

Native Hawaiians and the Reconstruction of Communal Property Values

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I. Preface

Native Hawaiians, in the hierarchy of the world's oppressed, stand in a unique position. Hawaiians were annexed by the nation that claims the birthright of democracy and self-determination. Moreover, as the United States continues a world stance of enforcing the legal high ground in the Middle East and Eastern Europe, Hawaiians continue to live with the consequences of their own version of invasion of Kuwait or the Hitler Stalin pact that annexed Lithuania. Hawaiians are unique in the means by which the world as a whole finds a means of overlooking the obvious parallels that undermine United States credibility as the world's enforcer of inherent rights of self-determination. It seems to be of little consequence that Hawaii cannot be pigeon holed in the "tribal" or "Indian" model justifying those abuses: Clearly Hawaii was a nation equal to the United States when the Kingdom of Hawaii was unilaterally annexed by an act of Congress in 1898.

Arguably, it is the most egregious act of imperialism in American history. Other territories which suffered the expansionist impulses of "manifest destiny" such as the Philippines, or

Puerto Rico, have either the right to vote themselves out of American domination, or, as in the case of Puerto Rico, the right to self-determination is at least recognized in some lesser, token form.

Hawaii, which was its own nation, and not a colony of some other European imperial power, has never been acknowledged as deserving a plebiscite on self-determination. Hawaii was listed by the United Nations as a non-self governing territory until 1959 when the residents of Hawaii [often called "Hawaiians" but of course, not ethnically nor politically the "Hawaiians" who suffered the consequences of the overthrow] voted to exchange the minimal rights held as residents of a United States territory for the privileges of statehood. However, the passage of time, as well as American disregard of promises made to the Hawaiian people during annexation, guaranteed that former citizens and their descendants of the Kingdom of Hawaii were vastly outnumbered by immigrants to the islands who were franchised to vote. Thus, like the French policy designed to render the Kanaks of New Caledonia a minority in their own homeland, the so-called vote on self-determination was a sham when cast solely as a choice between statehood [under American rule] or territorial status [under American rule].

Thus, Hawaii constitutes a dark stain on the American image as the world beacon of self-determination [as evidenced by the American rescue of Kuwait] and respect for the political rights of national and ethnic minority. This unbearable contradiction between the foreign posturing of the United States, and its own treatment of descendants of the overthrown nation of Hawaii perhaps explain the extraordinary energy expended to distort

and hide the history and present predicament of the Hawaiian people. The United States complicity in the overthrow of the lawful nation of Hawaii and the succeeding occupation of the Hawaiian Islands are striking counter-examples of the duplicity of the exploitation of America's indigenous peoples for the benefit of those and their descendants who profited by coming to the new world.

Thus, the destruction and denial of Hawaiian traditional values is practiced with vengeance. For, if the political legitimacy of the United States in any part of the United States is vulnerable, it is contained in the true history of Hawaii--a history conveniently hidden behind the assumption that where nature resembles "paradise" violations of legal and human rights are salved by the proximity of beautiful beaches. However, while most Americans have knowledge of the wrongs committed in securing a state so strangely non-contiguous the remainder of the United States, many people around the world see Hawaii as the paradigm of American duplicity in its foreign and domestic policy. Indeed, as Newsweek Magazine reported Saddam Hussein statements on the eve of the American blitz of his military forces, he was reported to have said: "I will get out of Kuwait when the United States leaves Hawaii."

Thus, both the political claim of Hawaiians, which parallels those of recently liberated in Kuwait, [or Lithuanians who were quickly recognized by the United States and most members of the United Nations] and the claims cultural traditions that are still practiced in their authentic are extremely threatening to the right of the United States to assume the role of Global moral cop. Political violence to

Hawaiians, Native Americans and African American seems to bring forth the most violent responses from the power structures--as if to catch one in hypocrisy is a worse crime than the substantive forms of oppression itself.

Thus, Hawaiians have, since the annexation in 1898, been the target of a very subtle, sophisticated campaign to hide from the world, and the Hawaiian people themselves, the nature of their claims to self-determination and a return to political autonomy. Moreover, the wholesale destruction of an authentic Hawaiian culture has been axiomatic to the dis-empowering of Hawaiians. Even if sovereignty were a viable political alternative, non-Hawaiians in Hawaii and in Washington who hold bureaucratic control over Hawaiians are quick to point the futility of any attempted return to Hawaiian self-governance, for clearly any cultural values which would differentiate Hawaiians from their neighbors in the islands has been abolished. Indeed, the myth upon which statehood for the Hawaiian Islands was sold to the American Congress--namely that Hawaii would be a melting pot where all races and creeds would be equal. Statehood was premised on a political need to equate the claims of indigenous and sovereign Hawaiians with the dissimilar struggle of all others in Hawaii, immigrant groups who left viable cultures that would survive elsewhere.

Thus, the issue is two-fold: First, how have Hawaiians resisted a universal campaign of Americanization, a plan of assimilation designed to convince Hawaiians that "constructively" chose to become Americans like other immigrant groups. This program of assimilation has resulted in the demise of Hawaiian religion, the virtual loss of the language as a native mother tongue of

Hawaiians, and internecine conflicts among Hawaiians who seek to revive the nation around traditional cultural values. The second issue is how Hawaiians would implement a system by which cultural values which have been hidden from the occupying and de-legitimizing culture of the United States, would be resurrected to form a political entity which would be Hawaiian and not American.

Given the difficulty of gaining the smallest victories, most Hawaiians fail to see the possibility of an outcome involving the creation of a state where Hawaiian values would prevail. Thus, without a process for identifying the traditional values, pessimism about sovereignty is reinforced by a failure to see how "Hawaii" would emerge from a long political struggle, as opposed to a struggle which would culminate in the re-invention of an American clone with Hawaiians who would govern much like their colonial predecessors. Why fight and die for the creation of a state which already exists, namely a Hawaii devoid of authentic Hawaiian values?

This second issue, poses a problem that non-Hawaiians have successfully thrown back at Hawaiian nationalists, if so much of the Hawaiian culture has been lost, and if that culture only remains in pockets and residues of the memory of the elders, the struggle for a separate autonomous Hawaiian political state is moot. It is simply too late, Americanization has prevailed and nothing is left of an authentic Hawaiian culture.

Thus, by necessity, this paper jumps past the tangle of political issues and the pragmatic knots that surround accomplishing sovereignty to address whether a culture disrupted and repressed successfully for a century has a chance to reclaim a viable society structured on reconstructing modernity

from its traditional values- values that appear today in their century old state. Thus, such values are easy targets for those who discount the contemporary relevance of such values. In short, Hawaiian tradition is either, dead, quaint or simply "romantic" and fit only for sunset luaus put on for tourists.

If however, the possibility exists that authentic Hawaiian values can be operative in contemporary society, that is be as "alive" as the American bill of rights, such a success would mean that the true harm done Hawaiians, the destruction of their community identity does have a viable and reachable remedy. Such a realization alone would be empowering to those who must contemplate the sacrifices entailed in any commitment to Hawaiian sovereignty.

In this paper and elsewhere, the author has explored how a repressed political groups attempt, over many generations, to retain the essence of its traditional identity, often in the face of severe political oppression. Thus, the first section, "Suffering and the Persistence of Culture" summarizes the authors work to date on how Hawaiian defiance against the totalizing destruction of their culture represented by wholesale assimilation to American values is resisted in a variety of microcosmic forms of political sabotage. Since direct confrontation in a military sense would be senseless, acts of defiance take the form of symbolic action, misunderstood and demeaned by the surrounding society. Or, more often, defiance is retained in the form of a collective community anger. Since such anger cannot be successfully brought to bear against the direct forces that oppress Hawaiian revival, that anger is retained and exercised against those who will not punish the defiant actor. Thus,

this need to retain anger [a thesis developed further herein] as a means of keeping alive the Hawaiian identity, becomes focused first on the self, and then on one's own community.

Hence, political defiance in Hawaiian communities often takes the form of deliberate destruction of the self, manifested by the worst health statistics for any group in Hawaii, or in the highest per capita rates of criminal behavior, or in other forms of non-assimilatory behavior: drug addiction, truancy, and a general unwillingness to accept the "program."

Thus, I am suggesting that there is a political context for evaluating poverty. From the view of the dominant class, the much higher rates of health problems, addictive behavior and spousal and child abuse are used to reinforce a view that Hawaiians lack civilizing, nurturing and positive values within their traditional values. Non-Hawaiians, particularly those in the school system or who administer the welfare apparatus that interacts with the Hawaiian under-class fail to see the political dimensions of this behavior at all. This is not an accident. For the rhetoric and hegemonic manner of describing Hawaii and Hawaiians internally and to the world at large deliberately conceals any parallels between the predicament of Hawaiians and more obvious dispossessed people, such as Palestinians, or South Mollucans, whose homeland has become the resource for the wealth of an immigrant class forced upon the Hawaiians. the behavior of the subordinated behavioral "totems" such as "anger" or "suffering" serve as devices for the persistence of a culture through oppression. Thus, the inter-generational passing of "experience" in the form of states of being, is analogous to the

secretive teachings from critical texts such as the torah or the koran for oppressed societies.

The second part of this paper, "Law and the Reconstruction of Local Knowledge," answers those who cannot imagine an institutional means by which a culture which has been repressed and lost much of its day to day reality as a practice can be reconstructed through an institutional for of "indexical" reproduction of the core states of being. In fact, the author finds that the legal system, based in the common law idea of precedent, has served that function in Anglo-American culture since the Constitution.

The desire of the author is convey simply and concisely the essence of these two issues. Thus, this paper is a summary of works that will be appearing elsewhere with much more extensive and elaborate examples to demonstrate the viability of these arguments.

II. Suffering and the Persistence of Culture

A. The Societal Function of Law as Preserving Counterfactual Possibilities

Hawaiian culture went "underground" since the mid nineteenth century largely as a result of the imposition of a system of thought, the western legal system, that denied the legitimacy of the authentic Hawaiian world-view -- an essentially communal system of property. In this section, I briefly show how one system [that of the west] excluded and silenced the Hawaiian system that was centered around the sharing of water. The details of this history are part of a grant that has been funded and is near completion. My choice of "water rights" as an example of how the first phenomenon described

above, that of "silencing" is quite deliberate. The western system of legal thought, the manner in which the world is conceptually arranged, particularly as to property, was the most powerful force in the demise of the Hawaiian culture. Yet, as one shall see the western legal system, particularly the idea of the "counterfactual possibility" was the very means by which culture was kept alive among Hawaiians. The central idea of justice is that until justice or just reparations is done, the present structure of the world is incorrect. Rather the world that we should be living in is one in which the wrong which has harmed us, such as the death of a loved one at the hands of a negligent driver, or the homelessness of a Hawaiian in their own country. It is in this manner that the idea of the cause of action in law, plays a powerful role on the psyche, that is by creating a formal institutional mechanism by which the self or a community can cling to the possibility of a counterfactual history, -- in short, the world that should have been.

In the case of Hawaiians, the legal system did not recognize that counterfactual history, and indeed was arranged in a manner to deny Hawaiians the privilege of asserting the legitimacy of their political claims to self-determination. Thus, I find that Hawaiians, like the behavior of many groups of traumatized communities, created their own symbolic material "totems" or even "behavioral" totems that served the same purpose -- the perpetuation of a counterfactual world history, namely of an unconquered Hawaiian nation, that should exist today.

In my description of the manner in which the law of water rights was used to undermine the communal property

system of Hawaiians, it is critical to recognize the power of western legal consciousness in Hawaii, much like western religious consciousness to undermine values in a manner far more pervasive and effective than one achieved by military conquest.

Thus, much of my awareness of the possibility of behavior as a form of counterfactual preservation lies in the manner in which present Hawaiian claims are simply not "heard" and cannot be understood within the language and syntax of the present legal system. These voices do not "fit" because the harms that are articulated are not specific enough or do not attach to values deemed worthy of protection. Yet, within their own metaphorical context, these claims occupy the same "place" as identifiable and concretized rights or harms in the accepted legal system. In other words, the emotions of suffering, to a Native Hawaiian, may indeed, be the "property," deserving of protection within a non-Hawaiian western legal system.

B. How Hawaiians Created an Alternative Rhetoric of Rights

Since such claims cannot be articulated in the traditional legal forms, they are expressed and simply "gotten" when presented as "stories." Thus, the use of "story" in present legal argumentation is often the attempt to recreate the metaphorical context of a subgroup, often oppressed, in order to demonstrate the equivalence and thus, the validity of the claim, from the dominant point of view. This article argues that such stories become necessary because the metaphorical context, as in the case of Native Hawaiians, which was once complete

and whole, has been fragmented and thus stored in "cultural packets" by a history in which one culture and metaphor was dominated and undermined by another. Thus, the only clues to recreating the metaphorical context lies in these "cultural packets" which frequently take the form of narrative. It is argued here that states of being, or emotions, such as suffering, also constitute such "cultural packets."

To those of the sub-group who possess such packets of "local knowledge," they often deem themselves to have a self-imposed responsibility to keep the possibility of cultural reconstruction alive. This is often done by endlessly telling the same story, by the retention of certain states of being, such as anger or suffering, or, the deliberate performance of what the dominant society deems to be antisocial behavior. Thus, recidivist criminal behavior and substance or behavioral addiction may be a form of this "cultural preservation." While this may appear to be a remarkable claim, to "suffer" in modern Hawaii, may be the structuralist equivalent of "being Hawaiian" two hundred years ago. I do not suggest that this is a conscious or deliberate strategy but rather that suffering and being Hawaiian became exchanged over the past two hundred years ago. Thus, as one becomes less and less Hawaiian, and thus suffers more and more, the only link to the original metaphorical context is the state of being of suffering. There is a resistance to giving up suffering, because since it is now equated, at an unconscious level, with being Hawaiian, because to give it up would be to forfeit one's identity--that of being Hawaiian. In other words, like the "things" land and water discussed above, suffering becomes a reified "thing." It is no longer

suffering as we know it in the west, it becomes a reified symbol, or totem within structuralist terms, of Hawaiian-ness. For example, a child's favorite stuffed animal is, within the structure of that child's world, not just a toy, but a totem for something else: mother, the womb, or a sense of security. One might cling to that toy long after forgetting what it "stands for" because it becomes the critical bridge to reconstruction within a new metaphorical context. Until one is confident that there is a means of articulating what it now "stands for" one clings to the totem because it and only it, has the power to call forth, under the right circumstances, the essential elements of the original metaphorical context.

For example, the Native Hawaiian today can never return to the exact environment two hundred years ago within which certain concepts, now reified by land, such as "community," are conveyed in their exact sense. However, until the modern equivalent of "community" can be reconstructed, the totem that has become the symbol of "community," such as land, is fought for as if it were the essential concept of "community" itself. Yet, completion occurs only when community is recreated, whether or not it takes the form of land.

Narratives and other reified totems in oppressed subgroups constitute "genetic codes" for cultural transmission and revival. Thus, groups often adopt deliberate strategies for protecting the totem, as if it were the culture itself. For example, the refusal of many literate Hawaiians to read legal documents that affect their rights can not be viewed simply as irrational

behavior from a Western legal point of view, but as totemic. The refusal to read a law is a way of restating, and thus retaining the memory of how trust, as opposed to "paper" was the more important concept in Native Hawaiian society. To these Hawaiians, to understand law would be proof that one was no longer Hawaiian.

A structuralist approach may be the means by which the legal system itself can be the process for the reconstruction of culture. As presently constituted, the legal system is viewed as a process that has destroyed and silenced non-majoritarian culture. Yet, if my earlier thesis is partially correct, that this oppression occurred by the misdescription of essential Hawaiian ideas from a western model, than the process can work in reverse. That is, the legal system can be the basis for the appropriate reconstruction of the metaphor, not in its original forms, but with contemporary forms. This is so because the legal system uses the idea of "cause of action," in a totemic sense. Like suffering, a cause of action constitutes a "counterfactual possible world." To claim to have a legal action against someone, is in effect, to claim that the present world should be different in some material respect. To entertain this possibility is to believe that the world could be "something other than what it presently is." The retention of totems expresses the same idea. For the Hawaiian there is an ever-present sense that they have been denied, by wrongful intervention, the history that should be theirs. Like the victim of a tort that has never been compensated, the Hawaiian must retain, in some way a means of reconstructing how the world today "could be," if only the wrong had not occurred. Thus, the persistence of grief,

much like keeping safe a contract where one can prove a wrongful breach, reifies how the present would be different.

It is this premise of counterfactual possibility that gives both totem and cause of action the power to redefine (open) or foreclose (close) certain versions of history. Much of Native Hawaiian behavior, particularly as to political activism, can be restructured as the attempt to retain through symbol struggle, a historical record that is systematically denied by non-Hawaiians.

It is the very threat of counterfactual possibility, on the other hand, that makes the legal system so essential in oppressing the stories and claims of subgroup. Each judgment, in the simplest of property cases, reaffirms the pyramid of historical facts that give a party the right to claim land today, despite the wrong of its original taking from the Kingdom of Hawaii. Thus, the dominant world presents its counter-totem, the judgment, as a means of officially denying, albeit implicitly, the possibility of a different status quo.

III. Two Example of Contemporary Conflicts Involving Communal Property Values: The Geothermal Litigation and the Transformation of Water Rights

A. Property Rights in The Relational [as opposed to "Rights"] World

As a general rule the significant words in the Hawaiian language did not denote an object or a concept but were expressions of relationships. Thus, things were not the "thing in of itself" but

signified critical relationship. The "present" for example, was where the past begins. The definition of self was accomplished by relating oneself to society as a whole--by genealogy and one's proximity to gods. The closer one was to a "god" by birth, the higher one's rank. History was understood as a progression from creation to the present where god and man are connected. The world of objects signified the real world, whereas for nineteenth century westerners, the world of objects was the real world.

In a 1987 Hawaii Supreme Court decision, the court set aside the claims of "Pele Practitioners" (the goddess Pele) to stop the state from allowing geothermal wells to be drilled in the Kilauea area, an active volcanic zone known to be one of the homes of the goddess Pele.

While applying a two-part test of sincerity and burden, the court did not question the "sincerity" of the practitioners, but held that they had failed to prove that the drilling burdened the practice of the religion. Plaintiffs had claimed that the drilling was a "desecration" of a sacred site. The court, on the other hand, ruled that the plaintiffs could not show actual harm to Pele, nor that the particular sites had been actually used for worship. However, the plaintiffs complained of serious harms to their own health and the withering of their souls. To be a Pele Practitioner meant that she was "family" or ancestry. To drill, was thus to desecrate an ancestor. Instead of understanding the extension of Pele, through the land, into a contemporary person's identity, the Court interpreted Pele in a corporeal sense, as having a being of her own that could be harmed. Moreover, by insisting that worship had

to be localized in a western sense, the court did not grasp that it was not "worship" but "respect" of one's most sacred ancestors that was at stake.

Clearly, the plaintiffs suffered from the inability to communicate these concepts to the court. The Hawaiian "voice" or means to articulate this relational understanding of the world, does not exist within a western context. Moreover, Hawaiian culture was interrupted from evolving approximately one hundred fifty years ago such that the series of paradigmatic examples that would "stand for" these concepts does not exist. It would be as if the last case one could find to cite for a proposition was one in 1850. The concept exemplified by that case would not have immediate comprehension in a modern context.

Thus, the claims of the Pele practitioners are an attempt to refer to that signified (the relational context) by the last available signifying representation--Pele. It is not so much Pele, that is the goddess as known two hundred years ago, that is asserted as the claim, but rather that which is signified -- a state of mind or being which defines one's relationship to nature and the unknown. Thus, the claim represents an attempt to express a Hawaiian "voice" in a modern context. The legal system, through the device of judgment, offers a means of expressing that voice in a modern context. There would be no requirement that the court describe Pele practice. By simply affirming that the Pele Practitioners have a valid free exercise claim, observers could attempt to "get" or understand the Hawaiian view of the world by inference.

Pele is a totemic representation of

the world. She is in the case of contemporary Hawaii, aa culture trying to preserve itself. In similar fashion, the final judgments issued by courts are totems as well. Final judgments affirm certain assumptions about the world. When a cause of action is denied by a judgment, a particular counterfactual possibility of the world is closed off. In that potential claims represent "the world as it should have been," to deny a cause of action is to invalidate that particular possibility of history. Thus, the institution of the "final judgment" in our legal system has a singularly powerful affect on the reality of subcultures within our society. Subordinated cultures, such as that of contemporary native Hawaiians can only maintain the viability of a different context through signifying objects, goddesses like "Pele."

Other forms of cultural "packets" for dismembered cultures can be forms of behavior, often deemed deviant or antisocial by the majority society. Yet, these signifying objects or states of being, represent, like a plaintiff's cause of action, the attempt of an individual to retain the possibility of a world that should exist. The power of law, in its ability to take goods, or prestige from one person and give it to another, lies in it allowing people to believe that history "could be other than how it is presented." If one believes that the status quo is wrong, one must keep alive in some sense, the memory of "that which should be."

For Hawaiians, "that which should be" is a living culture that would find voice in modern institutions. Thus, packed within the reified form of "Pele" is much more than the identity of a goddess, but the claim that had not Hawaiians unjustly been oppressed,

there would no doubt exist today, a form of Pele that would be validated in contemporary western concepts.

Thus, these are the two parts of my structural analysis. First, in order to understand the means by which Hawaiians lost their voice and culture, one must take the relationship between the signifying and the signified and examine how the change from a relational to a realist framework destroyed the "world" as the Hawaiian knew it. Second, one must examine the remaining signifying objects as if they were a text in which the previous world can be unravelled.

B. Water in Hawaiian Society: Not An Individual's Claim, but the Nexus of a Society

The error of replacing Hawaiian "trusteeship" with Western "ownership," may initially have resulted from the difficulty of finding exact equivalents in Western terminology, but, the retention of these substitutions, once they were known to be inaccurate, was very consequential. "Ownership," deemed to be in the konohiki, or lesser chief cleared title of the complicated relationships embodied in trusteeship and concentrated the incidents of Western fee interest in the owner.² Those deemed by law to succeed to the konohiki's interest took a similar interest which conveyed this confluence of rights. Eventually this allowed transfer of control and exclusive use, (alienation) unthinkable within the original Hawaiian framework.

Under traditional concepts ownership of the water was unthinkable. The waters were the province of the Akua, or gods, whose "powers regulated all the earth and the awesome forces of nature." The gods were to be feared and

proximity to them meant death to a commoner. The Alii were the protectors of the common people from these unseen forces. The highest ali, the ali nui or king was the trustee of the earth and waters, a protector and mediator between the Akua and the commoners. As trustee, his own privileges to the resource were exceeded by his obligations to the beneficiaries of the trust, the people.

During the last half of the 19th century, the principal land use changed from taro to sugar cultivation. The rules appropriate for taro, where water was rotated among various users, were inappropriate for sugar. Unlike taro, which was cultivated in the riparian lands within lush mountain valleys, sugar grew best in the hot distant, leeward areas requiring long distance diversion of water. Once the waters were used to irrigate the sugar lands, the water evaporated or percolated into the earth and could not be returned to the streams. Taro cultivation, on the other hand, depended upon the return of the natural flow. The flowing water is used to cool the crop as well as to irrigate: lower water levels result in higher water temperature leading to rotting of the taro plant.

The rise of the sugar industry meant inevitable conflicts with the remaining native taro growers. Sugar depended on the long distance delivery of water and the de-watering of the streams. Taro relied upon the return of water to the stream, the maintenance of the natural flow and the allocation of water by rotation. The law changed to meet the sugar planters' need for contractual rights to take water out of the valley. Sugar production required a ton of water to produce a pound of sugar. The certainty of water contracts were essential to maintain a steady output of

sugar.

As Hawaiian society changed from subsistence taro farming to the cultivation of a cash crop, water lost its quasi-sacred character within the Hawaiian metaphor. Water, like labor, became a factor, to be figured in the cost of production. The Hawaii Supreme Court during the time of the Kingdom, the Republic and the Territory period facilitated the change in law by reaffirming water as a commodity. The Court adjudicated a number of conflicts over water in the early 1890s, many involving competing diversions by sugar companies. As in land interests, a concept of adverse use allowed new users to claim abandoned water.

Despite the clear economic agenda of the sugar industry, the supreme court always noted its obligation to decide water rights cases by reference to Hawaiian practice. Since this "rule" could not be avoided, it was interpretation of the relationship between konohiki and society that was reinterpreted. The reconstruction of the role of the ali, from that of manager and trustee to one of owner of the resources they distributed came at a vulnerable political moment to Hawaiians. Western thought and culture, centered around the plantation, was rapidly gaining power and influence, while Native Hawaiian customs receded. Indeed, the importation of immigrant labor from Asia and the depopulation of the Hawaiian community by illness, made Hawaiians a minority in their own homeland. Foreigners dominated industry, education and commerce, served as members of the Cabinet, acted as judges, and developed the legal system.

The water rights decisions in the subsequent "Territorial" period accelerated the privatization of water. In 1904, the Territorial Supreme Court

affirmed the konohiki's private ownership over most of the surface waters. Water became a commodity and the sugar industry created a market in waters. Given the political hegemony that existed in Hawaii, it was evident that the courts would not invalidate these contracts. Under the prevailing jurisprudence in the United States, contracts were within the realm of private behavior--to be enforced according to their terms and not to be modified by the incorporation of customary law or public trust principles.

Hence when territorial courts referred to the settled traditions of water rights--they were referring to contemporary commercial practice, not the now diminishing world of the Native Hawaiian. More important, there was no one to complain or interfere with this judicially sanctioned privatization of water. When litigation did occur, it was typically between two sugar companies, over one company's unwarranted modification of an irrigation system. As the courts divided the waters among the sugar interests they saw no reason to challenge the basic assumption that water was a commodity. In purporting to reflect reality, the "reality" of private ownership was reaffirmed by practice and stare decisis. Each subsequent water rights decision, whether or not it reached fresh issues, started from a premise approving private ownership of water. Since each judgment could be viewed as an implicit affirmation of these foundational principles, the simplest water rights case, whether or not a written opinion was issued, restated the new world order.

The power of a judicial decision to close the world for the Hawaiians also inherently carries with it the power to explode assumptions once thought

clearly settled. Thus, in the first post-statehood water rights case, McBryde v. Robinson, the Hawaii Supreme Court invalidated the assumptions of private ownership upon which the private parties had proceeded. Even though the parties themselves had not raised the validity of private ownership by means of konohiki rights, the court deemed it to be an issue that was implicitly raised by issues regarding transfer. Transfer was not conceivable if a private sugar company could not own water rights.

The insight to overrule the concept of private ownership of water did not come suddenly to the Supreme Court of Hawaii as a sudden revelation. Rather it was reflective of political changes that occurred after statehood, changes that reflected the possibility that some of the cultural heritage of Hawaiians, or more precisely, of "local" people could be reconstructed through the power of the judicial system. In particular, the power of the court to take judicial notice that prior assumptions, made under other political regimes, regarding property were incorrect gave the court great power to reexamine fundamental relationships in society. The power of the first post-statehood supreme court to reconstruct a jurisprudence that incorporated modern equivalents of traditional Hawaiian property practices must be closely examined as a possible means of connecting political claims with the revival of a Hawaiian voice.

Resources such as land or water, which objectified property and ownership in western law were in Hawaiian culture, society itself not the symbol of the aggregate or individual wealth of that society. Water formed,ed the nexus of a series of duties, obligations and understanding. Thus to "have" water in Hawaiian culture signified the place one

had in society. "Water" thus "stood for" a series of relationships in which one could extrapolate the fundamental aspects of Hawaiian society. Thus, resources such as land and water, were totems in the same sense as Pele. Indeed, this quality was pervasive in what appeared to be the "material world" of the Hawaiian.

The interconnectedness of that world meant that almost every "object," be it a canoe, burial ground, or shell, signified large realms of the Hawaiian cosmology. Objects, places and people were their stories. It was the stories that were real, the objects were significant as aids to remembering. Western concepts of property reversed this priority: the objects, such as land, became much more significant than the narratives they stood for. The reification of land and other resources gave the "present," in terms of one's economic net worth, more significance than the past. The former obligations which came with occupation of land, the trusteeship of the narrative, gave way to viewing land in terms of its exchange value.

A world in which the symbols had no value apart from their narratives, became, much to the surprise and detriment of Hawaiians, a world in which the symbols, themselves were the very things of value. In such a new world, the native Hawaiian clings to the symbol or the signifying as if it had its former meaning. When native Hawaiians prove their claims, and when reparations programs are implemented, now trusting only in the value of the symbol, the Hawaiians demand the signifying as payment. Surrounded simply by the symbols, the Hawaiian has no way of reconstructing what was truly loss, the culture it signified.

Hence, contemporary redress

claims focus on the signifying objects. Nothing is more signifying than "land." But it is more than specific lands that Hawaiians have lost, but the societal relationships at which land was the center. As lands are returned, or housing is created for native Hawaiians, there is a fundamental lack of satisfaction. The return of the signifying is not the recreation of the signified. In the same manner, the identity of Hawaiians has become signified by "blood"--the having of Hawaiian blood. Thus, deeper questions of cultural identity and political identity have been subsumed within a preoccupation with that which is signifying, the traces of Hawaiian blood. However, in both the cases of property and blood, it is not difficult to detect that Hawaiians are using these terms to "stand for" that which has been truly lost. The emotional intensity with which these issues are addressed indicate that these signifying devices are mostly connections with a deeply felt loss. These things then, become "what could have been," and must be kept alive as a claim to a counterfactual history.

IV. Using an Indexical Model of Selecting Core Example of a Concepts as a Means for Reconstructing Traditional Values

A. The Indigenous Origins of Hawaiian Concepts of Communal Property:

The first step in reconstructing a process by which apparently ambiguous principles, such as "communal property values" or "malama aina" [to massage the earth] would have dictate real outcomes is to derive an understanding of the origins of such concepts. Like understanding the legislative history of

the constitution of the United States, a general sense of purpose serves as the guide to the application of open-textured terms that once shared the same lack of precision as "malama aina." -- terms such as "due process" [meaning the process that is due].

Thus, one must reconstruct, as comprehensively as possible, the totality of the world by which these concepts had meaning--much in the same manner that when lawyers debate whether the eighth amendment [prohibiting cruel and unusual punishment] renders the death penalty unconstitutional today--both sides must debate the relevance of the 18th century backdrop [where executions were more common] against which these terms were applied.

In the case of Hawaiians, this would require, at minimum, some basic understanding of how to apply malama aina -- an ability too garner such an understanding from those who know how to properly apply the term to examples in the real world. As for "malama aina" -- by understanding its origins one can understand that it was not a function of a society where individuals used "rights" to hold others at bay, rather malama aina was a concept which transferred to each generation the proper attitude or state of mind. Possession of this attitude, by truly "getting the story" was critical to its proper application. Proper application was not derived from memorizing the core examples without understanding how such examples were bound together.

The creation epics are among the best remaining sources to piece together an image of the metaphorical context of Hawaiians. The epics stress the importance of the original unity among body, spirit and environment. The contrary Western concept of rights --to exercise one's legal privilege without

regard for other parties, undermined the reciprocity in Hawaiian relationships that flowed from the epics. The universe was an extension of the kinship system, and the genealogy of the universe was part of one's personal history. By one's act of chanting or hearing the Kumulipo, the account of creation, one experiences, as opposed to simply learns of, the fundamental unity that generates the relationships in the world:

O Ke au i kahuli wela ka
honua

At the time of
changing, the earth
was hot

O ke au i kahuli lole ka lani

At the time of changing, the
heavens unfolded

O ke au i kuka'iaka ka la

At the time when the sun
appeared in shadows

E ho'omalamalama i ka malama

Causing the moon to shine

O ke au o Makali'i ka po

At the time when the Pleides
were seen in the night

O ka walewale ho'okumu honua ia

It is the slime that establishes
the earth

O ke kumu o ka lipo, i lipo ai

At the beginning of the deep
darkness, darkening

O ke kumu o ka Po, i po ai

At the beginning of the night,
only night

O ka lipolipo, o ka lipolipo

In the unfathomable
darkness, dark blue
and bottomless

O ka lipo o ka la, o ka lipo o
ka po

In the darkness of
the sun, in the
endless night

Po wale ho'i

Indeed, it was only night

Hanau ka po

The night gave birth

Hanau Kumulipo i ka po, he
kane

Kumulipo [foundation of
darkness] was born in the
night, a male

Hanau Po'ele i ka po, he
wahine

Po'ele [the dark night] was
born in the night, a female...

Emphasis on genealogy created extraordinarily different relationships in Hawaiian society than in the West. The Hawaiian's identity and structure for understanding the world flowed from the Kumulipo. Every event was part of the sequence that begins at the moment of creation. All Hawaiians were, and presently are, ultimately related, descendants of common ancestors. Relationships are governed by degrees of kinship, and rights are accorded more to the family or to the society than to the individual, unlike in the West. While divisions did exist between chiefs and commoners, there was an overriding context of wholeness and unity among the people.

Chants and epics were the means for understanding the practices and

customs on earth. Epics, such as that of Papa and Wakea, the earth-mother and the sky-father, created the patterns for behavior on earth, and generated controlling principles, such as malama 'aina--caring for the land.

The first daughter of the sky-father Wakea and the earth-mother Papa, is Ho'ohokukalani [to generate stars of the sky]. She is a great beauty and Wakea, the sky-father has a growing desire for his daughter. Wakea hopes to consummate this relationship with his daughter without the knowledge of Papa. Under the aikapu, the division between men and women, there are four nights each lunar month set aside for the special worship of certain gods. On these nights it is forbidden for men to sleep with their wives. On one of these nights

Wakea is alone with and makes love to his daughter. His daughter returns and tells Papa, her mother, about this event. A great argument ensues between Wakea and Papa who leaves their home. Wakea and his daughter produce celebrated offspring in the Hawaiian cosmology:

The first child of Wakea and Ho'ohokukalani was an unformed fetus they named Haloa [long stalk]. They buried Haloa in the earth, out of which the first taro plant is said to have grown. The second child, also named Haloa became the ancestor of the Hawaiian chiefs and people. Thus the taro plant, which was the main staple of the people of old, is also the elder brother of the Hawaiian race, and as such deserves great respect. [This quote and much of the ideas for this section are taken from Professor Lilikala Kame'elei'hiwa's Phd. thesis--see Center for Hawaiian Studies, University of Hawaii]

The third and fourth child of Wakea and his daughter are the islands Lana'i and Moloka'i. These are to be added to the other original siblings of Ho'ohokukalani, the islands of Hawai'i and Maui. Thus, the children of the mating of Papa and Wakea are 1) the island of Hawai'i, 2) the island of Maui and the daughter Ho'ohokukalani. The children of the incestuous relationship between Wakea and his daughter are 1) Haloa, the taro, 2) Haloa the Chief, 3) the island Lana'i and 4) the island Moloka'i.

A number of important principles that govern Hawaiian life are derived from this epic. Among them are the principle of 'aikapu, or sacred eating, which protects the purity of men by separating them from the profanity of women, the mana, importance of incest in the enhancement of mana, and malama 'aina, or caring for the land.

Thus, in the epic of Papa, Wakea and their daughter, the taro, the people, and all the islands are siblings. So each sibling owes reciprocal duties to the others. The younger siblings must serve and protect the elder siblings, the taro

and the land. The elder siblings, be they taro, land or people, must provide for the well-being of the younger ones.

B. Behavior as a Kind of Text

Epics such as these should not be understood as only conveying literal accounts of genesis and causation, but rather, also as a reminder and means of recreating a "state of mind" necessary in Hawaiian society for success and order. To enter that state of mind will generate right practice. Rules that call for clear, pre-ordained results, are secondary, and merely evidence of "the right state of being"--a psychological allegiance with one's community. Thus the chanting, the hula, and the poetry of the epics were the means of calling forth states generated the right actions.

The creation epics, like the Constitution, also acted as important symbols of societal agreement. In neither case were precise meanings necessary to govern; the meaning would be filled in later. The kumulipo, reveals a consensus as to the importance of genealogy in Hawaiian life and history.

Thus, the importance of these epics does not rest on their factual or scientific credibility as accounts of the world. Like the Constitution, or the Declaration of Independence, they constituted a means of recalling important concepts. To call upon them, in chant or legal argument, is to remind others of a duty to adhere to a tradition. These epics, then are the original sources of Hawaiian customary law, like the magna carta, more important in symbolic than in literal terms.

The structure of the above epics instruct the Hawaiian that he or she is related by blood, both to the lands and to certain Gods. Thus, certain practices in regards to the land would be per se

wrong. Certain practices in regards to the gods of one's lineage would be equally wrong. A society constructed on these ideas of relationship similar to kinship would not require rules in order to define rights to a commodity. If the land is one's sibling, then the proper conduct towards the land would be motivated by the right state of being.

Thus, for many Hawaiians, the Navy's use of an island for bombing practice was qualitatively different the use of bulldozers to clear a field. While both may have contravened the practice of malama aina (to caress the land, for it shall caress you) as understood two hundred years ago, one practice (clearing) may now be acceptable, while the other (bombing) is an egregious wrong. When forced to articulate the distinction between the two practices, the explanation, such as "the island is alive," may not make sense from a eurocentric model of the world. The expression, however, only signifies the metaphorical context. It is not the metaphorical context itself. For non-Hawaiians to understand what is meant by "alive" or malama aina, would be to see the extension of that term, the paradigmatic examples, like case law, which exemplifies its meaning.

Similar to the difficulty that westerners had in refraining from imposing their model on Hawaiian actions, Hawaiians had similar difficulty with the critical concepts of "metaphorical context" of the west, as contained in its legal system. The rise of the western metaphorical context made up of western legal context coincided with the demise of the Hawaiian metaphor. The success of one system of thought depended upon the demise of the other. Surprisingly, the indexical form by which essential concepts are presented is common to both.

An argument that the rules of practice as derived from Hawaiian culture could have been as precise and defined as present western legal concepts, and thus can be reconstructed in such a manner, is based on the historical observation that the 1) the essential syntax of both, that is word-concept, totem-metaphor were similar, and 2) the indexical process for communicating these norms, that is by paradigmatic example as well as by central "text," were quite similar. Given the unequal power relationship between Hawaiian and outsider, these similarities gave outsiders a tool, in the form of legal concepts, for undermining the fundamental elements of Hawaiian society.

Obviously land and water were important in polynesian societies as a means of survival. Yet the systems of resource stewardship that developed were based on gift, rather than ownership. In other words, to possess a resource implied great obligations to share, not as a means to barter, but rather as the cultivation of an attitude, "pono" or harmony. Certain lands were identified with one's family, not from a sense of exclusive uses, but as part of one's genealogy. Resources are part of one's kinship system, thus the personal feelings that one would attribute to relatives, are felt, in Hawaiian society towards natural resources.

As the upper classes experimented with bartering and exchange with the west, the reification of these resources, ultimately meaning the destruction of the relational significance of resources, was inevitable. However, as the ruling class made greater and greater compromises to the demands of foreigners, there was a constant attempt to replicate the traditional understanding that Hawaiians had to the land, using

the new symbols--the panoply of western legal interests in land. The rulers became convinced that through a legal system, the essence of traditional understandings could be preserved. Through codification and decision, the kings of Hawaii entrusted western lawyers with the task of reconstructing a Hawaiian essence through words and precedent.

The triumph of the signifying, and the demise of what it signified in the Hawaiian world, was accomplished by the legal system. The power of precedent created a device by which meaning could almost always be divorced from its proper context. Thus, a world which was uncertain but in which one was obliged to act in good faith, was replaced by legal uncertainty, which one was allowed to exploit.

For example, the essence of water, as the nexus of relationships between lesser administering chief and commoner who cultivated the field, became objectified. No longer were the relationships significant, particularly those involving shared labor and product, but the water itself, and the power to move the water became most significant. In a series of decisions, the mutual relationship between chiefs and commoners became a "stewardship" -- implying privileges to the ranking hierarchy. "Stewardship," once understood only within the context of pono, that is man, gods and nature, in harmony, was restructured as a "feudal" relationship.

Once absolute control became implied from this feudal relationship, absolute control itself became ownership. Ownership of water thus became dependent on ownership of certain parcels of land. These were decisions that depended upon discrete divisions of the resource with fixed rights

and arbitrary award of rights to a certain class of chiefs. However, once sufficiently privatized, western interests, which had available cash at that time, easily acquired these interests, much as is predicted by the simplest theories of law and economics.

The redistribution of the new "rights" resembled a massive corporate reorganization where chiefs, commoners and the royal family receiving different classes of stock or debt. The idea of justice focused solely on the initial distribution and not the framework by which future control and acquisition might take place.

The konohiki class, sort of junior preferred stockholders, quickly traded lands for other commodities. Commoners were allocated a fair share of lands, but few had the ability to pursue possession. The economic consequences of land redistribution were unknown to Hawaiians. For within such a relational context, the possession of land had little significance for the average person so long as the essential rules of the economy remained unchanged. The average Hawaiian could not imagine, how, or why the whole fabric of society should be changed, simply because different persons, even foreigners, occupied certain lands. Hawaiian history had witnessed continuous reallocations of lands, but the obligation of the new konohiki remained the same as the old. The notion that people could be excluded from the use of water or land was unthinkable.

Native Hawaiians today conceptualize the loss of all lands, whether sold in a private transaction or seized by the United States as a result of the illegal overthrow and annexation as indistinguishable. The history of losing these lands, whether by the encroaching privatization of the legal system, or

outright seizure, seem equivalent departures from preexisting understandings. It is not land when many Hawaiians speak emotionally about the loss of the "aina"--they are really speaking about the loss of themselves.

Two words commonly used in rights advocacy by native Hawaiians today are "lands" and "trust." When combined, they signify better than any other words in English, the relational context which was lost. Indeed, in traditional Hawaiian land tenure, one could not conceptualize, land, without there being a coterminous "trust." To have any property, was to have a "trust" for no one could "have" (own) anything, all material things were the province of the gods. Hawaiians were guests in the "material" world of the gods. Like being a guest in the house of another, one had no "rights," and one's stay was clearly limited.

V. Conclusion:

The purpose of this introductory paper has been to explore powerful "what ifs"? Namely, if Hawaiians are empowered such that an autonomous self-governing political entity does become a reality, there are institutional processes which, already exploited by the western legal system, could serve a similar function in generating an evolving contemporary Hawaiian culture. Clearly, however, the inability of Hawaiians to capture the rhetorical stage, where malama aina would be "alive" and not simply an element of Hawaiian antiquity, is deeply rooted in the political obstacles deliberately placed before Hawaiians. Thus, the manner in which Hawaiian culture is dismissed, as either, dying, dead or lacking the sophistication

of western counterparts, is an argument founded not in the truth of the proposition asserted, but in the deep fear, and guilt, of the disruptive consequences of even minimal success.

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