Law, Culture, and Cultural Appropriation

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Anthropological research on law since the early twentieth century has provided critically important perspectives on the way law is embedded in the social life of distinctive cultural groups. Yet over the last decade, the concept of culture on which many of these insights depend has come under siege. The nature of culture has been radically retheorized. This change demands an equivalent rethinking of the relationship between law and cultural phenomena. Using an example of legal transformation in the nineteenth-century Pacific, this Essay suggests an approach to analyzing relationships between law and culture that relies on a more complex, contested, and historically located understanding of culture. It examines the process of legal appropriation in the context of competing cultural logics and the expansion of European capitalism and imperialism into social worlds governed by other systems of exchange and power.

Between 1825 and 1850, the sovereign Kingdom of Hawai'i adopted a system of Anglo-American law, courts, and prisons to replace the Hawaiian system of kapu (tabu) and chiefship. The adoption was incremental: Small steps initiated broader, frequently unanticipated changes, shifting the landscape in ways that precipitated taking further steps. The transformation took place within a cultural field defined in part by European conceptions of sovereignty and of racial and religious difference. The reigning Hawaiian chiefs deliberately appropriated Anglo-American law in order to "civilize" their country and assert sovereignty in European terms. This was not an act of imposition, although the chiefs acted in a situation of considerable pressure and constraint. They did not simply accept the new system but resisted some of its features and redefined aspects of it according to their own categories and systems of meaning.¹ Instead of seeing

¹ See generally THE IMPOSITION OF LAW (Sandra Burman & Barbara E. Harrell-Bond eds., 1979) (illustrating that this is a common reaction to the imposition of a new legal system).
this situation as an instance of acculturation, a smooth blending of two "cultures" and their embedded legal systems, it should be understood as appropriation and resistance taking place on a field of contested cultural meanings and power relations. Examining cases of legal appropriation and the kinds of cultural meanings and social transformations that result provides a more dynamic and agentive way of understanding the linkage between law and culture.

Many of the important early anthropological insights about law built on a concept of culture as integrated, stable, consensual, bounded, and distinctive. Culture was defined as the common values, institutions, and regular social interactions shared by a group of people. Many theorists attributed change to evolutionary processes rather than historical events or individual action. Anthropological research from the 1920s to the 1950s demonstrated that law was a fundamental part of the normative system of any society and served to maintain its social order.\textsuperscript{2} Systems of rules were organically connected to distinctive social structures. Nonstate mechanisms such as informal moots and councils, reciprocity, ostracism, gossip, witchcraft accusations, and other forms of subtle social pressure produced social order.\textsuperscript{3} At moments of trouble, the law became visible and articulated, but afterward returned to equilibrium.\textsuperscript{4} In the 1970s and 1980s, developing this tradition in conjunction with interpretive anthropology, Clifford Geertz and Lawrence Rosen developed a sophisticated analysis of the cultural embeddedness of law understood as a system of meaning.\textsuperscript{5} Geertz described law as a way of imagining the real, foregrounding its role in constituting culture as a system of meaning.\textsuperscript{6} Rosen explored law as a symbolic and cultural system that simultaneously constructs the order of the larger society and is suffused by that order. "[T]he analysis of legal systems, like the analysis of social systems, requires at its base an understanding of the categories of meaning by which participants

\textsuperscript{2} See, e.g., E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN (1954); BRONISLAW MALINOWSKI, CUSTOM AND CONFLICT IN A SAVAGE SOCIETY (1926).

\textsuperscript{3} See, e.g., MALINOWSKI, supra note 2; Sally Engle Merry, Rethinking Gossip and Scandal, in \textit{TOWARD A GENERAL THEORY OF SOCIAL CONTROL} 271 (Donald Black ed., 1984).

\textsuperscript{4} See, e.g., KARL LLEWELLYN & E.A. HOEBEL, THE CHEYENNE WAY (1941) (suggesting that incidents of trouble or hitch and the responses that these cases evoke are the best way to understand law).

\textsuperscript{5} For Geertz's work most relevant to the study of law, see CLIFFORD GEERTZ, \textit{Local Knowledge: Fact and Law in Comparative Perspective}, in \textit{LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY} (1983) [hereinafter \textit{GEERTZ, Local Knowledge}]. For the clearest exposition of the interpretive approach, see CLIFFORD GEERTZ, \textit{THE INTERPRETATION OF CULTURES} (1973). Lawrence Rosen has developed this approach with fine-grained studies of the cultural and linguistic aspects of law in Moroccan communities. See LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AND CULTURE IN ISLAMIC SOCIETY (1989).

\textsuperscript{6} See \textit{GEERTZ, Local Knowledge}, supra note 5.
themselves comprehend their experience and orient themselves toward one another in their everyday lives.\textsuperscript{7} The legal realm is a part of the entire social fabric, and its concepts, its power, and its struggles extend across the disparate domains of social life.\textsuperscript{8}

Challenges to understanding law through this concept of culture came through the study of disputing processes, which provided a more agentive, dynamic understanding of the relationship between culture and law but did not necessarily challenge the notion of culture as integrated and bounded.\textsuperscript{9} The management of disputes was the product of the set of social relationships within which they occurred, so that the choice of adjudicative rather than conciliatory approaches depended on the web of relationships among the parties.\textsuperscript{10} Sally F. Moore's emphasis on law as process incorporated history into the analysis and focused on how rules were created, maintained, and enforced in everyday interactions, thus historicizing the concept of culture.\textsuperscript{11} In the 1980s, June Starr and Jane Collier emphasized power relationships and historical change,\textsuperscript{12} and in the 1990s, Susan Hirsch and Mindie Lazarus-Black focused on hegemony and resistance in the analysis of legal phenomena.\textsuperscript{13}

Over the last two decades, the meaning of culture has come under intense scrutiny within anthropology. Instead of a reified notion of a fixed and stable set of beliefs, values, and institutions, culture is being redefined as a flexible repertoire of practices and discourses created through historical processes of contestation over signs and meanings.\textsuperscript{14} Cultural forms and practices are locally expressed but connected to global systems of economic exchange, power relations, and systems of meaning.\textsuperscript{15} They are constructed and transformed over historical time through the activities of individuals as well as

\textsuperscript{7} ROSEN, supra note 5, at xiv.
\textsuperscript{8} See id. at 5. For example, the qadi, a local Islamic judge, long regarded by Western scholars as exercising enormous discretion, follows consistent principles drawn from everyday life. The qadi Rosen describes shares the cultural logic of the small Moroccan town where he works. As he determines the facts of the case and reasons from these facts to a decision, he builds on shared cultural concepts of knowledge and right, of human nature, of the public interest, and of the ways states of mind are attributed to actors.
\textsuperscript{9} See, e.g., THE DISPUTIVE PROCESS (Laura Nader & Harry F. Todd eds., 1978).
\textsuperscript{12} See HISTORY AND POWER: NEW DIRECTIONS IN THE STUDY OF LAW (June Starr & Jane Collier eds., 1989).
\textsuperscript{13} See CONTESTED STATES: LAW, HEGEMONY, AND RESISTANCE (Mindie Lazarus-Black & Susan Hirsch eds., 1994) [hereinafter CONTESTED STATES].
\textsuperscript{14} See, e.g., JAMES CLIFFORD, THE PREDICAMENT OF CULTURE (1988); JOHN COMAROFF & JEAN COMAROFF, FROM REVELATION TO REVOLUTION (1991); GEORGE MARCUS & MICHAEL FISHER, WRITING CULTURE (1986).
\textsuperscript{15} See ERIC WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY (1982).
through larger social processes. Transformation occurs through particular historical events rather than through gradual social evolution. Thus, culture is continuously produced and reproduced at particular historical times in specific places situated within global movements of people and capital.

Moreover, culture is integral to systems of power. Cultural forms construct hegemonic understandings as well as the counterhegemonies that challenge these understandings. Since the maintenance of relations of power depends on retaining particular cultural meanings, moments of resistance include redefinitions of cultural meanings, as well as more direct forms of resistance such as noncooperation, sabotage, foot-dragging, petty thievery, and refusal to conform to gender or class expectations.

This redefined concept of culture has significant implications for theoretical understandings of the linkage between law and culture. The notion of an organic embeddedness describes some but not all social situations. Law’s systems of meanings are not necessarily identical to those of the culture within which they operate, nor are their consequences only to maintain order. Law is a cultural system that can be imposed on other cultural systems. Consequently, the relationship between law and culture becomes deeply problematic in situations involving legal transplants, when law is appropriated from one society to another or imposed by one society on another through colonialism or conquest.

In my study of Hawai‘i, I found that the Hawaiian Islands during the nineteenth century were not the site of an isolated cultural system but lay at the crossroads of a dizzying array of peoples engaged in the expansion of capitalism and European imperial power. After Cook’s initial “discovery” of the islands in 1778, the islands were visited by merchants from Britain, France, the Netherlands, and the United States; goods were traded in Spanish dollars brought from Chile and Peru; and Chinese merchants and sugar masters settled in Honolulu to trade or moved into the wet valleys to grow rice or sugar. The New

England missionaries arriving from upstate New York, western Massachusetts, and western Connecticut in 1820 came from communities more isolated than many in Hawai‘i at the time. Nor were these islands culturally cohesive or integrated. Hawai‘i in the 1830s and 1840s was a social field buffeted by competing cultural logics rooted in particular structures of power, a situation typical of colonial contexts. The distinctive cultural worlds of Hawaiian ali‘i (chiefs) and maka‘ainana (commoners), British and American whaleship owners and crews, European sugar planters, Chinese sugar masters and rice farmers, Spanish and Peruvian merchants, American Protestant missionaries, Russian fur traders, French Catholic priests, resident American and British merchants, deserting and abandoned seamen from New England and the South Pacific, and roving fortune seekers from around the globe jostled together in a rapidly evolving social situation. After midcentury, the importation of large numbers of sugar plantation workers from China, Portugal, Japan, Korea, Puerto Rico, the Philippines, and the South Pacific further complicated the variety of cultural logics at play within local social situations. Under such conditions, the concept of a homogeneous, cohesive cultural system within which a unitary system of law is embedded seems grossly inadequate.

Part I of this Essay explores the changing meanings of culture within anthropological theory. Part II illustrates the strengths of a new conception of culture for understanding the legal transition in nineteenth-century Hawai‘i. This is a dramatic instance of legal appropriation, yet legal transplants of this kind are widespread in colonial history and in the contemporary postcolonial world. Part III considers how legal appropriation constitutes a form of resistance.

I. CHANGING CONCEPTIONS OF CULTURE

Constructing a definition for anthropology’s core concept has always been difficult, but at no time more so than the present. Culture is everywhere a topic of concern and analysis from cultural studies to literature to all the social sciences. Classic conceptions of bounded, coherent, stable, and integrated systems are clearly inadequate. Culture is now a deeply contested term; part of many discourses, from cultural studies to multiculturalism, are doing work on the concept, suggesting both its significance and its elusiveness as a category of analysis. Although the difficulties posed by the concept of culture in the analysis of cultural change have been widely discussed, it is less clear what concept can replace the totalizing, coherent, normative idea of culture that developed as part of the natural-history approach to studying and describing cultural difference.
A. Nineteenth-Century Sources of the Concept of Culture

Historically, culture as an analytic concept in anthropology developed to describe a world in which Europeans understood there to be civilized people and "primitives" who lived unchanging and utterly different, although internally coherent, lives. These "primitives" had to be tolerated, not because they conformed to the values of the observer but because they were, in a sense, off the edge of her moral universe. But in the last two decades, world system theory has criticized the model of society as an isolated "billiard ball" within global economic and cultural processes, while the analysis of globalization, the expansion of cultural studies, and the emphasis on discourse and power in Foucauldian work have all challenged understandings of culture as based on shared norms and values and bounded or homogeneous social groups. Culture is now understood as historically produced rather than static; unbounded rather than bounded and integrated; contested rather than consensual; incorporated within structures of power such as the construction of hegemony; rooted in practices, symbols, habits, patterns of practical mastery, and practical rationality within cultural categories of meaning rather than in any simple dichotomy between ideas and behavior; and negotiated and constructed through human action rather than superorganic forces.

This list of characteristics suggests that the earlier idea of culture was never suitable for understanding an interconnected and historically changing social world. The concept was largely a nineteenth-century construct. There were at least two sources of this concept of culture within the field of anthropology in the last century. One was a natural-history approach to knowledge, developed during the eighteenth and nineteenth centuries as part of the planetary (global) consciousness of European society. In this period, naturalists and explorers journeyed out of Europe and engaged in a discovery process that, although understood as innocently disconnected from power, produced bodies of knowledge that classified and charted the animals, plants, and, ultimately, peoples of the world into categories. Isolated cultural groups were seen as analogous to isolated and primitive plants and animals, located at earlier stages in the evolutionary process. King Leopold II's museum of Africa in Brussels, built in

1898, is a prime exemplar of this approach to knowing cultural "others." In an ornate Victorian building, exhibits of tools, weapons, houses, and spirit ancestors from African peoples are juxtaposed with stuffed animals, insects on pins, and mineral exhibits from Central Africa. The museum displays the range of species of animals, plants, rocks, and "cultures" populating the "other" world.

A second source for definitions of culture used by early anthropologists was the Germanic notion of Kultur. As Norbert Elias notes, the concept of Kultur was juxtaposed with Zivilisation in nineteenth-century German thought. Civilization referred to the manners and practices shared across national boundaries that joined the French, the British, and other "civilized" peoples in a global society. Kultur, on the other hand, emphasized difference: It was the category through which the German bourgeoisie claimed a distinctive peoplehood through their own manners and customs. They celebrated German Kultur, he argues, because they were excluded from European civilization by the marginality of their aristocracy. Kultur was, in fact, the way that the bourgeoisie emphasized to themselves that they were better than the aristocrats of other nations. They celebrated their own values and work ethic rather than aping the manners of "civilization." Thus Kultur became a way of claiming separateness and superiority in the face of a globalizing aristocracy of learning, language, and custom.

It is understandable that nineteenth- and early-twentieth-century anthropologists, searching for a language to celebrate the divergent yet legitimate ways of life of those generally labeled savages, would turn to the concept of Kultur, an idea already in use, to emphasize difference and legitimacy in opposition to a globalizing civilization. Just as the Germans had Kultur, so did the Nuer and the Tallensi. Boundedness and coherence were therefore fundamental political features of this concept, along with a militant assertion of separateness and superiority. Emphasizing the authenticity and coherence of distinct cultures was a way anthropologists could resist the civilizing mission fundamental to the European colonial project. But the concept that served so well in the context of nineteenth- and early-twentieth-century imperialism now carries with it far different implications. It fixes and separates just at a time when scholars have come to see national, cultural, and ethnic boundaries as fluid and identities as hybrid. The important theoretical problems arise from the analysis of contact zones, colonial projects, and borderlands rather

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than "societies" or "cultures." The combined impact of technology, tourism, global capitalism, deterritorialized communities, and migration are blurring and redrawing cultural boundaries at a rapid rate.

B. Recent Theories of the Concept of Culture

Other models of culture provide richer possibilities for thinking about the relationship between law and culture under conditions of cultural contact, hybridity, and globalization. Comaroff and Comaroff take culture to be "the semantic space, the field of signs and practices, in which human beings construct and represent themselves and others, and hence their societies and histories. It is not merely an abstract order of signs, or relations among signs. Nor is it just the sum of habitual practices."23 Culture is never a closed, entirely coherent system but contains within it polyvalent, contestable messages, images, and actions.

It is, in short, a historically situated, historically unfolding ensemble of signifiers-in-action, signifiers at once material and symbolic, social and aesthetic. Some of these, at any moment in time, will be woven into more or less tightly integrated, relatively explicit worldviews; others may be heavily contested, the stuff of counterideologies and "subcultures"; yet others may become more or less unfixed, relatively free floating, and indeterminate in their value and meaning.24

This is a concept of culture that allows for agency and contest in situations with multiple and contradictory cultural logics and systems of meaning.

Mary Louise Pratt describes fields of interaction between competing cultural logics as contact zones: "social spaces where disparate cultures meet, clash, and grapple with each other, often in highly asymmetrical relations of domination and subordination—like colonialism, slavery, or their aftermaths as they are lived out across the globe today."25 Unlike the term "frontier," which privileges a center and an edge, the term "contact zone" focuses on intersections among equally centered entities. Pratt suggests the term "transculturation" to describe how subjugated peoples receive and appropriate metropolitan modes of representation. She explains how peripheral groups constitute the metropolis, creating its need continually to create and recreate itself in opposition to those peripheries.26

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23. COMAROFF & COMAROFF, ETHNOGRAPHY, supra note 16, at 27.
24. Id.
25. PRATT, supra note 21, at 4.
26. Id. at 6.
Nicholas Thomas advocates the study of “colonial projects” rather than a totality such as a culture or a period that can be defined independently of a people’s perceptions and strategies. A colonial project is “a socially transformative endeavor that is localized, politicized and partial, yet also engendered by longer historical developments and ways of narrating them.”  

It is a deterritorialized social system: “Colonial projects are construed, misconstrued, adapted and enacted by actors whose subjectivities are fractured—half here, half there, sometimes disloyal, sometimes almost ‘on the side’ of the people they patronize and dominate, and against the interests of some metropolitan office.”

To examine a colonial project is to look at the process itself and to attend to its agents, both its proponents and detractors, and to analyze the hybrid cultural practices and people that are its consequence. This notion of the partial, transposed, or truncated character of groups in the colonial social field highlights the contest and negotiation of meanings over time rather than consensus or shared values. As an anthropological concept, “project” emphasizes orientations toward transformation and innovation, frequently a characteristic of colonial situations. Settlers often seek to change while the colonized often seek to return to former circumstances, itself a transformative project.

Thus, these conceptions move us away from seeing cultures as homogeneous entities, toward imagining them as arenas of contest among competing cultural logics in which variously situated actors seize and appropriate cultural practices. The location of culture is no longer a fixed geographical space, but rather it is constituted in multiple places reflecting the movement of peoples, capital, and symbolic systems. Many of the struggles in the colonies to transform the social order, to expand the knowability and visibility of the population, and to implement the disciplinary systems of the modern state paralleled similar efforts to refashion the rural peasantry and the urban poor at home. In Hawai‘i, for example, New England missionaries attempted to control the sex trade between seamen on merchant and whale ships and the Hawaiian maka‘ainana women during the 1820s and 1830s. This project was linked to similar struggles in the northeastern United States but took on a new valence in the Hawaiian context. The interaction partook of the cultural and ethnic features of the colonial encounter: Women of color were appropriated by visiting white men while missionaries resisted this appropriation in order to protect their charges. At the same time,
missionary intervention also reflected the class and religious dimensions of the New Englanders' concern with the moral character of lower-class sailors. The dimensions of Christian virtue and class difference marked out these seamen as sites for reformist projects in both locations.

Marxist-oriented anthropologists tend to highlight social class rather than culture and to avoid fixed concepts of culture. The concept of class in the Marxist tradition is relational, processual, and specific so that any particular social class can only be defined in relation to other social classes, forces of production, and property relations that create and transfer surpluses. Gerald Sider, in his study of the shifting political economy and changing cultural forms of Newfoundland over a long historical period, shows that cultural forms change in response to shifts in political economy and that culture as a set of symbolic meanings is derivative of political and economic processes. Culture appears to be independent because it is an abstract and all-inclusive concept. Yet, culture is part of the larger process, not a static abstraction or an epiphenomenon of other, more fundamental changes.

One of the more cogent recent critiques of the concept of culture is an argument that in the process of generalizing from the particularities of person and event, anthropologists reify culture and construct an "otherness" by imagining the totality and integration of a culture and the discrete and bounded nature of cultures in relationship to one another. Lila Abu-Lughod argues that despite the intention to account for and understand cultural difference, anthropology ends up creating difference and making it seem self-evident. She suggests "writing against culture" as a method of resisting generalizations. Abu-Lughod proposes that anthropologists tell stories rather than construct models of institutions, rules, and ways of doing things, and that they describe particular people and the way they marry and live rather than attach a marriage practice to a culture as a whole. Roger Lancaster employs a similar approach in his ethnography of Nicaragua, resisting generalizations that efface particular people, actions, and stories.

Ironically, just as the older concept of culture seems less appropriate for contemporary society, it is being vigorously appropriated by indigenous peoples and a plethora of ethnonational
groups in search of sovereignty and self-determination in this new cultural world. Native American groups and groups such as the Hawaiian Sovereignty Movement make claims on the basis of their "traditional" cultures, joining an interest in cultural renaissance with the political constraints of a society that is willing to recognize claims on the basis of cultural authenticity and tradition but not demands for reparations based on acts of conquest and violation in the past. In her discussion of the concept of culture as it is used in the politics of indigenousness in Colombia, Jean Jackson notes that the tendency to essentialize culture within anthropology has been adopted by Indian movements in Colombia, as well as by other indigenous societies, to make claims in the modern world. The concept the indigenous people appropriate is based on a quasi-biological analogy by which a group of people "has" a culture in the way that a group of cats have fur, inherited as genes are inherited. Instead, culture can be seen as something they create and improvise to adapt to changing social conditions and situations.

C. Cultural Production and Appropriation

All of these newer understandings of culture emphasize the agentive aspects of culture and its interactive co-construction over time. Concepts such as cultural production and cultural appropriation provide for agency and power in historically constituted spaces. Cultural production incorporates notions of production and culture, since this form of production draws on "a stock of already existing cultural elements drawn from the reservoirs of lived culture or from the already public fields of discourse." Cultural appropriation means adopting a cultural product in terms of local meanings and practices. In its broadest sense the term means taking an existing cultural form from one social group and replaying it in another with different meanings or practices: perhaps taking the tune and playing it in a different key or at a different tempo so that it becomes something different, yet still the same.

The concept of cultural appropriation has been developed in the field of intellectual property to refer to processes by which dominant

35. See WARD CHURCHILL, FROM A NATIVE SON (1996).
37. See id. at 18. Jackson notes that anthropologists tend to view "pure" cultures as more prestigious than less remote or isolated cultures, conferring differing levels of prestige on those who study these cultures as well.
groups take, and often profit from, the artistic, musical, and knowledge productions of subordinate groups. A recent collection from the intellectual property perspective uses a resolution of the Writer’s Union of Canada from June 1992 and broadly defines cultural appropriation as “the taking—from a culture that is not one’s own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge.” This definition focuses on takings that produce profits for the taker. However, cultural appropriation encompasses a very broad and pervasive phenomenon as cultural influences blend and merge in constantly layered ways. Although cultural appropriation in this framework is viewed as a taking by a dominant group from a subordinate group, it can be done the other way as well. But power relations are fundamental to the concept of cultural appropriation as it is used in this field. A problem with this notion of cultural appropriation is that it still relies on the problematic notion of culture as a bounded and integrated system of meanings.

The game of Trobriand cricket, captured in a well-known ethnographic film, provides a dramatic illustration of such subversive appropriation. The Trobrianders adopted the game of cricket from British missionaries, who had hoped the game would “civilize” the Trobrianders and replace tribal fighting. Instead, the Trobrianders redefined cricket as an occasion for competitive chanting, gift-giving, and performance in which the host team and village must always emerge victorious. In a similar process of appropriation, the leaders of the Hawaiian Sovereignty Movement staged a tribunal in 1993 commemorating the one hundredth anniversary of the American-backed coup against the Hawaiian Queen Liliʻuokalani. The tribunal accused the United States of a series of acts of destruction of culture and appropriation of land and sovereignty using the form of a criminal trial. The seat labeled “U.S. Representative” was glaringly vacant as witnesses testified about the overthrow and their cultural and economic losses to a panel of judges, eminent activists, and human rights lawyers from around the world. The organizing committee issued a formal complaint before the tribunal, accusing the United States of violating a series of national and international laws. Thus this tribunal appropriated the form of United States law and its language in a complaint against that same government.

40. See id. at 1-8.
41. See TROBRIAND CRICKET: AN INGENIOUS RESPONSE TO COLONIALISM (Government of Papua-New Guinea 1975).
42. See Sally Engle Merry, Sexuality, Sovereignty, and the Civilizing Process: Law and the
The important questions about culture are, therefore, how cultural logics and practices are introduced, appropriated, deployed, reintroduced, and redefined in a social field of power over an historical stretch of time. Through historical processes, particular cultural logics become embedded in politically and economically powerful institutions such as legal systems. Focusing on production and appropriation provides a framework that recognizes the agency of subordinated peoples at the same time as it emphasizes the political and economic constraints on that agency. It replaces ideas of imposition with an analysis of the negotiated and partial nature of transformation. Those introducing new forms, meanings, and practices are continually confronted by frustration and failure, and with the inability to impose a new system in whole cloth rather than in shreds, as those who take it on and carry it out constantly redefine its forms and practices in terms of other meanings and practices. As agents of dominant groups struggle with the recalcitrance and reinterpretation of customs by the subordinate, which Rudyard Kipling described so eloquently in *The White Man's Burden*, their own consciousness and cultural repertoire is redefined.

The Hawaiian ali'i and mo'i appropriated a largely New England-derived legal system in the nineteenth century. The Hawaiians invited the American missionaries living on the islands to help them craft a new system of laws and government. As the challenges to Hawaiian sovereignty increased, the ali'i hired more foreigners to design a constitution, a bill of rights, and a set of law codes based on models drawn from New England and other parts of the world. Rather than labeling this behavior collusion, I think it is important to examine how various actors in particular historical situations endeavored to maneuver in uncertain and changing political, economic, and cultural environments. I argue that the ali'i and mo'i adopted a Western legal system in order to appear "civilized" and thereby enhance their claims to sovereignty at a time when imperial powers were dividing up the Pacific, and resident European and

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43. See *RUDYARD KIPLING, The White Man's Burden, in RUDYARD KIPLING'S VERSE: INCLUSIVE EDITION, 1885-1918*, at 371 (1919). This poem was written just after the signing of the Treaty of Paris (Dec. 10, 1898), the peace treaty between the United States and Spain that ended the Spanish-American War. The treaty enabled the U.S. takeover of Cuba, the Philippines, and Puerto Rico. See *RALPH DURAND, A HANDBOOK TO THE POETRY OF RUDYARD KIPLING* 229 (1914). According to a 1914 commentary, "Both on selfish and unselfish grounds, it was imperative that, in spite of her Constitution, the United States should 'take up the White man's burden' of imperial responsibility and charge herself with the care of the semi-civilized islands that she had wrested from Spain." *Id.* This date is highly relevant to the situation in Hawai'i as well since it was shortly after this war that the United States agreed to annex the islands.

44. See *Merry, supra* note 42.
American merchants were demanding to be governed only by their own national laws. At the same time, the New England missionaries appropriated Hawaiians as benighted savages to whom they could bring light.

The introduction of new legal systems into societies with existing legal systems is widespread and poses important theoretical problems. Sometimes called legal transplantation or the imposition of law, it accompanied nineteenth-century colonialism, radically reshaping and pluralizing the law of much of Africa, Asia, and the Pacific. Colonial officials typically endeavored to eliminate customs they considered repugnant, such as polygamy, witchcraft, payback killings, suttee, ritual gift-giving ceremonials such as the potlatch, and many other kinds of practices defined as "savage" or "uncivilized." More subtly, the law was also mobilized to control and restrain behaviors attributed to inherent flaws of character such as laziness or licentiousness.

Legal transplantation also occurs widely when nations borrow or appropriate parts of the legal system of other societies. Ataturk's adoption of the Swiss civil code in 1926 is one dramatic example, but similar processes are now taking place in Eastern Europe, in Western Europe with the introduction of American concepts of leasing and franchising, and in many other parts of the world. Similarly, American alternative dispute resolution techniques have been introduced into many Asian countries in the last two decades. The Bhopal disaster in India in 1984 sparked a massive introduction of American tort law into India. American law, legal practices, and lawyers are fundamental to the legal system of the Federated States of Micronesia. These are only a few examples of a widespread pattern of legal transplantation in the contemporary world.

II. LEGAL APPROPRIATION IN THE KINGDOM OF HAWAI'I, 1820-1850

The transplantation of American law to the Kingdom of Hawai'i occurred by and large between 1820 and 1850. This was a time of
massive economic and social change in Hawai‘i as the subsistence economy of fishing and taro farming under the supervision of a hierarchy of chiefs gave way to several decades dominated by mercantile exchange with fur traders, sandalwood merchants, and whalers. By the end of the nineteenth century, the islands were characterized by an industrial plantation economy based on sugar production. During the period from Captain Cook’s arrival in 1778 until the coup against Queen Lili‘uokalani in 1893, the Hawaiian population suffered a catastrophic decline, from an initial population of as many as 800,000 people to 40,000 a century later.\(^\text{51}\) By the 1880s, the Native Hawaiian people were a minority in their own land, surrounded by a burgeoning population of imported sugar workers from Asia and Europe. Annexation to the United States in 1898 was followed by a sixty-year period of colonialism and, in 1959, admission to statehood. In some ways, this ended the colonial status of the islands, but many of the relations of American/Hawaiian colonialism and the racially stratified plantation economy remain.

The appropriation of American law by the ali‘i in the early nineteenth century is a complex historical story, but it can be understood in terms of two major transitions: first from Hawaiian law to a theocratic Hawaiian and Christian law, and second to a secular law based on American models. In each transition, apparent similarities as well as geopolitical concerns induced adoption, yet differences emerged that sent the social transformation onto new and often unanticipated trajectories. Each new form brought with it the need for experts to run the new system, experts who were increasingly beyond the control of the ali‘i and engaged in running the system according to the practices of New England, where most of the experts originated.

**A. The First Transition**

In the first transition, from 1825 to 1843, the ali‘i converted to Christianity and soon began to adopt Christian law as the law of the land. The New England missionaries translated the Ten Commandments into the Hawaiian language and suggested their adoption to the ali‘i in the 1820s.\(^\text{52}\) By 1827, the ali‘i had passed the first printed laws outlawing murder, theft, and adultery.

The idea of a system of law descended from the authority of the deities and enacted through their earthly representatives, the ali‘i nui

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52. See, e.g., Hiram Bingham, A Residence of Twenty-One-Years on the Sandwich Islands (Rutland, Vt., C.E. Tuttle Co. 1981) (1847).
(high chiefs), made sense to the ali'i as it did to the Protestant Christians. Pre-1820 Hawaiian legality was inextricably joined to the institutions of chiefship and religion, with conceptions of mana (the spiritual power from Akua or deities), and with the link between the ali'i nui and the Akua. Religion functioned to maintain the concept of chiefly authority—not merely the rule of a particular dynasty, but political authority in general. The chiefly and priestly kapus (the sacred, consecrated, and prohibited) served to protect and enhance the spiritual/religious power of the chiefs, much as the eating kapu protected masculine power. They maintained the elaborate system of distinctions in rank and dramatically and severely punished those who violated the system. Commoner men were put to death for violating kapus of chiefly women, while chiefly women were generally impervious to punishment for infractions of kapu. In the highest ranks, adultery was punished by death, but punishment of this severity was restricted to sanctioning violations of the first marriages of high-ranking women. The system of law regulating relations between ali'i (chiefs) and maka'ainana (commoners, people of the land) defined the prerogatives and power of chiefship. The focus was not on the correction of everyday offenses, but rather on the dramatic and vivid display of the awesome power of the ali'i and the reinforcement of hierarchy and rank. This was a symbolic economy of punishment; the severe rules tinged with mercy dramatized the power and majesty of the ali'i and marked them as different.

Thus the political system of the ali'i envisioned political power as inextricably linked to religious power. The right to rule descended from the Akua (the deities), and ruling power was retained only as long as the chief remained pono (in a state of righteousness). The rapid decline in the population suggested to the ali'i that they were not pono, or righteous. The new Christian religion offered eternal life and righteousness as well as access to a new source of power, including the ability to record and transmit thoughts through writing. It was clear to the ali'i that the old deities were failing: The people

54. The eating kapu restricted men to eating only with other men in order to protect their sacredness and divided foods between those appropriate for women and those only for men. It was fundamental to Hawaiian religion before 1819, when this kapu was broken by the mo'i Liholino.
56. See Linnekin, supra note 53, at 35.
57. See Ellis, supra note 55, at 421.
were dying out, the land was no longer pono. They understood the duty of the ali‘i to malama, or care for the people and the land, as a spiritual one. If the king were devout, his government would last.

It was, probably, in the hope that the new priests were powerful enough to make things right that the ali‘i converted to Christianity. To the ali‘i, the missionaries spoke for a new and powerful god, Jehovah. It was common practice for a chief or king to take a new god from the pantheon of thousands of deities as his personal god, to build temples to him and make offerings in the hope of support in his endeavors. Kamehameha, the mo‘i (king) who first unified the islands at the end of the eighteenth century, chose Ku as his personal deity and was favored by Ku in his military and political exploits. This was an instance of ‘imi haku, searching for a leader or deity. Conversion to Christianity was, then, consonant with existing politico-religious practices.

In 1825 Ka‘ahumanu, the powerful regent, became one of the early converts to the strict Calvinist version of Protestant Christianity brought by the missionaries from New England. Soon after her conversion, the missionaries urged the ali‘i and mo‘i to pass laws based on the Ten Commandments, some of which did become law. These new laws came from God as interpreted by the ali‘i or by Protestant missionaries, just as laws did in the Hawaiian politico-religious system. As Marshall Sahlins and Patrick Kirch point out, the missionaries offered the ali‘i connected with Ka‘ahumanu an alternate legitimation of their rule that was consistent with the political functions that had always been performed by the priesthood. When the converted Christian ali‘i imposed the Christian regulations, they in effect ended the period of disorder following the death of the mo‘i Liholiho by establishing a new kapu system based on Christianity. In doing so, they followed the traditional practice by which a new king recreated the social order dissolved by his predecessor’s death. But the god was now Jehovah, Ka‘ahumanu and her siblings were the kings, and the society was governed by the tabus of Calvinist Christianity. “Seen, then, from the Hawaiian perspective, what the Ka‘ahumanu ma and the American clergy were doing was reinstating

59. See id. at 68.
60. See DAVID MALO, HAWAIIAN ANTIQUITIES (MOOLELEO HAWAII) 75 (Nathaniel B. Emerson trans., Bishop Museum Press 1951) (1898).
61. See KAME'ELEHIWA, supra note 58, at 152-53. Moreover, when Ka‘ahumanu, the regent, successfully put down the 1824 rebellion in Kaua‘i with the help of two ali‘i and Christian prayers, she decided this was the new source of mana she needed and became a devout Christian.
63. See id. at 69.
the tabu (kapu) system. The word was explicitly adopted in this context, and Christianity thus received as a Polynesian ritual order—which in European terms would be a politico-religious order.\textsuperscript{64}

During this first transition between 1825 and 1843, the chiefs and king passed a series of laws. Some, such as harbor regulations and marriage laws, were borrowed directly from European models, while others, concerning the relationship between landlords (ali'i) and cultivators of low rank (maka'ainana), conformed to the kapu system already in place. The chiefs also passed a declaration of rights and a constitution modeled after American and French prototypes. In 1838, the ali'i hired the missionary William Richards to instruct them in new forms of governance, since their earlier efforts to find a legally trained person to help them acquire a European law code had been unsuccessful. As early as 1824, when the mo'i Liholiho visited Britain, the ali'i were anxious to acquire a European legal system.\textsuperscript{65} Between 1839 and 1842, Richards drafted a bill of rights, a constitution, and a series of laws that combined Hawaiian and Anglo-American principles, although he was not a trained lawyer. Significantly, these laws were written first in Hawaiian, then translated into English, with the Hawaiian version designated as binding.

The Constitution of 1840 begins with reference to the Christian God:

It is our design to regulate our Kingdom according to the above principles and thus seek the greatest prosperity, both of all the chiefs and all the people of these Hawaiian Islands. But we are aware that we cannot, ourselves alone, accomplish such an object. God must be our aid, for it is His province alone to give perfect protection and prosperity. Wherefore we first present our supplication to Him that He will guide us to right measures and sustain us in our work.

It is, therefore, our fixed decree,

I. That no law shall be enacted which is at variance with the Word of the Lord Jehovah or at variance with the general spirit of His Word. All laws of the Islands shall be in consistency with the general spirit of God's law.\textsuperscript{66}

This new legal system was consonant with many of the existing cultural logics of the Hawaiian state. The ali'i ruled through power of the Akua or gods, articulating their will to the people. The power to

\textsuperscript{64} Id. at 72.
\textsuperscript{65} See SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAII (1961).
\textsuperscript{66} HAW. CONST. OF 1840, in SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 14, 15 (William F. Swindler ed., 1974).
rule depended on the ruler's state of pono, or righteousness: his or her status of religious merit. Thus there was no division between legal authority and religious authority; the one expressed the other, just as they did within Protestant Christianity. The laws of this period began with an invocation to Jehovah, the Christian deity, but incorporated much of the existing legal relationship between ali'i and maka'ainana.

But despite the similarity in these systems of law, the missionaries' law differed in important ways from the kapu system by which the political structure of rank and distinction was maintained in Hawaiian society in the 1820s. For instance, under the new system, laws were written rather than oral. In addition, executions were public affairs carried out only after a public judicial procedure: a trial by jury. Generally speaking, the objective of the laws was the policing of everyday morality and the creation of self-discipline rather than a defense of the chiefly order of distinction and rank or the continuity of the local community. Instead of marking difference and hierarchy, as the chiefly system of kapu did, or guaranteeing a community order of mutual respect and care, as the system of ordering within local farming communities did, the new laws promoted the radically different idea that the individual was responsible for fashioning his or her self. Such self-fashioning was fundamental to Protestant Christianity. The practicing Christian was responsible for achieving not only spiritual insight but also correct conduct, particularly with regard to sexual behavior.

When the Hawaiian people appeared frustratingly slow to subject themselves to the Protestant regime of self-governance and self-entrepreneurship, missionaries turned to practices of exclusion and punishment. Church members were suspended and expelled in large numbers for violations that were often based on sexual conduct. Those incapable of fashioning themselves through self-discipline were expelled from the society of the saved and were punished in order to induce moral reform through habituation. The use of criminal sanctions and prisons to foster correct conduct became more important. Observers in the 1840s described roads built smooth and straight as arrows over vast ragged lava flows by convicted adulterers using only hands and crowbars. Chiefs and courts imposed first

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69. See Handy & Pukui, supra note 67; Malo, supra note 60.
four, and then eight months hard labor as a penalty for adultery and fornication. When particular chiefs no longer sought to enforce these laws in their own domains, however, the laws languished, leading to repeated demands by haoles (the Native Hawaiian term for foreigners, later whites) for stricter enforcement of laws, improved prison discipline, and separate quarters for male and female prisoners. Throughout the 1830s and 1840s, Europeans complained about lax prisons and the failure to enforce laws severely enough.

The missionaries hoped that the enactment of religious law on earth would promote the transformation in social relationships they envisaged, but quickly developed doubts about the chiefs’ commitment to enforcing these laws. In the hopeful years of the 1820s, they imagined that this was a matter of time and habituation, but by the 1830s, it became clear that such a transformation in conduct was eluding them. The Hawaiians readily went to church and adopted Western dress of various forms, but were far less willing to take on the new sexual practices that the missionaries advocated. Lists of people suspended and excommunicated from membership in the churches testified to the ongoing struggle.

B. The Second Transition

Between 1843 and 1852, a second transition took place. The Christian/Hawaiian law was largely replaced by a secular New England law. This system of law was based on law codes imported from the United States with little inclusion of Hawaiian law. The source of sovereignty was the will of the people, expressed in an elected legislature, not the Akua or Jehovah. The architects of the new system were New England lawyers who arrived in Hawai‘i in the 1840s and were hired by the missionary advisors who in turn had been hired by the Hawaiian king. One of them, William Little Lee, penned the 1850 Penal Code, the basis for the criminal code of Hawai‘i to this day. He modeled this code closely after a proposed penal code for Massachusetts developed in 1844. The cover page and table of contents of the two law codes are parallel in layout and arrangement. The categories of law in the Hawaiian code closely follow those of Massachusetts. Lee introduces the Hawaiian text by saying that he has adapted the customs of Massachusetts to the simpler mind of the Hawaiian. Although he says in his introduction that he has tried to conform to the principles of the ancient laws and usages of the

71. See, e.g., KAMAKAU, supra note 65.
Kingdom, this code incorporates very little Hawaiian law. Rather, Lee relied primarily on the principles of the English common law as the best basis for the future of the Kingdom. His statement on this compromise is telling:

To prepare a system of laws equally well adapted to the native and foreign portions of our community—one not too refined for the limited mind of the former, and yet enough so to meet the wants and capacity of the latter—it will be evident, is no easy task. I have no confidence to believe that I have performed it successfully. My chief aim has been to be so brief, simple, clear, and direct, in thought and language, as not to confuse the native, and yet so full as to satisfy his increasing wants, together with those of the naturalized and unnaturalized foreigner.

In striking contrast to the first codes, this one was written first in English and then translated into Hawaiian.

The new laws produced a dramatic transformation in the social organization of the islands that added to the disruption caused by major economic and political transformations taking place at the same time. One of the legal innovations was the introduction of fee-simple land ownership in place of ali'i title and maka'ainana use rights under the dispensation of chiefs. In the Great Mahele, or land division, of 1848, the land was divided up among the chiefs, and commoners were allowed to petition for title to the lots they had lived on and farmed. Few commoners received land in this allotment system, while the simultaneous decision to allow foreigners to buy land led to the extensive alienation of lands from both chiefs and commoners. The authority of the ali'i over the people was substantially diminished by laws that circumscribed the duties of the maka'ainana to the ali'i as well as by the reallocation of land in the Mahele. At the same time, the judicial authority of the ali'i over the maka'ainana living on their lands was eliminated by the Third Organic Act of 1847, which placed judicial power in the hands of an independent judiciary rather than the ali'i.

Marriage became a permanent relationship in which women were subordinated to the authority of their husbands. The doctrine of coverture (1845) and the disenfranchisement of women (1850) reinforced the authority of husbands over wives and eliminated

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74. Id.
women from political participation.\textsuperscript{77} Marriage was redefined as permanent; divorce became virtually impossible, and adultery was a serious criminal offense.\textsuperscript{78} The requirement that taxes be paid in cash rather than in kind and the elimination of the tax on labor propelled subsistence farmers into the wage labor market.\textsuperscript{79} A master-servant law, passed in 1850 and modeled on a New England prototype, promoted use on the nascent sugar plantations of contract laborers working under penal sanctions.\textsuperscript{80}

Thus, the second transition, the appropriation of Anglo-American secular law, was far more radical in its redefinition of legal institutions and law codes than was the first. Within the short space of five or six years, enormous changes in statutory law transformed the legal system of the Kingdom of Hawai'i into one similar to Western nations of the mid-nineteenth century.

The effects on Hawaiian society were equally dramatic: reshaping family relationships, replacing the ties of duty and *aloha* (love) between *ali`i* and *maka`ainana* with the obligations of the market, and separating the political and religious aspects of power. Ultimate authority was redefined as resting in the people rather than the *Akua*. Some of the everyday sexual practices of the *maka`ainana* were redefined as criminal offenses, and the position of women shifted from that of major political actors to wives in the circumscribed, protected space of the Victorian home.

The second transition continued the logic of discipline and punishment initiated by the first transition, which had differed sharply from that of the *kapu* system of law. Instead of dramatic and violent penalties imposed by the *ali`i* but moderated by the possibilities of mercy in places of refuge (*pu`uhonua*), the new system focused on reform and correction. Majesty and mercy were replaced by service and habituation. A new system of judges, constables, and prisons promoted this transformation, although complaints by *haole* judges about lax prison discipline and the failure to segregate male and female prisoners or even to require them to spend nights at the prison continued in the 1840s and 1850s.\textsuperscript{81} The Hawaiian interpretation of


\textsuperscript{78} Marriage practices before this change varied greatly according to rank, but generally had allowed spouses to separate and remarry unless they were of high rank. Adultery was discouraged, particularly for ranking individuals, but sexual contact between unmarried people generally had been accepted.

\textsuperscript{79} See LINNEKIN, supra note 53.

\textsuperscript{80} An Act for the Government of Masters and Servants (1850), 1884 HAW. COMPILED LAWS, ch. 30, at 453.

\textsuperscript{81} See Benjamin Pitman Letters (collection of Haw. State Archives, Honolulu, Haw., Interior Dep't Misc.).
prison, with convicts doing service on the roads during the day and returning home at night for food and shelter, was strikingly reminiscent of the system of labor tax that had been fundamental to chiefly power in the *kapu* system but was sharply at odds with Calvinist notions of repentance and character reform.

III. THE SEARCH FOR SOVEREIGNTY

Why did the Hawaiians adopt a secular Anglo-American law in the second transition? This was a choice made under considerable pressure from foreign gunboats and obstreperous merchants residing in Honolulu. The merchants had extended considerable credit to the *ali'i* in exchange for sandalwood and then complained when the debts were not repaid. Moreover, as the whale fishery developed, ships brought thousands of desperate men to the shores of the islands in search of drink, sex, and violence: men who required some form of control by the Hawaiian state. France, Britain, and the United States all contemplated annexation, as did their nationals resident on the islands. A British naval commander did take control for six months in 1843, reinforcing the fears of the *ali'i* that their sovereignty was in jeopardy. The *mo'i* and *ali'i* were battered by demands of resident foreigners for special privileges, as well as claims by European nations that their subjects be tried only by juries of their countrymen and that their products and their religious teachers be allowed access to the Kingdom. The *mo'i* and *ali'i* turned increasingly to foreign advisors to help them construct a government and legal system that would be recognized by the leaders of European and American nation-states as sovereign. This meant creating a nation that was viewed by European and American powers as capable of governing itself and those inhabiting its borders. Through these advisors, the apparatus of a state and legal system understandable to Europeans was created.

The appropriation of Western law in the second transition represented, then, an effort to construct a civilized nation in terms the European colonial powers would recognize and respect. It furthered the construction of the Kingdom of Hawai'i as a government under the rule of law, one able to claim the status of "civilized" and therefore sovereign. In the nineteenth-century Pacific, European nations were rapidly claiming and annexing related peoples, stoking the worries of the *ali'i* and *mo'i*. Thus, the second transition was an endeavor to create a civilized state that would be recognized within

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the expanding imperial world. And, for forty years more, this strategy
preserved sovereignty in a world in which brown people were falling
increasingly under the control of white.

Ironically, although these institutions legitimated claims to
sovereignty in the nineteenth-century global order, they also deepened
dependence on foreigners to run them. As many observers noted, few
Hawaiians understood the intricacies and practices of European
mechanisms of government and law sufficiently, at least in the early
nineteenth century, to run them in ways the Europeans found
acceptable. In the face of overwhelming economic forces and
political fragility, the Hawaiian elites acquired a legal system that they
had to hire others to run.

The search for sovereignty in the nineteenth century depended on
the creation of a society that appeared “civilized” to those European
states whose recognition conferred sovereignty onto aspiring peoples.
A fundamental part of this construction of a civilized society was the
adoption of the rule of law, defined in European terms. Efforts to
transform the family and sexuality by prosecuting adultery in Hawai'i
reinforced efforts by the Hawaiian king and chiefs to mimic the forms
of “civilized” society. Only by becoming a “civilized” people could
they claim an autonomous space in the world of nations. Yet this
required alterations in manners of eating, covering the body, naming,
and engaging in sexual relations. As the Hawaiian ali'i sought to
claim “civilized” status, they demanded cultural changes from the
population, most notably a reshaping of the family and gender order.
The creation of a bourgeois form of marriage required the energetic
prosecution of adultery and fornication.

Paradoxically, Hawai'i was mocked by other nations when it
mimicked the ceremonial forms of European nationalism. One writer
labeled it a “pygmy kingdom,” while during his 1866 visit, Mark
Twain called it a place where the grown folk “play empire”:

There is his royal Majesty the King, with a New York detective’s income of thirty or thirty-five thousand dollars a year from the “royal civil list” and the “royal domain.” He lives in a two-story frame “palace.”

And there is the “royal family”—the customary hive of royal brothers, sisters, cousins, and other noble drones and vagrants usual to monarchy—all with a spoon in the national pap-dish, and

83. See generally KAMAKAU, supra note 65; 1 KUYKENDALL, HAWAIIAN KINGDOM, supra note 82.
84. See generally ELIAS, supra note 22.
86. MARK TWAIN, MARK TWAIN IN HAWAII: ROUGHING IT IN THE SANDWICH ISLANDS 31 (Mutual Publ’g 1990) (1872).
all bearing such titles as his or her Royal Highness the Prince or Princess So-and-so. Few of them can carry their royal splendors far enough to ride in carriages, however; they sport the economical Kanaka horse or "hoof it" with the plebeians. 87

Twain lists a long series of officials, concluding: "Imagine all this grandeur in a play-house 'kingdom' whose population falls absolutely short of sixty-thousand souls!" 88 After describing the elegant and ornate gold-laced uniforms of the officials in a mocking way, he remarks: "Behold what religion and civilization have wrought!" 89 The Hawaiian effort to Christianize and civilize collided with the European inability to recognize the likeness of their nationalism among peoples of a darker hue. Twain's mockery encompasses the pretensions of European nationalism as well as its derivative enactment in Hawai'i.

IV. LEGAL APPROPRIATION AS RESISTANCE

The appropriation of an alien legal system in the search for sovereignty can be interpreted as an act of resistance to the threat of European takeover even though it appears to be a capitulation. Concepts of hegemony and resistance have contributed significantly to the redefinition of culture. Relations of power depend on systems of meaning embodied in culture, while resistance to these hegemonic cultural meanings takes the form of counterhegemonies or non-compliant practices and discourses. Cultural practices can be either hegemonic or resistant, but in either case they make up a field on which power is traced and disrupted. Much of the recent literature on resistance emphasizes its cultural character, its significance to consent and legitimacy. 90 Although earlier theories focused on articulated and politically aware resistance, more recent work has expanded the concept of resistance to include actions that do not involve a larger vision of social injustice or change. 91 The essential quality of resistance is that it is oppositional: It moves against something else,

87. Id.
88. Id. at 33.
89. Id. at 34.
90. See, e.g., ABU-LUGHOD, supra note 31; JEAN COMAROFF, BODY OF POWER; SPIRIT OF RESISTANCE: CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE (1985); COMAROFF & COMAROFF, ETHNOGRAPHY, supra note 16; COMAROFF & COMAROFF, supra note 14; CONTESTED STATES, supra note 13; ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., Int'l Publishers 1971); SCOTT, DOMINATION, supra note 17; SCOTT, WEAPONS, supra note 17.
91. See, e.g., COMAROFF, supra note 90; COMAROFF & COMAROFF, supra note 14; SCOTT, DOMINATION, supra note 17; SCOTT, WEAPONS, supra note 17; Ewick & Silbey, supra note 17; Merry, supra note 17; Sarat, supra note 17; Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 40 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991).
slowing down a moving entity. Phenomena identified as resistance have a quality of the covert, the subtle, and the unspoken. Resistance is noncooperation, often voiceless and inarticulate. It may or may not be informed by a larger consciousness of injustice or by a vision of a better social order. It is behavior that provides friction in the normal operations of power. An essential ingredient of resistance is disruption, the creation of disorder within order.

Crime on the streets, graffiti, failure to pay income taxes, drunk driving, work slowdowns by abused slaves, and labor union sabotage in protest against unfair labor practices are all disruptions of power but are not all forms of behavior generally considered resistance. This list encompasses behavior typically viewed as heroic as well as that which seems obstructionist, curmudgeonly, and self-serving. There is clearly a normative judgment underlying the concept of resistance. Forms of behavior identified as resistance are instances of noncompliant actions by individuals or groups against systems of power that the identifier considers unjust. The term has a celebratory function, relabeling certain kinds of behavior commonly seen as disreputable as heroism in the face of unjust oppression. The concept of resistance contains an implicit judgment about justice. Without this implicit criterion, it is difficult to construct an analytical definition of resistance that can be applied in a variety of social contexts. Endeavoring to construct a universal definition obscures the localism of the judgment about what constitutes justice and injustice and the importance of the positionality of the observer. Resistance is inextricably tied to the way a just world is imagined at particular historical moments by people in particular positions. Thus it is difficult to work with any more general concept of resistance and futile to construct a definition of what resistance really “is.” Labeling an action as resistance depends on the specificity of the situation, a theory about just and unjust power relationships within that situation, and a judgment by the observer in light of that theory.

Indeed, Antonio Gramsci clearly developed the concept in conjunction with his own political interest in revolutionary change. He emphasized the role of intellectuals who developed particular strategies for furthering the class interests of workers by appealing to a broad range of democratic and popular concerns. The organic intellectuals within each class, those who had a political vision, would lead the movement. As Martha Kaplan and John D. Kelly note, Gramsci viewed resistance as passive and unconscious, opposed to

92. See Gramsci, supra note 90, at 12. As Gramsci wrote, “The intellectuals are the dominant groups’ ‘deputies’ exercising the subaltern functions of social hegemony and political government.” Id. at 12.
agency. Resistance is the inarticulate, thing-like quality possessed by those who do not understand the conditions of their subordination. It was the organic intellectual, the person fully conscious of his or her situation, who could lead the subaltern from resistance to revolutionary agency. Gramsci, however, also thought all men capable of some moral reflection and believed that organic intellectuals are produced by all social classes. Thus there seems no sharp division between the politically conscious leader and the masses of the population. Kaplan and Kelly suggest exploring the terrain opened up by this expansion of the concept of resistance: that existing between mere resistance and a superconscious revolutionary vanguard. It is a political terrain of unconscious resistance, alienated ideologies, and agents who challenge existing structures of domination with different visions and who face different kinds of risks.

But, even in this domain, the search for a universal definition is futile. I think it is important to keep in mind the situated nature of resistance and the notion that any label is imposed according to a standard of justice held by the interpreter. Gramsci, for example, has a clear political stance about social justice within which he deploys the concept. But if one accepts that identifying acts as “resistant” depends on the position of the observer and his or her conception of social justice, focusing on these acts helps to reveal the contested and unstable nature of culture. A focus on resistance provides a way of undermining one-sided analyses of the imposition of law, the spread of colonialism, or the expansion of capitalism. These were everywhere contested processes, welcomed in some ways and resisted in other ways.

Although some scholars see resistance in bipolar terms as a clash between dominant and subordinate groups in which the cultural worlds of both groups seem integrated and coherent, thus incorporating earlier notions of culture, resistance can take the form of cultural appropriation as well. In his ethnographic study of Zaire, for example, Filip de Boeck argues that local political leaders legitimated their power through rituals that simultaneously drew on the symbolic forms of the past and symbols of the paternalistic power of Mobuto in the present. This is not understood as a contradictory practice

94. See GRAMSCI, supra note 90.
96. See Kaplan & Kelly, supra note 93.
97. See, e.g., SCOTT, DOMINATION, supra note 17; SCOTT, WEAPONS, supra note 17.
98. See Filip de Boeck, Postcolonialism, Power, and Identity: Local and Global Perspectives from Zaire, in POSTCOLONIAL IDENTITIES IN AFRICA 75, 94 (Richard Werbner & Terence Ranger eds., 1996).
but as continuous with a process of cultural appropriation that has long characterized this region of Zaire (now Congo): the creative incorporation of external elements within an existing social and cultural terrain. The incorporation provides a political space in the modern state within which local political leaders can construct some autonomy. Such local practices represent agentic appropriations under conditions of contact and multiplicity.

Resistant appropriation occurs within political and economic constraints. It means taking on board and adopting aspects of the dominant system under duress. The Hawaiian chiefs who adopted the Anglo-American legal system faced the periodic reappearance of European gunboats threatening to flatten the harbor towns. This pressure fueled their willingness to accept European notions of the superiority of civilization and the rule of law. Rather than the breakdown of a cohesive cultural system, this was a resistant appropriation of those aspects of the dominant system that constituted a cultural form more resistant to political conquest even as it incorporated certain cultural practices and institutions of that dominant system itself.

V. CONCLUSION

In sum, the concept of cultural appropriation provides a way of understanding social transformation that is attentive to agency, to competing cultural logics, and to the complexity of the social fields within which changes take place. The concept defines culture as contested, historically changing, and subject to redefinition in multiple and overlapping social fields. It emphasizes continual transformations in the meaning and structure of law rather than any notion that law is embedded in a homogeneous and shared culture. It incorporates the possibility of resistance, while recognizing that resistant practices involve actions that appear to be accommodation and adaptation.

Changing the way culture is conceived makes it possible to reimagine the relationship between law and culture. Processes of legal transplantation, imposition, and borrowing, widespread during nineteenth-century colonialism and contemporary globalization, are central sites for examining this relationship. Appropriation can be a resistant practice, even though it means adopting aspects of the dominant society, since it restructures the position that the subordinate occupies within the hegemonic structure created by dominant societies. Contemporary movements by indigenous groups to define themselves and their legal claims in terms of authentic tradition—the

99. See id. at 90.
discourse of settler states such as the United States and Canada—provide another example of this strategy.

This approach emphasizes the plurality of law and of culture: Law, like culture, exists in social fields with multiple systems of meaning and practice. Law can be theorized as consisting of local, regional, national, and global systems of rules and procedures, each bearing upon the ordering of local social relations in particular ways. Resistance, collaboration, cooperation, and appropriation define the shape of interactions between cultural practices and forms of legal process.