995).

[45] 80 Haw. App. 188, 907 P.2d 774 (App. 1995), *aff'd in part, rev'd in part*, 80 Haw. 212, 908 P.2d 1198 (1995) (The issue on appeal before the Hawai'i Supreme Court was not related to the damages award, but whether the ICA had erred in vacating the trial court's order denying Walsh's motion for a new trial.).

[46] *Dunbar*, 79 Haw. App. at 308-09, 901 P.2d at 1287-88.

[47] *Id.* at 310, 901 P.2d at 1289.

[48] *Id.* at 312, 901 P.2d at 1291.

On appeal, the ICA agreed that the trial court should have granted Dunbar's motion for a new trial.[49] The ICA stated, "A personal injury plaintiff is generally entitled to recover damages for *all the natural and proximate* consequences of the defendant's wrongful act or omission."[50] "General damages 'encompass all the damages which *naturally and necessarily result from a legal wrong done*,'"[51] "and include such items as physical or mental *pain and suffering*, inconvenience, and loss of enjoyment which cannot be measured definitively in monetary terms."[52] "Special damages are the *natural but not the necessary result of an alleged wrong* and . . . are often considered to be synonymous with pecuniary loss and include such items as medical and hospital expenses, loss of earnings, and diminished capacity to work."[53] The court went on to say, "[w]here a defendant's liability to a personal injury plaintiff is established, a jury verdict which awards the plaintiff special damages but no damages for pain and suffering is generally regarded as improper."[54]

Thus, the ICA concluded, "it was inconsistent for the jury not to award [Dunbar] *even a small amount* for pain and suffering, since both special damages for medical expenses and general damages for pain and suffering are largely dependent on the same proof."[55] The ICA then pointed out that Dunbar had "clearly experienced some pain and suffering," and thus the jury's award of zero general damages was "against the great weight of the evidence," and remanded the case for a new trial.[56]

B. Walsh v. Chan

In *Walsh v. Chan*,[57] the plaintiff, Timothy Walsh, sued the defendant, Serena Chan, for damages arising out of a vehicle collision.[58] Walsh sustained a sprained neck and multiple herniated discs, which needed to be

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[49] *Id.* at 308, 901 P.2d at 1287 (emphasis added).

[50] *Id.* at 315, 901 P.2d at 1294 (emphasis added) (citing Todd R. Smyth, Annotation, *Validity of Verdict Awarding Medical Expenses to Personal Injury Plaintiff, But Failing to Award Damages for Pain and Suffering*, 55 A.L.R. 4th 186, 191 (1987)).

[51] *Id.* (emphasis added) (quoting Ellis v. Crockett, 51 Haw. 45, 50, 451 P.2d 814, 819 (1969)).

[52] *Id.* (emphasis added) (citing 22 AM. JR. 2D *Damages* § 41 at 65 (1988)).

[53] *Id.* (emphasis added) (quoting *Ellis*, 51 Haw. at 50, 451 P.2d at 819) (internal quotation marks omitted) (citing 22 AM.JR.2D *Damages* § 41 at 65 (1988)).

[54] *Id.* (citing Smyth, *supra* note 50).

[55] *Id.* (emphasis added).

[56] *Id.* at 315-16, 901 P.2d at 1294-95.

[57] Walsh v. Chan, 80 Haw. App. 188, 907 P. 2d 774 (1995) *aff'd in part rev'd in part*, 80 Haw. 212, 908 P.2d 1198 (1995).

[58] *Id.* at 188-89, 907 P.2d at 774-75.

treated with painful cortisone injections.[59] Chan admitted liability prior to trial and so the only issue presented to the jury was one regarding damages.[60] The jury awarded Walsh $8,600 in special damages but zero general damages.[61] Although Walsh filed a motion for a new trial, the trial court denied his motion and entered a No New Trial Order and a judgment in favor of Chan.[62]

On appeal, the ICA agreed with Walsh's contention that "*the trial court abused its discretion* in the No New Trial Order because the jury awarded $8,600 for special damages and zero for general damages."[63] Turning to its recent opinion in *Dunbar*, the ICA once again recognized the connection between evidence of special damages for medical expenses and general damages for pain and suffering.[64] The court stated, "[W]hen there is uncontroverted evidence of an objective injury, a jury finding that the plaintiff suffered no past physical impairment and pain is against the great weight and preponderance of the evidence."[65] Thus, in reversing the trial court's No New Trial Order, the ICA reasoned,

> By awarding special damages for medical expenses, the jury must have determined that Walsh sustained some injury as a result of [the accident] and[,] . . . [i]f so, it was inconsistent for the jury not to find some pain and suffering for that part of the injury . . . and therefore award at least some amount for general damages.[66]

IV. HAWAI'I SUPREME COURT'S ANALYSIS OF *KANAHELE V. HAN*

On October 12, 2011, the Supreme Court of Hawai'i reversed the ICA's judgment, and held that, in a personal injury case, a jury's verdict awarding special damages but zero general damages is one that is legally inconsistent.[67] Most jurisdictions agree that a verdict awarding medical expenses but zero compensation for pain and suffering is inconsistent.[68]

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[59] *Id.* at 189, 907 P.2d at 775.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 190, 907 P.2d at 776 (The trial court denied Walsh's motion and entered judgment in favor of Chan based on its interpretation of a Hawai'i statute.).

[63] *Id.* at 192-93, 907 P.2d at 778-79 (emphasis added).

[64] *Id.* at 194, 907 P.2d at 780 (citing Dunbar v. Thompson, 79 Haw. App. 306, 315, 901 P.2d 1285, 1294 (1995).

[65] *Id.* at 194, 907 P.2d at 780 (citations omitted) (internal quotation marks omitted).

[66] *Id.* at 195, 907 P.2d at 781.

[67] Kanahele v. Han, 125 Haw. 446, 448, 263 P.3d 726, 728 (2011).

[68] Smyth, *supra* note 50, at §2[a]; *e.g.*, Powers v. Johnson, 562 So. 2d 367 (Fla. Dist. Ct. App. 1990); Bienvenu v. State Farm Mut. Auto. Ins. Co., 545 So. 2d 581 (La. Ct. App. 1989) (holding that, if liability is found, special damages cannot be awarded without general

A. The Supreme Court of Hawai'i was correct in holding that a verdict awarding special damages and nominal general damages is inconsistent with the law.

The court also went beyond the discussions contained in *Dunbar* and *Walsh* and held that, "in the instant case, the jury's $1.00 general damages award, after resubmittal of the general damages question, was the *symbolic equivalent of no award at all*, in light of its $12,280.41 special damages award [and] under the circumstances of this case, a new trial on damages must be granted," because the verdict is still inconsistent.[69]

The court took a few leaps in order to reach the conclusion that a $1.00 damages award is the symbolic equivalent of no award. First, it cited *Zanakis Pico v. Cutter Dodge, Inc.*,[70] stating, "nominal damages are 'a small and trivial sum awarded for a technical injury due to a violation of some legal right and as a consequence of which some damages must be awarded to determine the right.'"[71] "'Nominal damages are a token award only' and 'a vast majority of cases . . . usually adjudge *one dollar* to be the amount.'"[72] The court thus concluded that, because one dollar is a nominal damages award, and "[n]ominal damages means no damages at all," the verdict remains legally inconsistent, and a new trial on damages is warranted.[73]

However, the court affirmed the trial court's decision to reinstruct the jury, stating, "[W]hen a jury awards special damages but returns a zero general damages award . . . , it is not an abuse of discretion for the court to instruct the jury that the verdict is inconsistent, and to direct the jury to continue deliberations on the amount of general damages to be awarded."[74]

The consistency of courts' reactions to such an inconsistent verdict is based upon the principle that "a verdict that is clearly against the weight of the evidence can be the basis for a new trial on damages."[75] Because showings for general and special damages are largely dependent on the same evidence, courts tend to agree that if the jury believes the evidence

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damages; nor can general damages be awarded without special damages).

[69] *Kanahele*, 125 Haw. at 449, 263 P.3d at 729 (emphasis added).

[70] Zanakis-Pico v. Cutter Dodge, Inc., 98 Haw. 309, 47 P.3d 1222 (2002).

[71] *Kanahele*, 125 Haw. at 457-58, 263 P.3d at 737-38 (quoting *Zanakis*, 98 Haw. at 327, 47 P.3d at 1240 (Acoba, J., concurring)).

[72] *Id.* at 458, 263 P.3d at 738 (quoting Ferreira v. Honolulu Star-Bulletin, Ltd., 44 Haw. 567, 579, 356 P.2d 651, 658 (1960)).

[73] *Id.* at 458, 263 P.3d at 738 (citations omitted) (internal quotation marks omitted).

[74] *Id.* at 448, 263 P.3d at 728.

[75] JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 8:7 (3d ed. 2011).

supports an award for special damages, then the evidence should also support an award for pain and suffering, even if it is a small amount.[76]

However, in *Kanahele*, the Supreme Court of Hawai'i said that a verdict awarding special damages, but zero general damages could be allowed to stand when "there is no probative evidence that the plaintiff incurred pain and suffering as a consequence of the defendant's act, or where the only evidence of pain and suffering is the plaintiff's subjective testimony, which the jury could reasonably have concluded was exaggerated or lacking in credibility."[77]

Assuming the defendant is found liable to a personal injury plaintiff, the definitions above for general and special damages suggest that, if anything, general damages should be awarded because they naturally *and necessarily* resulted from the defendant's conduct. Thus, when holding a defendant liable for a plaintiff's medical expenses stemming from an injury, it logically follows that the defendant should also be responsible for compensating the pain and suffering incurred by plaintiff that required medical attention and treatment.

B. The Implications of Kanahele v. Han*: The Threshold Between Nominal and Adequate Damages Awards*

The parties in *Kanahele* were both right in contending that an award for special damages, but no general damages, rendered the verdict inconsistent. On the one hand, such a verdict from a jury communicates to a defendant like Han that he needs to pay the medical expenses and other such damages, even though the plaintiff did not incur any pain or suffering from his negligent acts. On the other hand, the verdict tells a plaintiff like Kanahele that, while they recognize that he suffered injuries needing medical attention due to the defendant's negligence, he did not experience any pain or suffering worthy of compensation.

In *Kanahele*, the Supreme Court of Hawai'i not only held that an award for special damages but zero general damages is inconsistent, it also held that a subsequent award of one dollar in general damages is the "symbolic equivalent" of zero damages.[78] It seems that the Hawai'i Supreme Court's main issue with the jury's special verdict on damages is the vast discrepancy between the amount awarded for medical expenses and that

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[76] Dunbar v. Thompson, 79 Haw. App. 306, 315, 901 P.2d 1285, 1294 (1995). *See also* Smyth, *supra* note 50, at § 2.

[77] *Kanahele*, 125 Haw. at 459, 263 P.3d at 739 (quoting *Dunbar*, 79 Haw. App. at 316, 901 P.2d at 1295) (internal quotation marks omitted).

[78] *Id.* at 448, 263 P.3d at 728.

awarded for pain and suffering.[79] The court could be trying to emphasize the point that evidence used to award $12,280.41 in special damages should implicitly result in a proportionate award of general damages for the pain and suffering that required those medical bills to be incurred in the first place. However, one cannot help but ask where the court would draw the line as to what amount of general damages would be too little in the face of a special damages award of over $12,000.

Perhaps a one dollar award for pain and suffering would be acceptable in a case where the special damages amounted to less than $100, but it is unlikely these cases would see the inside of a court room given the trivial amount involved. According to California's Civil Jury Instructions, "[n]o definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering."[80]

Because the court seems to demand at least some sense of proportionality between special and general damages awards, it is also relevant to note that Hawai'i has placed a statutory limitation on an award for pain and suffering in the amount of $375,000.[81] Thus, what if it just so happens that a plaintiff incurs a phenomenal amount of special damages, and the $375,000 seems nominal in proportion to the special damages award?

Furthermore, in addition to the two exceptions mentioned above, the Hawai'i Supreme Court also recognized that a verdict awarding special damages but no general damages would be allowed to stand when "the zero-general-damages verdict [i]s evidence of the jury's intent to include in the special damages award an amount for pain and suffering."[82] This exception, coupled with the court's holding that nominal damages is the equivalent of no damages, could lead to problems in future cases where a jury awards special damages in an amount just slightly higher than the amount claimed by the plaintiff. Granting Hawai'i courts discretion to infer that the jury had intended its special damages award to include compensation for pain and suffering is inevitably problematic because it further blurs the line between a nominal and sufficiently proportionate damages amount for pain and suffering. Therefore, although the Supreme Court of Hawai'i was correct in holding that the one dollar award in general damages was nominal and, therefore, the symbolic equivalent of no award,

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[79] *See id.* at 449, 263 P.3d at 729 (stating that, in light of the jury's award for special damages in the amount of $12,280.41, an award of $1 in general damages renders a verdict inconsistent).

[80] CAL. CIVIL JURY INSTRUCTIONS (BAJI) 14.13. (2011), *available at* Westlaw.

[81] HAW. REV. STAT. § 663-8.7 (2011).

[82] *Kanahele*, 125 Haw. at 460, 263 P.3d at 740 (quoting Dunbar v. Thompson, 79 Haw. App. 306, 316, 901 P.2d 1285, 1295 (1995)) (internal quotation marks and brackets omitted).

Hawai'i courts will probably need to address this issue once again in order to better define what constitutes a consistent verdict as far as the ratio between special and general damages.

V. THE TRIAL COURT WAS CORRECT IN DENYING KANAHELE'S MARCH 5 MOTION, BUT ABUSED ITS DISCRETION IN DENYING HIS APRIL 5 MOTION FOR A NEW TRIAL

Kanahele's March 5 Motion was filed before the trial court gave the jury its new instruction and supplemental special verdict form, and his April 3 Motion was filed thereafter.[83] The standard of appellate review of a trial court's decision to deny a motion for new trial is abuse of discretion.[84] The *Walsh* court stated, "An abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the *substantial detriment of a party litigant.*"[85]

A. Kanahele's March 5 Motion was properly dismissed

In affirming the lower court's decision to resubmit the issue of general damages to the jury instead of granting Kanahele's March 5 Motion for a new trial, the ICA cited *Dias v. Vanek*[86] and *Duk v. MGM Grand Hotel, Inc.*[87] According to *Dias*, the amount of damages to be awarded is entirely a question of fact to be solely determined by the jury.[88] "When an ambiguous or improper verdict is returned by the jury, the court should permit the jury to correct the mistake *before it is discharged.*"[89] The Ninth Circuit Court of Appeal's opinion for *Duk* provides in relevant part:

> The practice of resubmitting an inconsistent verdict to the jury for clarification is well-accepted. Federal Rule of Civil Procedure 49(b) provides that general verdict sheets may be "return[ed] to the jury for further consideration of its answers and verdict" when the answers to interrogatories are inconsistent with each other or with the general verdict. . . [W]e have [also] held that, because the rule does not prohibit it, special verdicts are also subject to the practice. *Mateyko v. Felix*, 924 F.2d 824, 827 (9th Cir. 1990).

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[83] *Id.* at 451-52, 263 P.3d at 731-32.

[84] Walsh v. Chan, 80 Haw. App. 188, 192, 907 P.2d 774, 778 (1995) (citation omitted).

[85] *Id.* (emphasis added) (citation omitted) (internal quotation marks omitted).

[86] 67 Haw. 114, 679 P.2d 133 (1984).

[87] 320 F.3d 1052 (9th Cir. 2003).

[88] *Dias*, 67 Haw. at 117, 679 P.2d at 135 (citations omitted).

[89] *Id.* (emphasis added) (citations omitted).

Mateyko's embrace of the practice is based on the notion that resubmission "promotes both fairness and efficiency." *Id.*[90]

In *Larson v. Neimi*,[91] the Ninth Circuit affirmed its holding in *Mateyko*, stating, "[W]hen the very body that issued the ambiguous or inconsistent verdict is still available to clarify its meaning, a request that it do so comports with *common sense as well as efficiency and fairness*."[92] Therefore, because the jury was still available to "fix" its inconsistent verdict, the trial court was consistent with Hawai'i law in denying Kanahele's March 5 Motion and giving the jury the supplemental instruction. Subsequent events, however, indicate that Kanahele's April 3 Motion, filed after the jury awarded one dollar in general damages, should have been granted by the trial court.

B. The trial court abused its discretion in denying Kanahele's April 3 Motion

Both the ICA and the Supreme Court of Hawai'i affirmed the trial court's decision to deny Kanahele's March 5, 2008 and April 3, 2008 motions for a new trial after the jury returned its initial verdict of zero general damages, and instead resubmit the issue to the jury with additional instructions and a supplemental special verdict form.[93] Given the current law on reinstructing juries discussed above, this note agrees that the trial court was correct in denying Kanahele's March 5 Motion because the jury was still available. Although the Supreme Court of Hawai'i reached the correct decision in ordering a new trial on damages, it did so only because it concluded that the nominal amount of one dollar is the symbolic equivalent of no award. However, the Supreme Court of Hawai'i should have found that, given the circumstances of the case, the trial court had abused its discretion in denying Kanahele's April 3 Motion by exceeding the bounds of reason to the substantial detriment of Kanahele.

While the law gives a trial court broad discretion in this respect, the circumstances of the case indicated that the jury had already decided not to award Kanahele any amount for non-economic damages, despite being told that the law considers such verdicts to be inconsistent. In fact, the jury's intent becomes obvious when, barely thirty minutes after being given the

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[90] *Duk*, 320 F.3d at 1056. (HAW. R. CIV. P. Rule 49(b) contains language that resembles the FED. R. CIV. P. Rule 49(b) cited herein).

[91] Larson v. Neimi, 9 F.3d 1397 (9th Cir. 1993).

[92] *Duk*, 320 F.3d at 1056 (emphasis added) (citing *Larson*, 9 F.3d at 1402).

[93] *See* Kanahele v. Han, 125 Haw. App. 18, 250 P.3d 281 (2011) (unpublished disposition); Kanahele v. Han, 125 Haw. 446, 263 P.3d 726 (2011).

new instructions and the supplemental special verdict form, it asks the court, "*What is the minimum under the law?*"[94] The trial court should have recognized this question as the jury's communication that it felt, regardless of what the law considers an inconsistent verdict, that its initial verdict was just compensation for Kanahele. Moreover, after the judge responded to the jury's inquiry by simply stating that "the amount of general damages [was for it] to decide," merely thirty-two minutes lapsed before jury came back with a one dollar general damages award for Kanahele.[95] Even the Supreme Court of Hawai'i commented:

> Demonstrating the jury's disregard of the court's directive was the jury communication asking what the "minimum" award required under the law was, indicating that the jury was not considering fair and adequate compensation for [Kanahele], *but seeking to reinstate its first verdict of zero to the extent possible.*[96]

Therefore, the trial court should have found that the jury had disregarded its new instruction in the completion of the supplemental special verdict form, and granted Kanahele's April 5 Motion.

In *Dunbar*, the court stated, "[a] conflict in the answers to questions in a special verdict does not automatically warrant a new trial; a new trial will be ordered only if the conflict is irreconcilable."[97] The trial court denied Kanahele's March 5 Motion because it did not consider the jury's initial verdict to be irreconcilable, as the jury was still available to fix its mistake.[98] The trial court accepted one dollar under the belief it was sufficient under Hawai'i law, which was overruled in the Hawai'i Supreme Court's opinion.[99] However, the Supreme Court of Hawai'i failed to comment upon the fact that the trial court disregarded the jury's obvious intent that would eventually make the conflict between its awarded special and general damages irreconcilable.

In *Walsh*, the ICA held that the trial court had abused its discretion in denying Walsh's motion for new trial because of the inconsistent verdict.[100] The Supreme Court of Hawai'i admitted that, pursuant to *Walsh*, Kanahele was correct in asserting that "when an award of special damages indicating physical injury is rendered, a zero award of general damages is improper

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[94] *Kanahele*, 125 Haw. at 452, 263 P.3d at 732.

[95] *Id.*

[96] *Id.* at 459, 263 P.3d at 739 (emphasis added).

[97] Dunbar v. Thompson, 79 Haw. App. 306, 312, 901 P.2d 1285, 1291 (1995) (quoting Kalilikane v. McCravey, 69 Haw. 145, 152, 737 P.2d 862, 867 (1987)) (internal quotation marks omitted).

[98] *Kanahele*, 125 Haw. at 451-53, 263 P.3d at 731-33.

[99] *Id.* at 449, 263 P.3d at 729.

[100] Walsh v. Chan, 80 Haw. App. 188, 192-93, 907 P.2d 774, 778-79 (1995).

and generally results in a new trial on general damages when liability is not disputed."[101] However, the court distinguished *Kanahele* from *Walsh* in that, at the time Kanahele filed his March 5 Motion, the jury was still available, whereas the jury had already been dismissed and judgment entered when Walsh filed his motion for new trial.[102] The trial court ignored the jury's obvious intent to attempt to reinstate its zero general damages award for Kanahele. Thus, the trial court's denial of the April 3 Motion clearly exceeded the bounds of reason to the substantial detriment of Kanahele.

VI. CURRENT JURY INSTRUCTIONS AND PROPOSALS FOR FUTURE FAIRNESS AND EFFICIENCY

The Hawai'i State Judiciary website provides a list of jury instructions adopted by the Supreme Court of Hawai'i.[103] The Hawai'i Civil Jury Instructions includes a basic description of damages, a more specific description of economic and non-economic damages, and a description of pain.[104] According to the *Kanahele* opinion, the trial court appears to have read verbatim Hawai'i Civil Jury Instructions 8.2, 8.3, and 8.4 regarding general damages, special damages, and pain, respectively.[105]

The problem with these instructions is that there is no mention as to the legal inconsistency of an award for special damages but zero general damages. Even in *Dunbar*, the trial court instructed the jury that, if the defendant was liable, it should award her an amount that would "fairly and adequately compensate her for the injuries which she suffered."[106] The judge also instructed the jurors that, in determining the amount of such damages, they should consider Dunbar's pain and suffering, disability, and mental anguish.[107] Although these jury instructions seem to be accurate verbal representations of the legal concepts, they do not necessarily form the whole picture. There do not appear to be jury instructions that inform the jury that, although special verdict forms ask the jury to determine separate amounts for special and general damages, the two go hand-in-

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[101] *Kanahele*, 125 Haw. at 457, 263 P.3d at 737.

[102] *Id.*

[103] HAWAI'I STATE JUDICIARY, http://www.courts.state.hi.us/legal_references/circuit_court_standard_jury_instructions.html (last visited May 19, 2012).

[104] *Hawai'i Civil Jury Instructions*, 50-52 (1999), www.courts.state.hi.us/docs/legal_references/jury_instructions_civil.pdf (last visited May 19, 2012).

[105] *Kanahele*, 125 Haw. at 450, 263 P.3d at 730; *Hawai'i Civil Jury Instructions*, *supra* note 104, at 50-52.

[106] Dunbar v. Thompson, 79 Haw. App. 306, 316, 901 P.2d 1285, 1295 (1995).

[107] *Id.*

hand. Thus, because a plaintiff's damages are separated into special and general damages, it probably leads a jury to believe that it can award one without the other in a way that is not inconsistent with the law.

The reason for not having an instruction that describes such a relationship between special and general damages is probably due in part to the presumption that juries follow the circuit court's instructions.[108] Similarly, there is also a recognized presumption that "citizen jurors will properly perform the duties entrusted to them and will not construe resubmission as an invitation to subvert the law and contort findings of fact in favor of a desired result."[109] The current law assumes that the jury will follow the judge's subtle instructions that hint at, but do not explicitly state, the relationship and necessary connection between the two types of damages. Also, defendants' counsels would probably object to such an instruction on the basis that it could lead jurors to overcompensate the plaintiff.

It would promote judicial efficiency to provide juries with a simple instruction that explains that, if the defendant is liable for the plaintiff's injuries, an award of special damages should also be accompanied by an award for general damages.

As mentioned above, it could be argued that an instruction as to the legal inconsistency of such a verdict would encourage a jury to receive a more than reasonable general damages award under the circumstances. If the jury has determined liability and awarded special damages, such an instruction could put more pressure on a jury to award an amount of general damages that the court would accept as proportionate and fair. This is consistent with the current system.

VII. CONCLUSION

The Supreme Court of Hawai'i was correct in affirming the trial court's decision that a jury's verdict awarding special damages but zero general damages in personal injury cases is legally inconsistent. The court's holding is not only consistent with the ICA's previous holdings, but also a majority of jurisdictions across the nation. However, the circumstances within the trial of *Kanahele v. Han* should have required the trial court to grant Kanahele's April 3 Motion for a new trial after the jury returned with a general damages award of one dollar. Although the trial court had broad discretion in making its ruling on Kanahele's motion, it was apparent that

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[108] *See* Kawamata Farms, Inc. v. United Agri Products, 86 Haw. 214, 247, 948 P.2d 1055, 1088 (1997) (citations omitted).

[109] Duk v. MGM Grand Hotel, Inc., 320 F.3d 1052, 1058 (9th Cir. 2003).

the jury was not going to budge on its decision. Courts generally allow issues to be resubmitted to juries in furtherance of judicial efficiency and fairness. In order to better serve these principles, proper jury instructions should be created in order to further inform juries and assist them in executing their civil duties.

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