

A CLASH BETWEEN CULTURE AND LAW: A COMPARATIVE LOOK  
AT THE CONFLICT BETWEEN QUIET TITLE ACTIONS IN HAWAII,  
THE KULEANA ACT OF 1850, AND THE DISPLACEMENT  
OF INDIGENOUS PEOPLE

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INTRODUCTION

“It’s a grandparent. You just don’t sell your grandmother,” said Law Professor Kapua Sproat, describing the ties Native Hawaiians have to the ancestral land, which was originally provided to them by the Kuleana Act of 1850.<sup>1</sup> Native Hawaiians, like many other indigenous

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1. Craig Fitzpatrick, *Mark Zuckerberg feels heat from Hawaii as he continues “presidential” US Tour*, NEWSTALK, (Jan. 23, 2017, 5:14 PM), <https://www.>

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people around the world, have suffered land loss as a result of modern property law and legislation.<sup>2</sup> One of the most prominent examples of this conflict is Facebook CEO Mark Zuckerberg's purchase of 700 acres of land in Kauai to build a family home.<sup>3</sup> Almost a dozen small parcels are owned by native Hawaiian families who, per the Kuleana Act, have the right to walk across Zuckerberg's property<sup>4</sup> and use the natural resources located on the property. As a result, Zuckerberg brought legal actions to quiet title and partition the property.<sup>5</sup>

Quiet title and partition actions are not uncommon in Hawaii.<sup>6</sup> One issue that could give rise to these types of actions involves ownership of kuleana lands which are largely undocumented.<sup>7</sup> The lands have been passed down through generations, and many of the current descendants own small fractions of the property interest.<sup>8</sup> These descendants face economic challenges to protect their property interest as litigation costs can be upwards of \$100,000.<sup>9</sup>

This Note describes the conflict between culture and law in Hawaii, and proposes legislation that will preserve native Hawaiian culture and land rights by prohibiting the sale of kuleana land. To fully understand the conflict between culture and law, this Note compares the land history, legislation, and the resulting socio-economic impact between native Hawaiian and Australian people. Perhaps a better understanding of this conflict will allow for the formation of a new bill that is more harmonious and practical. *Section I* discusses land law and indigenous rights. *Subsection A* provides a history of Hawaiian land law including: (1) a description of the Kuleana Act of 1850 and current bills that aim to protect native Hawaiian kuleana land rights; and (2) the resulting homelessness of native Hawaiians. *Subsection B* provides a

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[newstalk.com/Mark-Zuckerberg-feels-heat-from-Hawaii-as-he-continues-presidential-US-tour](http://newstalk.com/Mark-Zuckerberg-feels-heat-from-Hawaii-as-he-continues-presidential-US-tour).

2. Andrew Gomes, *Facebook's Zuckerberg sues to force land sales*, HONOLULU STAR ADVERTISER (Jan. 18, 2017, 6:08 PM), <http://www.staradvertiser.com/2017/01/18/business/facebooks-zuckerberg-sues-to-force-land-sales/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

comparative history of Australian land law and the resulting homelessness. *Section II* describes international indigenous land law legislation by way of the United Nations Declaration of the Rights of Indigenous Peoples. *Section III* proposes legislation that will preserve native Hawaiian culture and land rights by prohibiting the sale of kuleana land.

## I. LAND LAW AND INDIGENOUS RIGHTS

### A. *History of Hawaiian Land Law*

Before colonization, land afforded the Hawaiian people a self-sufficient economy.<sup>10</sup> The *konohiki*, headman of a land division, oversaw the land administration.<sup>11</sup> As the *konohiki*, he was entitled to certain rights to land and product surplus because he secured the portion of wealth that went to the *ali'i nui*, king of the island.<sup>12</sup> The *konohiki's* responsibility required him to manage the land for conservation and enrichment of its human and natural resources.<sup>13</sup> In 1778, on behalf of Great Britain, explorer Captain Cook arrived in Hawaii.<sup>14</sup> He discovered the Native Hawaiians operated a complex tenure system similar to the feudal system of medieval Europe.<sup>15</sup> Despite this similarity, native Hawaiians did not have a concept of fee simple absolute, and thus landholdings were considered revocable.<sup>16</sup>

After colonization began, conflicts arose between Western and native Hawaiian philosophies regarding land ideals. For example, the British, as capitalists, treated land as a commodity; whereas, native Hawaiians had a deeper spiritual and cultural connection to the land.<sup>17</sup>

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10. JON J. CHINEN, *THE GREAT MAHELE, HAWAII'S LAND DIVISION OF 1848* 5-6 (Univ. of Haw. Press, 1958).

11. *Id.* at 3.

12. *Id.* at 5.

13. Maivan Clech Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 Wash. L. Rev. 233, 243 (1989).

14. JEAN HOBBS, *HAWAII – A PAGEANT OF THE SOIL* 1 (Stanford Univ. Press, 1935).

15. *Id.*

16. Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 849 (1975).

17. *Id.*

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Native Hawaiians view land as an ancestor, rather than a possession.<sup>18</sup> This ideological conflict continues today. It has been argued that current actions to quiet title against natives for kuleana land are the “face of neocolonialism.”<sup>19</sup> Native Hawaiians faced similar pressures when Hawaiians first traded with foreigners and the *ali'i nui* paid for foreign goods and services with small pieces of land.<sup>20</sup>

In 1810, Hawaii became a monarchy, and land rights evolved as a result.<sup>21</sup> For example, one result was the Great Mahele, a mutual quitclaim of the king and chiefs to redistribute out their land interests.<sup>22</sup> The Mahele created three categories of landlords: the king, government, and *konohiki*.<sup>23</sup> But the Mahele did not create fee simple titles; rather, the landlords held the land “subject to the rights of native tenants.”<sup>24</sup> When the landlords began selling land, confusion arose over title. Therefore, to clarify and protect the rights of native tenants, the Kuleana Act was passed.<sup>25</sup>

### 1. Hawaiian Legislation

The Kuleana Act of 1850 contains seven provisions.

(1) Fee simple title is given to all natives who occupy and improve any government land, if the Land Commission approves their claims.<sup>26</sup> This provision does not apply to *konohiki* or government-owned land in Honolulu, Lahaina, and Hilo.<sup>27</sup>

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18. Julia Carrie Wong, *Mark Zuckerberg drops lawsuits to force hundreds of Hawaiians to sell him land*, GUARDIAN (Jan. 27, 2017, 2:59 PM), <https://www.theguardian.com/us-news/2017/jan/27/mark-zuckerberg-drops-hawaii-land-lawsuits>.

19. *Id.*

20. Lam, *supra* note 13, at 248.

21. *Id.* at 249.

22. CHINEN, *supra* note 10, at 15.

23. Lam, *supra* note 13, at 261.

24. CHINEN, *supra* note 10, at 29.

25. *Id.* at 30.

26. CHINEN, *supra* note 10, at 29-30 (Land Commission and Crown Lands were defined in the Act, and the author retained the cases).

27. *Id.* at 30.

(2) Provision (1) applies to natives who occupy and improve *konohiki* and Crown Lands.<sup>28</sup>

(3) The Land Commission separates the land, awards fee simple title, and provides equitable exchange where possible, so that each man's land may be by itself.<sup>29</sup>

(4) Certain government land is sold in lots of one to fifty acres to natives with insufficient land.<sup>30</sup>

(5) House lots, not part of cultivated land, cannot be larger than one-fourth of an acre.<sup>31</sup>

(6) Land Commission will only grant cultivated land that is actually in use (not waste land or land cultivated in different spots in an attempt to enlarge the lot).<sup>32</sup>

(7) The people on the land have the right to take firewood, house timber, *aho* cord, thatch, *ti* leaf, but they may not sell these articles for profit. The people must tell the landlord or his agent their use of the land and proceed with the landlord's consent. Further, the people are entitled to drinking water, running water, and the right of way. Springs, running water, and roads are free to all people on land granted in fee simple, except for wells and water courses built by individuals for their own use.<sup>33</sup>

Today, Zuckerberg's purchase of 700 acres exemplifies an existing conflict between the property rights provided by the Kuleana Act and current property law. What legislative action has been taken to correct the clash between native property rights provided by the Kuleana Act and quiet title actions?

Uniform Partition of Heirs Property Act gives native Hawaiians the right of first refusal.<sup>34</sup> It applies to an action for partition when: (1) there is no recorded agreement binding all co-tenants; (2) one or more of the co-tenants received title from a relative; and (3) either 20% or more of the interests are held by a related co-tenant, or 20% or more of the co-tenants are relatives.<sup>35</sup> However, land, acquired through the

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28. *Id.*

29. *Id.* at 29.

30. Levy, *supra* note 15, at 261.

31. *Id.*

32. *Id.*

33. *Id.* at 262.

34. S.B. 2408, 28th Leg., Reg. Sess. (Haw. 2016).

35. *Id.*

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Kuleana Act and inherited through generations of people, has been poorly documented.<sup>36</sup> Many native Hawaiians are unaware that they own land until after they receive compensation from quiet title actions.<sup>37</sup> Further, defendants in quiet title actions have only twenty days to respond after being served.<sup>38</sup> Otherwise, the defendant does not have a say in the proceeding.<sup>39</sup> If the legal action continues, legal representation for the defendant is often costly.<sup>40</sup>

Per H.B. 1450, the Hawaiian legislature finds that it is the state's constitutional duty to protect title to kuleana land given to the natives.<sup>41</sup> Thus, the purpose of H.B.1450 is to require kuleana land claimants to hold title to more than 50% of a parcel in order to initiate a quiet title action.<sup>42</sup> An action to establish title can be brought by anyone who has been in adverse possession of five acres or less for twenty or more years and a showing good faith.<sup>43</sup> Although 50% ownership may help buffer claims against native land interests, the poor documentation and natural dilution of the natives' property interests<sup>44</sup> make adverse possession by an outsider relatively easy. For example, Zuckerberg met this ownership claim by purchasing interests from several part-owners.<sup>45</sup> Thus, for big hitters like Zuckerberg, the 50% requirement is a low barrier.

In addition, H.B. 860 explains that, if requested by the defendant, courts will order mandatory mediation or consolidation for actions to quiet title involving kuleana land.<sup>46</sup> However, native Hawaiians will still have access to the land for cultural and traditional practices.<sup>47</sup> A plaintiff cannot recover costs, expenses, or attorney's fees.<sup>48</sup> Further,

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36. Gomes, *supra* note 2.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. H.B. 1450, 29th Leg., Reg. Sess. (Haw. 2017).

42. *Id.*

43. *Id.*

44. Gomes, *supra* note 2.

45. *Id.*

46. H.B. 860, 29th Leg., Reg. Sess. (Haw. 2017).

47. *Id.*

48. *Id.*

if the land is kuleana land, the Office of Hawaiian Affairs would be joined as a plaintiff, the plaintiff has reason to believe the owner of the inheritable interest died intestate, and there is no taker under article II of the Hawaii Uniform Probate Code.<sup>49</sup> This bill provides some protection over native land for cultural and traditional practices. However, the bill does not change the fact that native Hawaiians may still be deprived of their ancestral land.

## 2. *Homelessness in Hawaii*

Indigenous people, in various parts around the world, have a “spiritual relationship . . . with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.”<sup>50</sup> Dispossession of one’s land can have devastating consequences on Indigenous people.<sup>51</sup> Anthropologist W.E.H. Stanner described the Aborigines state of dispossessed living as a state of “homelessness,” which resulted in a loss of personal identity, personal relationships, and complex social structure.<sup>52</sup> Thus, one wonders what effects homelessness is causing in Hawaii.

Many framers believed that liberty required property.<sup>53</sup> In fact, John Adams stated “[p]roperty must be secured or liberty cannot exist” because property is not thought of as sacred, and society will break into anarchy and tyranny.<sup>54</sup> As a result, homelessness can be seen as the worst kind of liberty.<sup>55</sup> In fact, from a societal standpoint,

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49. *Id.*

50. Jose R. Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7, Add. 4, 39 (1986).

51. Garth Nettheim, *International law and native title in Australia: Annual Richar Cooper Memorial Lecture*, 27 U. QUEENSLAND L.J. 167, 168 (2008).

52. W.E.H. STANNER, *After the Dreaming*, in *WHITE MAN GOT NO DREAMING: ESSAYS 1938-1973* 230 (1979).

53. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HIST. OF PROP. RTS.* 43 (3d ed. 2007).

54. *Id.*

55. Wayne Wagner, *Homeless Property Rights: An Analysis of Homelessness, Honolulu’s “Sidewalk Law,” and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights Under the U.S. Constitution*, 35 U. HAW. L. REV. 197, 227 (2013).

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homelessness could be considered the absence or loss of liberty. Homelessness lacks the idea of a nuclear family, political participation, financial responsibility, and is often linked to alcohol and drug use.<sup>56</sup> Thus, the dominant view of homeless people is that they are dirty, lazy, irresponsible, uncivilized, criminal, and unredeemable.<sup>57</sup>

However, in Hawaii, one of the main causes of homelessness is the lack of affordable housing.<sup>58</sup> Hawaii has one of the most expensive housing markets, the highest cost of living, and low average income.<sup>59</sup> In 2012, 82% of poor Hawaiians spend more than 50% of their incomes on housing.<sup>60</sup> Further, 46% of homeless adults in shelters or outreach programs had a high school diploma or GED, and 27% were attending or graduated from college.<sup>61</sup> As few as 30% of adults in the state's shelter programs were employed.<sup>62</sup>

As a result of high housing costs, native Hawaiians are more likely than non-natives to live with subfamilies and multiple wage earners.<sup>63</sup> Over 24% of native Hawaiians are part of federal, state, and local housing programs.<sup>64</sup> Native Hawaiian homeownership opportunities

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56. *Id.*

57. KATHLEEN R. ARNOLD, HOMELESSNESS, CITIZENSHIP, AND IDENTITY: THE UNCANNINESS OF LATE MODERNITY 7-8 (2004).

58. Wagner, *supra* note 55, at 202.

59. COST OF LIVING DATA SERIES 2ND QUARTER 2012, MISSOURI ECON. RES. AND INFO. CENTER (2012), [http://www.missourieconomy.org/indicators/cost\\_of\\_living/index.stm](http://www.missourieconomy.org/indicators/cost_of_living/index.stm).

60. PETER WITTE, NATIONAL ALLIANCE TO END HOMELESSNESS, HOMELESSNESS RES. INST., A RES. REP. ON HOMELESSNESS JANUARY 2012: AN EXAMINATION OF HOMELESSNESS, RELATED ECONOMIC AND DEMOGRAPHIC FACTORS, AND CHANGES AT THE NATIONAL, STATE, AND LOCAL LEVELS, STATE OF HOMELESSNESS IN AMERICA 2012, 20, 24-25 (2012), <http://b.3cdn.net/naeh/9892745b6de8a5ef59q2m6yc53b.pdf>.

61. CENTER ON THE FAMILY AT THE U. HAWAII AND THE HOMELESS PROGRAMS OFFICE OF THE HAWAII STATE DEPARTMENT OF HUM. SERVS. (hereinafter referred to as "CENTER ON THE FAMILY AT U.H."), HOMELESS SERV. UTILIZATION REP. 2012 2, 7-9 (2011), <http://uhfamil.hawaii.edu/publications/brochures/HomelessServiceUtilization2012.pdf>.

62. *Id.* at 7.

63. Maris Mikelsons & Karl Eschbach, *Housing Problems and Needs of Native Hawaiians*, OFF. OF POL'Y DEV. AND RES. 1, 3 (Mar. 1996), <https://www.huduser.gov/publications/pdf/hawaii.pdf>.

64. *Id.*

have always been limited and decreased as housing costs increased.<sup>65</sup> Lower income native Hawaiians particularly are at risk for diminished ownership opportunities.<sup>66</sup> The lack of affordable housing led to major overcrowding for native Hawaiians.<sup>67</sup> Native Hawaiians sacrifice space for affordability.<sup>68</sup> Between 1980 to 1990, there was a particular surge of native Hawaiians who moved to the mainland in search of affordable housing.<sup>69</sup>

Homelessness is more common among native Hawaiians.<sup>70</sup> Research has shown that over 20% of all homeless people in Hawaii are native Hawaiians.<sup>71</sup> “The native Hawaiian population is younger, has lower average education, higher unemployment, and lower income than the non-Hawaiian population.”<sup>72</sup> Native Hawaiians are less likely than non-natives to have a high school education, and only 77% of native Hawaiians have a high school education, while only 99% of native Hawaiians earn a four-year college education.<sup>73</sup>

Homeless encampments have sprung up in Hawaii. The largest encampment in Hawaii, *Pu’uhonua o Waianae* or the Refuge of Waianae, is located 30 miles outside of Honolulu and holds roughly 200 people.<sup>74</sup> Residents of this encampment practice *pu’uhonua*.<sup>75</sup> *Pu’uhonua* means “a place of refuge, or a sacred place where miscreants can find forgiveness and a clean slate.”<sup>76</sup> Twinkle Borge has been the leader of this encampment for ten years.<sup>77</sup> Borge estimates

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Liz Barney, *Hawaii’s largest homeless camp: rock bottom or a model refuge?*, GUARDIAN (June 22, 2017, 7:00 AM), <https://www.theguardian.com/us-news/2017/jun/22/hawaii-homeless-camps-puuhonua-safe-zones>.

75. *Id.*

76. *Id.*

77. *Id.*

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40% of the residents in the encampment cannot afford housing, and many others have addictions or mental health conditions.<sup>78</sup>

The Hawaiian legislature acclaimed Borge for “practicing *pu’uhonua*, one of Hawaii’s most valued ideologies.”<sup>79</sup> In addition to Borge’s leadership, there are eight captains, seven of whom are female.<sup>80</sup> Thus, there is a strong matriarchy within the encampment.<sup>81</sup> A large number of children live in the encampment and are considered *hanai* babies, children that are nourished by people apart from their parents.<sup>82</sup> This matriarchy “help[s] with everything from settling fights to providing new clothes for job interviews.”<sup>83</sup>

Nevertheless, the governor’s coordinator on homelessness states, “[W]e know from what we’ve seen in the past, once an encampment goes above a certain size, it becomes unmanageable.”<sup>84</sup> There is nowhere for encampment residents to properly dispose of trash.<sup>85</sup> The bathrooms in the nearby park have been permanently closed.<sup>86</sup> There is a risk that the Hawaii Department of Land and Natural Resources, owners of the encampment land, may shut off water hoses in the area because of increased water bills, which now cost over \$500,000 per year.<sup>87</sup> Rather than fund hygiene facilities and trash removal, the state’s goal is to shift everyone into homes.<sup>88</sup> However, given the incredibly high cost of housing, and the popular concept of legal campgrounds in Seattle and Portland, Hawaiian lawmakers are considering creating *Pu’uhonua* safe zones.<sup>89</sup> *Pu’uhonua o Waianae* would be the prototype.<sup>90</sup>

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78. *Id.*

79. *Id.* (emphasis added).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

*B. History of Australian Land Law*

The doctrine of terra nullius – a land without people – was established during British colonial rule of Australia and lasted until 1992.<sup>91</sup> The doctrine essentially state that indigenous land was “empty” or belonged to no one and therefore could be claimed by Westerners.<sup>92</sup>

The absence of aboriginal farms was crucial in the formation of this doctrine because the British historically associated property rights with a society’s stages of development.<sup>93</sup> Great Britain hired Captain Cook to travel to the South Pacific in order to track the path of Venus and determine the distance between Earth and the Sun.<sup>94</sup> Once he finished this expedition, Cook headed farther south to search for a suspected southern continent.<sup>95</sup> If Cook found the continent, he was instructed to purchase land in the name of the king of Great Britain from any natives who were willing to sell it.<sup>96</sup> Unlike the other natives Cook encountered on behalf of the British empire, the Aborigines were hunter-gatherers, not farmers.<sup>97</sup> According to the stages of development, hunters did not have property rights.<sup>98</sup>

Further, the Aborigines showed no interest in trading with the British.<sup>99</sup> The Aborigines would not even trade land because there was nothing they would take in exchange.<sup>100</sup> Cook’s travels led the British to believe there was no need to buy Australia; therefore, they returned to claim it outright.<sup>101</sup> However, the British later realized that tribes were nomadic, though only within the tribes’ own boundaries, and that land was divided among individuals and passed down generations.<sup>102</sup>

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91. Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 *LAW & HIST. REV.* 95, 95 (2005).

92. *Id.*

93. *Id.* at 101.

94. *Id.* at 97.

95. *Id.*

96. *Id.*

97. *Id.* at 100-01.

98. *Id.* at 102.

99. *Id.* at 104.

100. *Id.* at 103.

101. *Id.*

102. *Id.* at 114.

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Before the 1960s, Australia did not recognize Aboriginal land rights. However, Indigenous people now own up to 22.4% of Australia as a result of statutes and validation of native title established by the High Court of Australia in *Mabo v. Queensland*.<sup>103</sup> Most of the land to which Aborigines now have title is found in remote areas.<sup>104</sup> Further, “[t]he grant of statutory land rights does not necessarily extinguish native title, which means that it is possible to have both native title and statutory land rights over the same land.”<sup>105</sup> To better understand current Aboriginal land law, one must review its legislative history.

### *1. Australian Legislation*

The Aboriginal Land Rights (Northern Territory) Act of 1976 (ALR) and Native Title Act of 1993 (NTA), among other acts, aimed to protect Aboriginal title rights. The ALR created Aboriginal land trusts.<sup>106</sup> Specifically, the Act provides:

[W]here the Land Trust is named as the grantee of land in a deed of grant held in escrow by a Land Council – to acquire, as and when practicable, the estates and interests of other persons in the land with a view to the surrender to the Crown of those estates and interests and the delivery to the Land Trust of the deed of grant held by the Land Council.<sup>107</sup>

Land council is comprised of one Chair and three or more other members appointed by Minister for Indigenous Affairs, unless the Minister states otherwise.<sup>108</sup>

The principal objectives of the NTA are to recognize and protect native title, establish how to deal with native title, determine how to establish native title claims, and provide validation for past acts.<sup>109</sup>

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103. Leon Terrill, *Converting Aboriginal and Torres Strait Islander Land in Queensland into Ordinary Freehold*, 37 SYDNEY L. REV. 519, 521 (2015).

104. *Id.*

105. *Id.*

106. *Aboriginal Land Rights Act 1976* (N. Terr.) (Austl.).

107. *See id.* pt II s 5(1)(c).

108. *See id.* pt II s 7(1).

109. *Native Title Act 1993* pt I s 3 (Austl.).

Native title described in this Act cannot be destroyed or terminated.<sup>110</sup> Further, this Act provides it should be interpreted subject to the provisions of the Racial Discrimination Act of 1975.<sup>111</sup> The Racial Discrimination Act of 1975 prohibits racial discrimination and offensive behavior based on race.<sup>112</sup> Regarding sale, purchase, and ownership of land, the Act states that it is unlawful to treat a person less favorably than another person.<sup>113</sup>

Further, the NTA says that natives are allowed access to land to practice traditional activities.<sup>114</sup> Rights of lessee or holder of non-native title rights prevail in instances of traditional activities, but they can make agreements with the natives regarding the manner of exercise and variation of the natives' rights.<sup>115</sup> In addition, indigenous land use agreements must meet the requirements set forth in two sections. Section 24CB relates to future acts, compensation for past acts, exercising any native rights, and native rights relating to water.<sup>116</sup> Section 24CE states an agreement may be for any consideration and subject to any conditions agreed on by the parties.<sup>117</sup> Consideration can also be by freehold grant or other interests.<sup>118</sup>

In addition, future acts are valid if allowed in this Act.<sup>119</sup> For example, future acts will be valid if the parties consent to certain agreements, and the details are on the Register of Indigenous Land Use Agreements at the time it is done.<sup>120</sup> Other bases for validity of future acts include: when procedures indicate absence of native title on non-exclusive farming or pasture land, management of water and airspace, renewals or extensions of acts, public housing, reservations, leases,

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110. *See id.* pt II div 1 s 11(1).

111. *See id.* pt I s 7(1).

112. *Racial Discrimination Act 1975* pt IIA s 18C (Austl.).

113. *See id.*

114. *Native Title Act 1993* pt II div 3 s 44B (Austl.).

115. *See id.* s44B(3).

116. *See id.* pt II div 3 sub-div C s 24CB.

117. *See id.* pt II div 3 sub-div C s 24CE.

118. *See id.*

119. *See id.* pt II div 3 sub-div A s 24AA.

120. *See id.*

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public facilities, low impact future acts, acts that pass the freehold test, and acts affecting offshore places.<sup>121</sup>

Prior to the Northern Territory National Emergency Response Act 2007 (NTNERA), aboriginal land was held for Aborigine owners.<sup>122</sup> The NTNERA, which gave the government broad discretionary power,<sup>123</sup> is no longer in force<sup>124</sup> but it demonstrates that even after a history of legislation promoting the protection of indigenous land, legislation contrary to those initial rights can affect catastrophic change. The impact is evident even in the manner of its passage; the NTNERA was passed quickly, which made it impossible for the Aboriginal people to partake in the formation of the legislation that affected them.<sup>125</sup>

Pursuant to Section 5, “the object of this Act is to improve the well-being of certain communities in the Northern Territory.”<sup>126</sup> However, a lease of land for five years by force of this Act is granted to the Commonwealth by the relevant owner of the land, including aboriginal land.<sup>127</sup> This means that the government can take possession of aboriginal land for five years. While a five-year lease might seem like a compromise compared to prior comments, such as the one Prime Minister Howard made in 2005 when he proposed a ninety-nine-year lease, it is still a compromise imposed on Aborigines without their consent or input.<sup>128</sup>

The Australian government stressed that the NTNERA did not get rid of native title, but admitted that some native title rights would be suspended because of the section 5 provision regarding the five-year

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121. *See id.*

122. Chloe Cameron, *Recognizing Human Rights in Australia's Third World: A critical analysis of the displacement and dispossession caused by the Federal Government's Northern Territory Emergency Response*, 4 QUEENSLAND LAW STUDENT REVIEW 73, 94 (2011).

123. *Id.*

124. *Northern Territory Emergency Response Act 2007* (Austl.) [hereinafter NTNERA].

125. Jenna Gruenstein, *Australia's Northern Territory National Emergency Response Act: Addressing Indigenous and Non-Indigenous Inequities at the Expense of International Human Rights?*, 17 PAC. RIM L. & POL'Y J. 467, 480 (2008).

126. NTNERA 124 pt I s 5 (Austl.).

127. NTNERA pt IV div 1 sub-div A s 31 (Austl.).

128. Gruenstein, *supra* note 125, at 483-84.

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lease.<sup>129</sup> The simple fact remains that the government's ability to take land from Aborigines significantly impacts the Aborigines' ability to control their communal land.<sup>130</sup> The government's ability to strip people of their right to land, on a whim, regardless of duration, really equates to no rights to that land at all.

Although the NTNERA preserves any existing right, title, or other interest, if the land is covered by the lease under Section 31 and the right, title, or interest exists immediately before the time that lease takes effect,<sup>131</sup> then NTNERA does not apply to native title rights and interests.<sup>132</sup>

Section 37 states the termination of rights, titles, interests, or leases, but this section does not apply to rights granted under specific sections of the ALR.<sup>133</sup>

Further, Section 51, subsection 1 states that the Future Acts section of Native Title Act 1993 does not apply to Section 31, 47, or any act done under or with any provision of this Part.<sup>134</sup> Additionally, subsection 2 states that the non-extinguishment principal (from the Native Title Act 1993) applies to the acts in subsection 1.<sup>135</sup> Thus, the NTNERA eroded the prior acts, like the NTA and ALR, to such a degree that the land title rights which the acts bestowed upon Aborigines, were essentially nullified. Although NTNERA was repealed, it serves as a cautionary tale of the government's ability to decimate, in one fell swoop, legal protections for Aborigines that took years to establish.

## 2. Homelessness in Australia

The right to own and manage traditional land and resources is central to the cultural and physical wellbeing of indigenous people.<sup>136</sup> Poor housing is a key contributor to indigenous poverty and

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129. *Id.* at 488.

130. *Id.*

131. NTNERA pt IV div 1 sub-div A s 34 (Austl.).

132. *See id.* pt IV div 3 s 51.

133. *See id.* pt IV div 1 sub-div A s 37.

134. *See id.* pt IV div 3 s 51.

135. *See id.*

136. ALEXNDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS* 238 (Cambridge Univ. Press 2007).

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disadvantage due to its ties to health, education, employment, family safety, and crime.<sup>137</sup>

In the 1950s, town camps like Lajamanu were established as welfare settlements by the government.<sup>138</sup> Lajamanu originally belonged to the Gurindji people, who, in turn, were subsequently displaced.<sup>139</sup> Four hundred Aborigines were initially transferred from Yuendumu to Lajamanu, followed by another 150 people.<sup>140</sup> The people, separated from relatives, their country, and its sacred places, all walked back.<sup>141</sup> Although they were again transported back to Lajamanu, they stayed and called it home, but Yuendumu remains their spiritual homeland.<sup>142</sup> However, many Aborigines who still live on their ancestral land survive in sub-par housing conditions in isolated communities that the government poorly funds.<sup>143</sup>

Currently, Aborigines make up 23% of the homeless population in Australia and only 3% of the general population.<sup>144</sup> Apart from physical homelessness, Aborigines also face spiritual homelessness due to separation from their country, customary law, and kin (or skin) groups.<sup>145</sup>

*a. Physical Homelessness*

In terms of physical homelessness, housing can deteriorate an individual's physical and mental health.<sup>146</sup> Because housing can

137. Cameron, *supra* note 122, at 99.

138. Katherine W. Health Bd. Aboriginal Corp., *Lajamanu*, <<https://www.kwhb.com.au/clinics/lajamanu-chc>>.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Jane Bardon, *A big mob in the house*, AUSTL. BROADCAST COMPANY (July 10, 2016, 4:43 PM), <http://www.abc.net.au/news/2016-07-08/indigenous-communities-appeal-for-an-end-to-housing-crisis/7569546>.

144. HOMELESSNESS AUSTL., HOMELESSNESS AND ABORIGINAL AND TORRES STRAIT ISLANDERS (2016), [http://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Homelessness\\_and\\_ATSIv3.pdf](http://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Homelessness_and_ATSIv3.pdf).

145. *Id.*

146. Ross S. Bailie & Kayli J. Wayte, *Housing and Health in Indigenous Communities: Key Issues for Housing and Health Improvement in Remote Aboriginal and Torres Strait Islander Communities*, 14 AUSTL. J. RURAL HEALTH 178 (Oct. 10,

indirectly affect people's health on an individual and group level, it serves as a partial representation of socio-economic status and influences access to services.<sup>147</sup>

In the remote location of many Aborigines, there is often a lack of resources and job opportunities.<sup>148</sup> Further, existing housing is often substandard.<sup>149</sup> In 2001, 32% of permanent indigenous dwellings required major repair or replacement, and 55% of indigenous or community housing rental programs had major structural problems.<sup>150</sup> The Aboriginal custom of kin (extended family) living all in one dwelling exacerbates this issue.<sup>151</sup> It is common for extended family members to all live in one house; houses built for Aborigines are not often built with that concept in mind.<sup>152</sup> This results in severe overcrowding, which can endanger rental agreements and lead to eviction.<sup>153</sup> In addition to overcrowding, another leading contributor of homelessness is that Aboriginal and Torres Strait Islander youth make up the majority population in out-of-home care and juvenile justice institutions.<sup>154</sup> Other factors that contribute to homelessness amongst Aborigines include family violence, mental illness, unaffordable rental housing, and long social housing waitlists.<sup>155</sup> Without a safe and stable home, Aboriginal youth face a high risk of homelessness and, in turn, the cycle of homelessness among Aborigines is perpetuated.<sup>156</sup>

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2006), <<http://onlinelibrary.wiley.com/doi/10.1111/j.1440-1584.2006.00804.x/full?woliURL=/doi/10.1111/j.1440-1584.2006.00804.x/full&regionCode=US-CA&identityKey=05d9310e-25b8-41d3-b861-b85dd6c978d9>>.

147. *Id.*

148. HOMELESSNESS AUSTL., *supra* note 144.

149. *Id.*

150. Bailie, *supra* note 146.

151. HOMELESSNESS AUSTL., *supra* note 144.

152. *Id.*

153. *Id.*

154. Catherine Yeomans, *25 Percent of Homeless People in Australia Are Indigenous*, HUFFPOST AU (9 July 2016), <[http://www.huffingtonpost.com.au/catherine-yeomans/25-percent-of-homeless-people-in-australia-are-indigenous\\_a\\_21465965/](http://www.huffingtonpost.com.au/catherine-yeomans/25-percent-of-homeless-people-in-australia-are-indigenous_a_21465965/)>.

155. HOMELESSNESS AUSTL., *supra* note 144.

156. Yeomans, *supra* note 154.

*b. Spiritual Homelessness*

Although there is no current empirical evidence or clear definition of “spiritual homelessness,” one study has sought to define it as Aborigines who have lost their traditions and are chronically homeless.<sup>157</sup> It has been challenging to create a collective definition of what “home” means to Aborigines because natural human idiosyncrasies cause the definition to vary slightly.<sup>158</sup>

However, a study of the North Wellesley Islands’ Lardil people shed light on the definition of “home” and “spiritual homelessness.”<sup>159</sup> At the time of initial European contact, this Aboriginal tribe was comprised on twenty-nine patriarchal estates.<sup>160</sup> Each estate contained multiple campsites.<sup>161</sup> The camps were complex units that ranged in size and purpose for the community.<sup>162</sup> For example, some camps’ sizes and spatial structures would fluctuate with the seasons and available harvest.<sup>163</sup> The camps were not defined by physical structures but rather by consistent patterns of use over long periods of time.<sup>164</sup> These consistent patterns caused people to associate the same experiences, stories, and sacred sites with each camp generation after generation.<sup>165</sup> Thus, “home” was not a specific architectural residence, but the different camps and the sociability and memories associated with the camps.<sup>166</sup> This sense of country as home was shared by all other stable Aboriginal groups.<sup>167</sup>

Today, some Aborigines successfully combat spiritual homelessness to a certain degree by transposing their cultural identity

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157. Paul Memmott, *Differing Relations to Tradition Amongst Australian Indigenous Homeless People*, 26 *TRADITIONAL DWELLINGS & SETTLEMENTS REV.* 59, 59 (2015), [http://iaste.berkeley.edu/iaste/wp-content/uploads/2012/09/2015/09/Memmott\\_TDSR\\_26.2.pdf](http://iaste.berkeley.edu/iaste/wp-content/uploads/2012/09/2015/09/Memmott_TDSR_26.2.pdf).

158. *Id.* at 60.

159. *Id.*

160. *Id.*

161. *Id.* at 64.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

to city camping. This is often referred to as a public-place-dwelling lifestyle.<sup>168</sup> A common attribute of Aborigines, who adopt such lifestyles, is low income, where most money is spent on alcohol, minimal possessions, and frequent regular sets of places where they camp in small groups and socialize.<sup>169</sup> It is not as stressful or worrisome for them to adopt this lifestyle because Aborigines have a tradition of open-air camping.<sup>170</sup> By living this way in metropolitan areas, Aborigines are able to maintain their traditional, social, and domiciliary practices.<sup>171</sup> However, practicing the same lifestyle on different land does not avoid the problem of losing touch with ancestral land or the memories associated with its sacred and religious areas. It is also interesting to note that while this lifestyle may be a partial solution for spiritual homelessness, to local authorities it appears that the Aborigines are homeless.<sup>172</sup>

However, not all Aborigines successfully combat spiritual homelessness in this manner. For example, from 1910 to 1970, various government assimilation policies resulted in Indigenous children being forcibly removed from their families.<sup>173</sup> These children, who were displaced during this time period, are called the Stolen Generation.<sup>174</sup> Aboriginal children were taken from their parents, taught to reject their indigenous heritage, and forced to adopt the culture of the colonizers.<sup>175</sup> The purpose behind these actions was to allow Aborigines to “die out” through natural elimination or assimilation.<sup>176</sup> However, the Aboriginal children were ultimately not accepted by white society due to rampant racism during that time.<sup>177</sup> There are cases of Aboriginal children who attempted to return to their cultural and spiritual roots after reaching adulthood and largely being rejected by the white

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168. *Id.* at 66.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *The Stolen Generations*, AUSTRALIANS TOGETHER, <<http://www.australianstogether.org.au/stories/detail/the-stolen-generations>> (last visited Nov. 13, 2018).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

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community.<sup>178</sup> However, they were unable to connect with their roots and descended into spiritual homelessness, being unable to connect with either society.<sup>179</sup>

## II. INTERNATIONAL AGREEMENTS: UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES

On September 13, 2007, the United Nations General Assembly adopted the United Nations Declaration of the Rights of Indigenous Peoples.<sup>180</sup> One hundred forty-four states voted in favor of the Declaration, and four (Australia, Canada, New Zealand, and the United States) voted against.<sup>181</sup> In 2009 Australia endorsed the declaration.<sup>182</sup> The declaration is a non-binding text that states the individual and collective rights of indigenous people.<sup>183</sup> Experts argue that Australia's choice to back the Declaration is of "crucial importance" because it "strengthens global consensus regarding the rights of indigenous people."<sup>184</sup> Amongst other reasons, the United States refused to endorse the Declaration on grounds that it was unclear and subject to multiple interpretations.<sup>185</sup>

Article 8 of the Declaration states that indigenous people have a right to be free from forced assimilation and a right against the destruction of their culture. These rights protect against any action that aims or results in the dispossession of indigenous land, territories, or resources.<sup>186</sup> Article 10 further states that relocation will not occur without free, prior, and informed consent of the indigenous people and,

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178. Memmott, *supra* note 157, at 67.

179. *Id.* at 67.

180. G.A. Res. 61/178, annex, United Nations Declaration of the Rights of Indigenous Peoples, at 1 (Sept. 13, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [hereinafter U.N. Declaration].

181. *Experts hail Australia's backing of UN declaration of the indigenous peoples' rights*, UN NEWS (Apr. 3, 2009), <http://www.un.org/apps/news/story.asp?NewsID=30382#.Wep1K2hSxPY>.

182. *Id.*

183. *Id.*

184. *Id.*

185. WIKIPEDIA, Declaration of the Rights of Indigenous Peoples, [https://en.wikipedia.org/wiki/Declaration\\_on\\_the\\_Rights\\_of\\_Indigenous\\_Peoples](https://en.wikipedia.org/wiki/Declaration_on_the_Rights_of_Indigenous_Peoples) (last visited Oct. 20, 2017).

186. U.N. Declaration, *supra* note 180, at 5.

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when possible, after an agreement of fair compensation and an option of return.<sup>187</sup> Article 25 states indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands along with other natural resources.<sup>188</sup> In addition, Article 26 decrees States shall give legal recognition and protection to these lands and resources.<sup>189</sup> The Declaration, however, does not state specific ways to enforce such rights.

### III. POSSIBLE FUTURE LEGISLATION FOR NATIVE HAWAIIAN LAND RIGHTS

#### *A. Current Legislation*

The current Hawaiian legislation discussed earlier in this note all work together to make it more difficult for outsiders to purchase kuleana land. However, none of the current bills provide a complete solution.

#### *B. Conservation Land Trusts*

“Conservation land trusts are non-profit organizations that conserve land by working [with] private landowners and local governments using tools, such as conservation easements and fee-simple acquisitions of land with inherent or potential conservation value.”<sup>190</sup> In Hawaii, the trusts have many constituents of all different cultural backgrounds, from resorts to native Hawaiians.<sup>191</sup> Further, the purpose of land trusts is very different from those of private land owners; the easements are held in perpetuity and generally not sold.<sup>192</sup> Although land trusts have the right to exclude people from the land,<sup>193</sup>

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187. *Id.* at 6.

188. *Id.* at 10.

189. *Id.*

190. Jocelyn B. Garovoy, “*Ua Koe Ke Kuleana O Na Kanaka*” (*Reserving the Rights of Native Tenants*): *Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523, 523 (2005).

191. *Id.*

192. *Id.* at 549.

193. *Id.*

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it is suggested that a merger of conservation land trusts with kuleana land rights could result in a mutually beneficial relationship.<sup>194</sup>

The combination of conservation land trusts on kuleana land could, in some circumstances, be a great solution to the problem native Hawaiians face against quiet title actions. For example, it would allow native Hawaiians to keep outsiders from making quiet title claims against their ancestral lands. However, kuleana land is often used by native Hawaiians for cultural or agricultural purposes, which can be contrary to conservation.<sup>195</sup> Further, some of the land may have already been developed or may not have any valuable resources on it. Thus, holding kuleana land in conservation land trusts is a possible option but not a solution for every circumstance native Hawaiians face.

### *C. Native Hawaiian Land Trusts*

Land trusts already exist exclusively for native Hawaiians as part of the Hawaiian Homes Commission Act of 1920.<sup>196</sup> These land trusts allow native Hawaiians to receive a ninety-nine-year land lease for \$1 per year, if they can prove they are at least half-blooded Hawaiian and can be passed to descendants if they are at least 25% Hawaiian.<sup>197</sup> This poses problems for many native Hawaiians who have lived on the islands for generations and now have children and grandchildren that were born on the Hawaiian islands but do not have enough blood to inherit the homes their families have lived in for generations.

### *D. Proposed Future Bill*

Despite the current proposed and enacted bills, quiet title actions are still brought against native Hawaiians over kuleana land. Although the bills give more power to native Hawaiians, none of the bills – individually or together – provide a complete solution to this issue.

Perhaps the solution is not as conservative as conservation land trusts or any of the other current bills. A more radical approach could be necessary to fully protect kuleana land rights. After all, the radical

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194. *Id.* at 522.

195. *Id.* at 551.

196. Brittany Lyte, *Native Soil*, ATLANTIC (Sept. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/09/native-soil/501419/>.

197. *Id.*

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thinking which formulated NTNERA in Australia brought about great change in Aboriginal land rights. Although NTNERA negatively impacted Aboriginal land rights, a portion of the Act, turned on its head, could serve as a radical solution for native Hawaiians.

A section in NTNERA allows the government to take Aboriginal land in the form of a long-term lease. What if the only way to use or live on kuleana land was through a leasehold from native Hawaiians? And that kuleana land was otherwise held in perpetuity by native Hawaiians?

The main provisions of the proposed bill would include: (1) notice of kuleana land interest to native Hawaiians; (2) limit the sale of kuleana land to native Hawaiians; (3) permit a lease of kuleana land; (4) permit agreements to combine parcels in perpetuity for cultural, community purposes; and (5) prohibit adverse possession of kuleana land.

The requirement of giving notice to all native Hawaiians would be a great pro bono opportunity for estate planning attorneys in Hawaii. Alternatively, the government could hire attorneys and genealogists to track the lineage of the initial owners and provide notice to the heirs. The local government could also use this as an opportunity to interact directly with the community by setting up programs to assist native Hawaiians in accessing public records. This would work to resolve ownership issues over kuleana land which has been poorly documented, and after generations of inheritance, many owners merely own a small piece of land or are unaware of their interest in the land.

At first glance, with many native kuleana land owners only owning small parcels of land, it does not make sense to prohibit the sale of kuleana land because parcels are so small that nothing can be done with an individual parcel. Conversely, many owners of an area of land could actually be a good thing. For example, if all the owners agreed, they could use the land for traditional, cultural, and agricultural purposes as a community. Alternatively, the land could be rented out to the homeless native Hawaiians practicing *pu'uhonua* for a lower rental price than average. Thus, native Hawaiians would still be able to generate money from their kuleana land, and it would help resolve homelessness amongst native Hawaiians.

Today, leaseholds are relatively common for Hawaii condominiums. In 1967, the legislature found relatively few people were selling fee simple titles and instead were leasing property under

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long-term leases.<sup>198</sup> As a result, there was an artificial inflation in land value, which led to limited choice to own land, unfair lease terms, and the inability of lessee to fully enjoy the “freedom of the land.”<sup>199</sup> In response, the legislature determined that leaseholds had a negative effect on the “[State economy], public interest, health, welfare, security, and happiness of the People of the State.”<sup>200</sup> The legislature believed promoting fee simple land sales would stabilize land costs and improve the standard of living.<sup>201</sup>

However, the use of leaseholds in this instance is unlikely to cause the same issues that arose in the 1960s. This is primarily because this new rule would only apply to current kuleana land, against which no quiet title actions have been brought. In 1850, when native Hawaiians were first given kuleana land, the combined total land given was 28,600 acres, which is less than 1% of the land in Hawaii.<sup>202</sup> Since then, non-natives have continued to buy land and bring actions to quiet title over kuleana land, which has further reduced the amount of kuleana land. Thus, it is unlikely that prohibiting the sale of the limited remaining kuleana land would cause as much of an economic issue as long-term leasing did in the 1960s and 1970s. While native Hawaiians may receive payment from quiet title actions, their overall health, happiness, and welfare may be better served through the preservation of their ownership of kuleana land.

Prohibiting the sale of kuleana land seems counterintuitive because it effectively gives power back to native Hawaiians by stripping them of arguably the most essential right to land ownership – the right to sell their land. However, it protects against all the issues that native Hawaiians have faced thus far regarding their kuleana land rights. For example, the inability for kuleana land to be sold to non-native Hawaiians would preserve native Hawaiians’ right to kuleana land. An additional provision prohibiting adverse possession claims would

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198. Haw. Rev. Stat. § 516-83(1) (1985).

199. *Id.* § 516-83(2)-(3).

200. *Id.* § 516-83(4).

201. *Id.* § 516-83(6).

202. U.S. DEP’T OF THE INTERIOR & U.S. DEP’T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY – REP. ON THE RECONCILIATION PROCESS BETWEEN THE FED. GOV’T AND NATIVE HAWAIIANS 1, 24 (2000), <http://www.worldcatlibraries.org/wcpa/ow/86453bb378dafbcfa19afeb4da09e526.html>.

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further protect native Hawaiian rights to kuleana land. Further, prohibiting sale and adverse possession would allow native Hawaiians to continue to their spiritual and cultural practices related to the land. This would aid in preventing the spiritual homelessness that has been documented in Australia. In addition, it would preserve the natural resources available to the native Hawaiians. It would also remove the temptation brought by rich buyers, like Zuckerberg, who are willing to pay large sums for small pieces of land.

In conclusion, by limiting the sale of kuleana land to non-native Hawaiians, native Hawaiians would not have a true fee simple interest in kuleana land. However, the purpose of the Kuleana Act of 1850 was to give land back to native Hawaiians and ensure that it remains with the native Hawaiians. Therefore, limiting the sale of kuleana land stays true to that main purpose of the Kuleana Act of 1850.

*Nisha Bhakta\**

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