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PROPERTY THEORY AND OWNING THE SANDY SHORE: NO FIRM GROUND TO STAND ON

Robert Thompson[*]

I. INTRODUCTION

Imagine walking along the dry sand beach and coming to a sign that says, "Private Beach, No Loitering." Probably many readers have shared this experience, but how many people have stopped and thought, "why is it a private beach?" In most states, if the stroller were to ignore the sign and sit down on the dry sand, she could be forcibly removed and charged with trespass. But what is the moral justification for this official use of force by the State? Why should the State protect the individual beachfront property owner's desire to keep the dry sand beach empty on a day when numerous members of the public might want to enjoy it? The obvious response to these questions is that the beach belongs to the owner because the owner paid for it and the State protects private investments in property. That explanation, however, just moves the initial question back one transaction: that is, why was the beach private when the prior owner sold it to the present owner? We really need to go back to the beginning and ask what the moral justification was for granting private ownership of the sandy beach in the first place so that the buying and selling could begin. What was the moral justification for a property system that ended up excluding the vast majority of us from the vast majority of beaches?

Many people have probably never considered that theories had to be developed to justify the private ownership of all land, including beaches. Since the times of the ancient Greeks, however, the need to justify private

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land ownership has been recognized and debated in Western culture.[1] Indeed, the founding fathers of the United States extensively debated property theories, the rules that each theory could justify, and the type of society different property rules might produce.[2] Property debates often focus on whether the government is infringing on the rights of the owner, and not the underlying justifications for ownership and whether the owner's actions are in keeping with those justifications.[3] Yet, as Michael Heller points out, uncritical acceptance of private property causes people to fail to grasp its past and possible future flexibility: "If people thought deeply about the property they used, perhaps they would see that even the core meanings are historically contingent and indeterminate. However, the everyday perspective on property masks its mysterious character."[4]

But then again, even if a particular allocation of property rights is not questioned and debated in the courts, significant numbers of the public might refuse to accept or respect it.[5] Moreover, Robert Ellickson and others have pointed out that social norms within a community can be more important than the formal law in establishing the actual practice of property.[6] One certainly sees this along many beaches. Where people decide to walk, sit, fish, and swim seems to be determined more by past practice and following the examples of others than by the constitutional, statutory, or case law of the State. I have argued elsewhere that this practice is in part attributable to the difficulty of establishing workable boundaries on coastlines between public and private property.[7] Still, I believe that many people walk where they wish because they question

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1. *See* ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 107 (Island Press 2003).

2. *Id.* at 50-63; GEORGE S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970 19-83 (The University of Chicago Press 1997).

3. *See, e.g.,* Donald Krueckeburg, *The Difficult Character of Property: To Whom Do Things Belong?* 61 J. OF THE AM. PLAN. ASS'N 301, 304, 307 (1995).

4. Michael Heller, *Empty Moscow Stores: A Cautionary Tale for Property Innovators, in* PROPERTY AND VALUES 189, 191 (Charles Geisler & Gail Daneker eds., 2000).

5. JEAN ENSMINGER, *Culture and Property Rights, in* RIGHTS TO NATURE: ECOLOGICAL, ECONOMIC, CULTURAL, AND POLITICAL PRINCIPLES OF INSTITUTIONS FOR THE ENVIRONMENT 179 (Susan S. Hanna et al. eds., 1996).

6. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (Harvard University Press 1991). Ellickson's groundbreaking study of cattle ranchers in Shasta County, California, showed how residents frequently applied informal norms of neighborliness to resolve disputes even when the norms conflicted with the formal law.

7. *See* Robert H. Thompson, *Cultural Models and Shoreline Social Conflict*, COASTAL MANAGEMENT (forthcoming).

whether the beach should be privately owned, even if they never think about the issue in terms of formal property theory.

This Article examines the private ownership of the dry sand beach in terms of the leading moral theories that justify the private ownership of land. These theories are: first-in-time, possession, labor theory, personality theory, and aggregate social utility. This Article concludes that none of these theories provides a clearly satisfactory justification for the private ownership of most beaches. The search for justifications for private beaches is important because, as Eric Freyfogle points out, "private property is a form of state-sanctioned power [and] it is legitimate and worthy of respect only when it is adequately justified."[8] This Article ends by suggesting what the absence of a strong moral justification for the private ownership of dry sand beaches might mean for future policy options. The lack of strong moral arguments for private dry sand beaches can be used to justify different public policies that could expand public access to the beaches.

II. SOME INITIAL POINTS OF CLARIFICATION

Before discussing the different moral theories for property ownership, some initial clarifications will be helpful. This Article is not primarily about the public trust doctrine, takings law, or other legal doctrines such as custom, implied dedication, or public easement by prescription. While all of these legal doctrines are discussed, they are mostly discussed to show how a particular moral theory supports or does not support the doctrine rather than to establish the current state of coastal property law. Second, when this Article discusses private ownership of the beach, it is primarily concerned with the right to exclude the public from using the beach in any meaningful way. The right to exclude is key, because a property system could allow for private ownership of beaches, but also recognize a range of rights for the public to use and not be excluded from the beach. Later, this Article discusses some states that have this type of non-exclusive private ownership of beaches.

Finally, when discussing beaches, this Article primarily will be discussing what is called the "dry sand beach." Currently, the portion of the beach that is open to the public varies from state to state because states apply the public trust doctrine and custom differently. For example, Massachusetts, Pennsylvania, and Virginia use the mean low tide line to divide the public from the private beach; California, Florida, and Rhode

8. FREYFOGLE, *supra* note 1, at 107.

Island use the mean high tide line; Hawaii uses the debris line; Texas uses the natural vegetation line; and in Oregon and New Jersey the public has access to the dry sand area.[9] In most states, however, the public has very limited rights to the portion of the beach above the mean high tide line. Most members of the public seem to interpret this dividing line between public and private property as either the wrack line or the area above the current swash line, that is, the dry (or often dry) sand beach. Moreover, if one were designing a property system for the coastal environment from scratch, it would make sense to treat the uplands, the dry beach, and the foreshore separately.

III. DISCUSSION

A. First-In-Time Theory

1. The Weakest Moral Theory

Although being first on a public beach can secure you the informal right to maintain that particular spot for your blanket for the remainder of the day, can exclusive and permanent private ownership rights to beaches be justified by a first-in-time theory within which rights are given to the person who arrived on the beach first? When discussing the first-in-time theory with respect to private property generally, Freyfogle quickly dispenses with this "insubstantial line of reasoning":

> Only a bit of thinking is needed to see that this claim lacks any real moral force. For a justification to work, it must explain why the ownership claims of one person should be honored by others, to the point of submitting to punishment for failure to do so. Private ownership almost always benefits the owner; to show that means little. To justify property, another, tougher question needs answering: What is in it for the nonowners? Why should they respect an owner's claim? First-in-time as a justification provides no response . . . Mere happenstance, fortuity, or swiftness of foot can account for a person's being first, yet none carries moral weight.[10]

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9. GEORGE COLE, WATER BOUNDARIES 4-5 (John Wiley & Sons, Inc. 1997).
10. FREYFOGLE, *supra* note 1, at 108-9.

2. An Ahistorical Theory

Not only is the first-in-time theory morally uncompelling, it fails to account for the actual history of beaches in the United States. For example, when European colonists arrived in New England, Native Americans were using the shoreline to gather shellfish, catch fish, hunt sea mammals, and navigate.[11] Thus, Native Americans were certainly first-in-time to visit the beaches. Yet, as discussed below regarding labor theory, European colonists in New England did not follow a first-in-time theory because it would have made it much more difficult to justify seizing property from Native Americans. Moreover, even after the colonists had laid claim to the coastal areas of New England, the beaches often remained open to communal uses such as gathering seaweed for fertilizer, a right that is still protected in the Rhode Island Constitution.[12]

On the West Coast, the case of *State ex rel. Thornton v. Hay* provides another example of an early history of public use of beaches, rather than first-in-time private ownership system.[13] In *Thornton*, the Oregon Supreme Court found that:

> The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.[14]

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11. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 30-31, 39-40 (Hill and Wang 1983).

12. R.I. CONST. art. I, § 17.

13. 462 P.2d 671 (Or. 1969).

14. *Id.* at 673; *see also* Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 903 P.2d 1246, 1272 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996), where the court held that traditional and customary rights of native Hawaiians could be practiced on public and private land that was either undeveloped or less than fully developed.

Clearly in Oregon, the sand beaches were treated as common property rather than exclusive private property that a single owner controlled by being the first person to arrive.

B. Possession Theory

1. Possessing the Grains of Sand

Some property theorists use first-in-time and possession almost interchangeably; others treat possession as a requirement for being first-in-time. For example, explaining the first-in-time theory, Freyfogle states, "[i]t is the claim that private ownership is justified whenever a person seizes an unowned thing and becomes its first possessor."[15] So it seems that even in the first-in-time justification, establishing ownership requires more than simply showing up first and claiming land. Freyfogle talks about "seizing" and becoming the "possessor." While one can easily understand what it means to literally seize or possess personal property, these terms become metaphorical and more difficult to understand when they are applied to real property. One can literally hold a deed to a parcel that states that he is the owner, but this is not the same as possessing the physical space. Moreover, if the deed is legitimate, then some prior actions conveyed ownership and not the simple act of holding the deed.[16] Carol Rose has argued that establishing possession requires actions that mark the land and announce to the larger community that one claims ownership of the land.[17] For example, in a number of early California cases, "enclosing"

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15. FREYFOGLE, *supra* note 1, at 108.

16. One should not, however, underestimate the important role of innovations in surveying, cartography, and land recording systems in changing the very conceptualization of property. Recounting the breakdown of traditional English property systems in the late sixteenth and early seventeenth centuries, Nicholas Blomley explains:

> Land survey techniques, as a form of spatial representation, appear closely bound up with a changing conception of property. As the legal definition of real property became increasingly defined, so the spaces of possession were mapped with increased exactitude. Increasingly, property was no longer a relation between superiors and mesne lords, but a *thing*, to be rationally measured, commodified, and possessed, both legally and conceptually. It is not surprising, then, that many tenants and freeholders did not welcome the surveyor.

NICHOLAS BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 97 (The Guilford Press 1994).

17. CAROL ROSE, *Possession as the Origin of Property*, *in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 11, 14 (1994).

the land with fences or some other means was an important factor in establishing possession.[18]

Beaches, however, are both literally and conceptually more difficult to possess in this manner than other land. As a practical matter, a stormy ocean can quickly obliterate common boundary markers. Thus, the markers would need to be frequently replaced after storms and moved as the beach profile changes and the boundary between the private beach and the public trust beach shifts (a process that occurs even in the absence of storms). Building a seawall or revetment is an alternative option, but requires a good deal of energy and substantial materials. In addition, the seawall or revetment might end up encroaching on public property as the beach fluctuates during the course of the year or migrates over the years. Possessing a sandy beach is also conceptually problematic because sediment is always moving off the beach and being replaced by new sediment. Even if one were able to enclose the space with fences, one could not fully control the unconsolidated shore. The individual grains of sediment that cumulatively constitute a beach must continue to move or the beach will cease to exist.[19] At least one author has argued that the public should have both the right to the sand that moves down the longshore current to renourish public beaches as well as the right to ban structures like groins and seawalls that could disrupt the sediment flow.[20]

2. More Than Just Seizing the Land

Even assuming that one could physically enclose and seize the dry sand beach, early cases focusing on prior appropriation suggest that more than the mere enclosing of land was required to validate an ownership claim. In *Brumagim v. Bradshaw,*[21] the party claiming ownership by prior appropriation had built a wall across the end of a coastal peninsula. While the court found that the wall, together with the waters of San Francisco Bay, could combine to technically enclose the peninsula, this was not enough to establish ownership:

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18. *See, e.g.* Brumagim v. Bradshaw, 39 Cal. 24, 44-45 (1870).

19. KARL F. NORDSTROM, BEACHES AND DUNES OF DEVELOPED COASTS 155-56 (Cambridge University Press 2000); *see also* COLIN D. WOODROFFE, COASTS: FORM, PROCESS AND EVOLUTION 255-60 (Cambridge University Press 2002); *see also* DAVID M. BUSH, ORRIN H. PILKEY JR. & WILLIAM J. NEAL, LIVING BY THE RULES OF THE SEA 74-77 (Duke University Press 1996); *see also* CORNELIA DEAN, AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES 23-35 (Columbia University Press 1999).

20. Katherine Stone, *Sand Rights: A Legal System to Protect the "Shores of the Sea,"* 29 STETSON L. REV. 709, 728-29 (2000).

21. 39 Cal. 24 (1870).

> The general principle pervading all this class of cases, where the inclosure consists wholly or partially of natural barriers, is, that the acts of dominion and ownership which establish a *possessio pedis* must correspond, in a reasonable degree, with the size of the tract, its condition and appropriate use, and must be such as usually accompany the ownership of land similarly situated.[22]

Thus, the land must also be used, and used appropriately.

Land can be used appropriately in two senses: first, the land can seem naturally well-suited for a use (such as a meadow for grazing); and second, a use might be valued by the community and, hence, considered appropriate. As to the first sense, dry sand beaches are arguably more appropriately used as public recreation areas than anything else. This was the view of the *Thornton* court:[23]

> Perhaps one explanation for the evolution of the custom of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose. The dry-sand area is unstable in its seaward boundaries, unsafe during winter storms, and for the most part unfit for the construction of permanent structures.[24]

But to address whether land (or in the case of this Article, the beach) is used appropriately in the second sense, we must look beyond the theories of first-in-time and possession to other theories that explicitly state values upon which moral claims may be based.

C. Labor Theory

1. Privatization Through Improvement

In its simplest form, the labor theory of property states that if a person creates something through his own labor, then that person should own the thing created. Thus, the right to own land (at least initially) derives from working or "improving" the land. The general argument posited by the labor theory was widely known and utilized in colonial America.[25]

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22. *Id.* at 46.

23. 462 P.2d 671 (Or. 1969).

24. *Id*. at 673-74. Discussing appropriate uses that could establish prior appropriation, the court in *Wolf v. Baldwin,* mentioned cultivation, grazing, and erecting a house, none of which are reasonable uses for a dry sand beach. 19 Cal. 313 (1870).

25. FREYFOGLE, *supra* note 1, at 113; CRONON, *supra* note 11, at 55-57.

Eighteenth-century philosopher John Locke provided one of the most influential formulations and defenses of the labor theory. In *Second Treatise of Government,*[26] Locke begins his defense of the institution of private property in land by arguing that every man has a right to his own body and, thus, to his own labor and the products of that labor: "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."[27] Moreover, while Locke acknowledges that God gave the land to everyone as common property, he argues that God certainly wanted people to mix their labor with the earth to make it more productive:

> God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniencies of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational . . . .[28]

According to Locke, a man could remove as much land from the commons as he could productively use: "*As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*. He by his Labour does, as it were, inclose from the Common."[29] Thus, Locke's labor theory essentially creates the elements for prior appropriation: one finds land that is unoccupied (or at least inadequately occupied), encloses it, and improves it with one's labor.

2. The Missing Improvements

The labor theory does not seem to offer a moral justification for the private ownership of beaches, because one cannot till, plant, or cultivate the beach. Indeed, the Florida Supreme Court opined that:

> The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of

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26. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1689) *reprinted in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 17 (C.B. Macpherson ed., 1978).

27. *Id.* at 18.

28. *Id.* at 20.

29. *Id.* at 19.

> land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected.[30]

The Supreme Court of Oregon in *Thornton* similarly pointed out that the custom of public recreational use of the beach probably developed because the beach was not suitable for structures and other permanent investments.[31] This is not to say that people did not labor on the beach. The court in *Borough of Neptune City v. Borough of Avon-by-the-Sea* noted that the right to dry one's fishing nets on the beach had existed since Roman times.[32] And as mentioned above, early Rhode Islanders collected seaweed, and early Oregonians gathered and cooked clams. While all of this is work, it is not labor that actually improves the beach.

Certainly, owners of beachfront property invest in their property and make improvements as the phrase is commonly understood. They do so, however, beyond the beach and not on it. In fact, when they do permanently change the beach by building revetments, bulkheads, or seawalls, they do not improve the beach but instead destroy or degrade it by disrupting sediment flows, destroying dunes, and so forth.[33]

One might argue that, even if individual beachfront owners do not improve the beach itself in a traditional sense, private beach clubs often do by supplying lifeguards, changing rooms, refreshment stands, and so forth. While these are certainly facilities and services that many people desire when visiting a beach and are investments that are entitled to a return, they are not improvements to the beach itself. When early Americans thought about improving the land, they imagined activities like clearing a forest, removing the rocks, tilling the soil, and producing crops.[34] If a businessman simply brought customers to a forest and served them lunch and watched over them while they swam in a pond, no one would assert that the businessman was entitled to the forest because he improved it. Rather than adding to the value of the forest, the businessman would be profiting from the preexisting value of the forest, that is, its beauty and its cool, clear water. This is the case with the beach as well.

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30. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974).

31. 462 P.2d at 673-74.

32. 294 A.2d 47, 48 (N.J. 1972).

33. *See generally* NORDSTROM, *supra* note 19, at 155-56; BUSH, et al., *supra* note 19, at 74-77; DEAN, *supra* note 19, at 36-68; Todd T. Cardiff, *Conflict in the California Coastal Act: Sand and Seawalls*, 38 CAL. W.L. REV. 255, 258-61 (2001).

34. FREYFOGLE, *supra* note 1, at 26; *see also* CRONON, *supra* note 11, at 55-57.

Another possible argument is that mechanical beach raking improves the beach and therefore, the owner who pays for the raking should own the beach. There are at least two problems with this view. First, mechanical beach raking arguably harms the beach instead of improving it. Regular beach grooming reduces the wrack crop and disrupts the food chain, thereby reducing species diversity on the beach.[35] Mechanical beach cleaning can also eliminate incipient dunes, habitat for nesting birds, seed sources for pioneer dune colonizers, and food for fauna, thereby reducing the overall ecological productivity of the dune area.[36] Moreover, mechanical grooming can remove sand from the beach, literally reducing its volume.[37] The second problem with this view is that the alleged improvement brought about by beach grooming is rather short-lived. It is somewhat analogous to shoveling out a parking spot on a public street after it snows. In many neighborhoods, the norm is to allow the laborer to have exclusive use of that space until the next snow storm. With the next foot of snow, the product of the labor is eliminated and, along with it, the property claim. Similarly, more wrack and debris arrive on the beach with every high tide, rapidly dissipating the benefits of the raking. Thus, grooming is more of a service than a property improvement.

3. Henry George Visits the Beach

The work of Henry George helps us to better understand the sources of value in beach property and, thus, better judge the validity of private claims to that value. Henry George was a social reformer born in Philadelphia in 1839. He was keenly interested in understanding why poverty was increasing in a world where material wealth was increasing. He believed that the private ownership of land was a major cause of increasing poverty. In 1879, George published his highly acclaimed and influential book, *Progress and Poverty*, which asserted that all land should be common

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35. Jenifer E. Dugan, et al. *The Response of Macrofauna Communities and Shorebirds to Macrophyte Wracksubsidies on Exposed Sandy Beaches of Southern California,* 58 ESTUARINE COASTAL AND SHELF SCI. 133, 145 (2003).

36. Nordstrom et al., *Reestablishing Naturally Functioning Dunes on Developed Coasts*, 25 ENVTL. MGMT. 37, 40, 45-46 (2000).

37. NORDSTROM, *supra* note 19, at 53 ("The volume of sand removed with the wrack from the Ocean Beach, California littoral cell is from 20 percent to 75 percent of the total load and has been estimated at 7600 to 11400 m3a-1 . . . ." Nordstrom further explains that the cleaning breaks up the surface crusts of the sand as well as shells and gravel; the combined crushing and removal of wrack enhances the Aeolian transport of sand off of the beach.).

property.[38] One of George's important insights was that as regions and cities grew, property prices increased, but only part of the increased value was attributable to labor and other investments of the owner. Part of the value came from the fact that the land became surrounded by other valuable economic activities as the city grew. Even the landowner who did nothing to his land could capture part of this growth value. Another important part of the value came from scarcity. As land became more scarce as compared to demand, its value increased. Part of Locke's rationale for allowing the enclosure of land was the counterfactual assertion that there was plenty and that scarcity did not exist. While George agreed with Locke that the owner should reap the profits from improvements, George argued that scarce land should remain common property belonging to all people. He further argued that the value of any land attributable to its location in a region of economic growth or to the scarcity of land in that region should be taxed in order to capture that value and spend it for the public good.[39]

This argument is even stronger in the context of beaches. Where does the value of the beach come from? First of all, the value comes from the ocean, which belongs to the public. Ocean beaches are immense tourist attractions. More than 180 million people visit the United States coast each year, making it the number one recreational destination in the United States.[40] More than ninety percent of foreign tourists to the United States visit its coast.[41] If one goes to the great inland sand dunes of California or New Mexico, one does not see hordes of people sunning themselves on beach chairs or blankets—even on the nicest of days. It is the ocean that draws the visitors. The place to swim, the sound of the waves, the smell of the breeze, the infinite vistas, and the coolness of the air are all elements that add value to the beach. Why should the owner of a private beach be able to charge the public to enjoy a value that comes from the public's ocean and not from the beach owner's efforts?

Of course, scarcity is also an important part of the value of beach property. The popularity of the beach has continued to increase for over a century,[42] and both the permanent and seasonal coastal populations will

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38. HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH (Modern Library 1929).

39. *See generally id.*

40. TIMOTHY BEATLEY, DAVID J. BROWER & ANNA K. SCHWAB, AN INTRODUCTION TO COASTAL ZONE MANAGEMENT 2 (2nd ed. 2002).

41. National Oceanic and Atmospheric Administration, *Ocean Facts on Coastal Tourism* (1998), http://www.yoto98.noaa.gov/facts/tourism.htm.

42. *See* LENA LENČEK & GIDEON BOSKER, THE BEACH: THE HISTORY OF PARADISE ON EARTH 164-171, 204-215, 223-245 (Viking 1998).

continue to grow in the future.[43] But the increasing popularity of the beach would not have been possible without a tremendous public investment in infrastructure such as highways, bridges, and sewage treatment plants. C. Ford Runge et al. have pointed out that the public, not just the private owner, should benefit from the increase in property values that these types of public investments create.[44] What moral argument justifies the private owner capturing the value of this increased demand that is in large part attributable to public expenditures?

4. Charging for Services and Not the Value of the Beach

Over the last thirty years, the Supreme Court of New Jersey has developed a modern interpretation of the public trust doctrine that corresponds very closely to the above Georgian analysis of beaches. In *Borough of Neptune City*[45] the court held that, under the public trust doctrine, the public had rights in tidal lands "to recreational uses, including bathing, swimming and other shore activities."[46]

Later, in *Matthews v. Bay Head Improvement Ass'n*,[47] the court considered the extent of the public's interest in privately-owned dry sand beaches. The *Matthews* court held that the public's interest included the right to cross privately-owned beaches to gain access to the foreshore and the right to sunbathe and generally enjoy recreational activities on the dry sand.[48] It reasoned that swimming "must be accompanied by intermittent periods of rest and relaxation beyond the water's edge" and, if the dry sand was not available for this purpose, the unavailability "would seriously curtail and in many situations eliminate the right to the recreational use of the ocean."[49] The court also noted that New Jersey's beaches were a "unique" and "irreplaceable" resource, which was subject to ever increasing pressure due to population growth and improved transportation to the seashore.[50]

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43. *See* KRISTEN M. CROSSETT, THOMAS J. CULLITON, PETER C. WILEY & TIMOTHY R. GOODSPEED, POPULATION TRENDS ALONG THE COASTAL UNITED STATES: 1980-2008, 6, 9, 14, 16, 18, 20 (National Oceanic and Atmospheric Administration 2004).

44. *See* C. FORD RUNGE, ET AL., *Public Sector Contributions to Private Land Value: Looking at the Ledger*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 41, 49-53 (Charles Geisler & Gail Daneker eds., 2000).

45. 294 A.2d 47 (1972).

46. *Id.* at 54.

47. 471 A.2d 355 (1984), *cert. denied sub nom.*

48. *Id.* at 363.

49. *Id.* at 365.

50. *Id.* at 364.

Recently, the Supreme Court of New Jersey in *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*[51] reaffirmed the public's right to utilize privately owned beaches. Even though the *Raleigh* court reaffirmed that the private beach club could not exclude the public from the beach, or charge them a fee to access it, the court did allow the beach club to charge a fee for lifeguards, restrooms, and other services, but provided that the state's Department of Environmental Protection would determine what a reasonable fee would be based in part on the experience at state beaches.[52] So, in keeping with Henry George's analysis of land value, the New Jersey Supreme Court allowed the owners to receive a return on the services that they provided, but not to capture the value created by the ocean or scarcity.

5. Spoilage and Underutilization

As mentioned above, a major element of the moral argument for allowing individuals to claim private ownership of land is that the land will be used productively. In Locke's work, and in early American political thinking, this productive use requirement created two limitations on what one could claim for private property: no person could claim more land than he could productively use or accumulate more of its fruits than he could use without spoilage.[53] Although beaches do not spoil or waste away in the same way that apples or lumber can, one can spoil, waste, or destroy a beach by erecting coastal defenses that disrupt sediment movement and other coastal processes.[54] It seems morally indefensible to award private ownership of beaches to individuals only to allow them to destroy the resource.

The underutilization of private beaches also raises moral questions. The thinking of Locke and other like-minded philosophers caused early Americans to be suspicious of private claims to vacant or underutilized land:

> [M]any New Englanders questioned whether a person could claim full property rights in vacant, undeveloped land. Such land was not the same as other land, many believed; until tilled or enclosed it remained a shared asset, subject to public use and control. Wildness and lack of cultivation were also evidence that a land parcel's owner did not need the land for subsistence. This, too,

51. 879 A.2d 112 (2005).
52. *Id.* at 117.
53. LOCKE, *supra* note 26, at 19-20.
54. *See supra* note 20.

> was an issue under natural-rights reasoning, for a family could morally claim only as much land as it needed and could use. Private claims in vast, little-used tracts were morally suspect, particularly when the owner acquired title directly from the state at a trivial cost.[55]

Consequently, New Englanders considered privately owned woodlands to be open for recreation, hunting, and foraging.[56]

But what does a past view of the immorality of underutilizing property suggest about the contemporary morality of private beach ownership? Owners of private beach clubs do utilize their beaches daily (at least during the season), and provide services for which they should be paid. However, beaches fronting many private homes are grossly underutilized. Many beach communities have extremely large numbers of second homes and vacation rentals.[57] While every beach community is different, it is not uncommon in my community[58] for beachfront homes to be unoccupied during most of the year and even on many summer days. Moreover, even when the homes are occupied, the owners are actually using very little of the sandy beach for very little of the day. In any case, it seems undeniable that private beaches are typically grossly underutilized when compared to nearby public beaches. Is it morally defensible that private beaches that nature has created should lie unused while public beaches are overused?[59] To put the question another way, if our forebears had foreseen the public's growing interest in, and pressure on, the nation's beaches, would they have intentionally designed a system that gives the vast majority of the sandy beaches to relatively few private owners and that thereby confines the vast majority of Americans to comparatively tiny pockets of state and federally owned beaches?

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55. FREYFOGLE, *supra* note 1, at 26.

56. *Id.* at 23-24.

57. CROSSET, *supra* note 43, at 9-10.

58. The author lives in South Kingstown, Rhode Island.

59. One could argue that with renourished beaches, it is possible that private parties may have paid to improve the beach. Of course, it would also be important to know whether these same parties were responsible for the erosion of the beach. Furthermore, if public funds are spent to renourish the beach, then there is an additional moral argument for public access.

6. Trespass as a Means of Questioning the Legitimacy of Ownership

One of the interesting observations about behavior and beaches when it comes to property theory is that people's behavior often indicates that they do not fully accept the legitimacy of privately owned beaches. As Jean Ensminger explains, the lack of self-enforcement can be a sign of a property system that is considered illegitimate:

> The structure of property rights always has distributional consequences. In any given society those who find such distribution culturally acceptable, that is, consistent with their values concerning the just distribution of rewards, may voluntarily comply with the norms that enforce such institutions. In other words, they self-enforce, or comply with rules even when they could get away with breaking them. Voluntary compliance with social norms forms the backbone of society.[60]

I have lived on both the east and west coasts and have been intrigued to see people on both sides of the continent fail to comply with standard property norms on the beach. Many of the locals in my current coastal community trespass on the property of seasonal residents with impunity, particularly during the off-season. When I discuss this with local residents, they do not sound like criminals, trespassing whenever they think they can get away with it. Instead, the trespassers I have spoken with essentially feel that a property right allowing a nonresident owner to exclude local residents from an unused beach is somehow immoral and unworthy of respect. Perhaps this is a rationalization that allows them to simply do what they want, but even if it is a rationalization, it is one that probably would not work as well away from the beach.

In fact, beaches appear prominently in the case law where people who are not the owners of record assert the right to use property through either the theory of implied dedication or public easement by prescription.[61] A particularly interesting aspect of this litigation is the willingness of members of the public to take the law into their own hands, physically

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60. ENSMINGER, *supra* note 5, at 179.

61. A prescriptive easement is created by continuous, uninterrupted use that is open, notorious, and adverse. Most states allow the public to establish an easement by prescription when the public uses beach property in an adverse manner for the prescribed period. In implied dedication cases, the essential requirements are acts or circumstances that show that the landowner intended to donate an easement to the public and that such an offer was impliedly accepted through such acts as public maintenance. JOSEPH J. KALO, RICHARD G. HILDRETH, ALISON RIESER, DONNA R. CHRISTIE & JON L. JACOBSON, COASTAL AND OCEAN LAW 91-93 (2d ed. 2002).

defying the owner's claims to a right to exclude. Consider the experience of the Kings, property owners who tried to stop public access to what they considered their private beach:

> In 1960, a year after the Kings acquired the land, they placed a large timber across the road at the entrance to their land. Within two hours it was removed by persons wishing to use the beach. Mr. King occasionally put up No Trespassing signs, but they were always removed by the time he returned to the land, and the public continued to use the beach until August 1966. During that month, Mr. King had another large log placed across the road at the entrance to his property. That barrier was, however, also quickly removed. He then sent in a caterpillar crew to permanently block the road. That operation was stopped by the issuance of a temporary restraining order.[62]

Similarly, in *Concerned Citizens v. Holden Beach Enterprises*, sunbathers and fishermen battled a landowner for over twenty years to keep a path open to the shoreline.[63] People tore down "No Trespassing" signs and used them for firewood, destroyed gates and fences, and simply drove past a security guard in a guardhouse.[64] It is difficult to imagine cases occurring further inland where members of the community would so tenaciously engage in what was potentially trespassing and vandalism.

D. Personality Theory

The personality theory justifies the private ownership of property as being necessary for the full development of the individual. The personality theory conceives of at least three different explanations for private property. The first is that property is needed for subsistence and physical security. People cannot flourish if they are hungry, cold, and insecure. However, while people today certainly fish and gather shellfish along the beach, it probably rarely plays a role in subsistence. The second argument is that property that is closely connected to the talents and personality of the individual is necessary for that person's full development. For instance, a great cellist can only become a great cellist if she has a cello from an early age so that she can fully develop her natural talent. Arguably she has to have a secure property interest in the cello to feel secure enough to devote her life to the cello. A problem with this second argument is that it

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62. Gion v. City of Santa Cruz, 465 P.2d 50, 55 (Cal. 1970).
63. 404 S.E.2d 677 (N.C. 1991).
64. *Id.* at 685-86.

is hard to know what kinds of property are necessary to allow different individuals to fully develop or even whether an individual has failed to develop to his potential. While a pleasant time on the beach might help anyone develop into a happier person, it is difficult to imagine how the talents and personalities of beachfront property owners are closely tied to the beach in this developmental way.[65]

The third argument concerns the notion that psychological security and privacy are necessary if one is to fully develop and prosper in life. Both American trespass law and the Fourth Amendment to the U.S. Constitution protects the privacy of the individual, particularly in relation to activities within the home.[66] At first glance, this version of the personality theory seems to have merit. In conflicts over beach access, beachfront owners often complain that the people using the beach do not respect their privacy.[67] In such cases, the homeowners often argue that in order to protect their privacy it is necessary not only to reserve the dry sand beach, but also to restrict lateral public access along the waterline. However, a

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65. Robert George contends that the First Amendment protects expression that leads to self-fulfillment, that walking on the beach is this type of expression, and that for this reason private beaches must be open to the public. Comment, *The Public Access Doctrine: Our Constitutional Right to Sun, Surf, and Sand*, 11 Ocean and Coastal L.J. 1, 73 (2005-2006). George argues that, "[s]uch forms of [protected] expression might include walking on the beach, listening to the surf or building a sand castle." *Id.* at 97. So in George's view, if we are really interested in the full, happy development of people, beaches should be open to the public and not exclusively reserved to private owners. I of course agree that listening to the surf or walking on the beach can make people happier and healthier, but I cannot as readily agree that such activities are constitutionally protected expression. These are indeed activities that make people happier, but we should not have to rely on a First Amendment argument that seems a bit strained to get people back onto the beach. When I was sitting on the beach this afternoon, I felt content but I had no intent to express anything and I think I fulfilled that intent completely. As I will show in the "Aggregate Social Utility Theory" section, *infra*, utility is maximized by allowing public access to all beaches. If one looks at the public trust doctrine simply as a rule that has maximized social utility for centuries, then relying on the doctrine to protect the public's right to use the seashore is consistent both with the rationale and the history of that property rule.

66. Kyllo v. United States, 533 U.S. 27, 31-32 (2001). Jenifer Nedelsky, however, argues that the courts and legal scholars have relied too heavily on literal and metaphorical property boundaries as a way to protect autonomy:

> What is essential to the development of autonomy is not protection against intrusion but constructive relationship. The central question for inquiries into autonomy (legal or otherwise) is then how to structure relationships so that they foster rather than undermine autonomy. The boundary metaphor does not direct our attention to this question.

Jenifer Nedelsky, *Law, Boundaries, and the Bounded Self, in* LAW AND THE ORDER OF CULTURE 162, 168 (Robert Post ed., 1991).

67. THOMPSON, *supra* note 7.

moral theory based on privacy cannot be based on a purely personal expectation of privacy. Instead, the expectation of privacy must be one that society is willing to recognize as reasonable.[68] Thus, one needs to ask whether the beachfront owners' expectations of privacy are reasonable and worthy of societal respect; specifically, to what degree should the dry sand beaches be held privately, and should those private owners be able to exclude the rest of the public?

The longstanding common law rule in England and the United States is that property owners cannot prevent other people from looking onto their property: "the eye cannot by the laws of England be guilty of a trespass."[69] Still, social norms discourage people from engaging in voyeuristic abuses. In the case of beachfront property, however, it appears that it is not the beach strollers who are abusing the situation, but the property owners. The shoreline property owners do not have any reasonable expectation of privacy on the dry sand beach itself because it is flat, open, and readily observable from both the public trust beach and boats on the ocean. Moreover, even if shorefront residents feel that their privacy is being invaded in their homes, their perceived lack of privacy is often due to their own choices. For example, shorefront homes often have numerous windows on the ocean side in order for the owners to have expansive views of the public's ocean. Of course, architectural designs that are good for looking out make it easy for the rest of the world to look in. But it hardly seems reasonable to ban the public from the dry sand beach simply because the beachfront owners installed big windows to enjoy the aesthetic benefits of the public's ocean.

Furthermore, the problem is not only how owners build, but also where they build. If shorefront owners were more responsible, they would build their homes up and well back from the dry sand beach to protect them from storm damage, but instead they often build them dangerously close to — or even on—the beach.[70] When owners build on or beyond the frontal dune, homes are eventually destroyed and damaged and the public too often ends

68. When discussing the Fourth Amendment's protection against unreasonable searches, the Supreme Court stated that the protection did not apply "unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" Kyllo v. United States, 533 U.S. at 33 (internal citation omitted).

69. Boyd v. United States, 116 U.S. 616, 628 (1886).

70. BUSH, ET AL., *supra* note 19, at 164-65.

up paying for a sizable amount of the storm damage.[71] If coastal homes were built in truly safe locations, then it would be very difficult to observe activities within those homes from the dry sand beach. In the end, all of the variations of the personality theory, including privacy, offer very weak moral arguments to support the private ownership of dry sand beaches.

E. Aggregate Social Utility Theory

The aggregate social utility theory is grounded in utilitarianism. As Frederik Kaufman explains: "[u]tilitarians begin with an account of what is good—pleasure (or happiness) according to the classical utilitarians—and then define as right those actions that produced as much good as possible in a particular situation."[72] Thus, in the words of John Stuart Mill, one of the fathers of utilitarianism:

> The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.[73]

Utilitarianism is largely a consequentialist moral philosophy, that is, it conceives of right and wrong solely according to the consequences of actions and not the intrinsic features of the actions themselves. The morality of an action is judged by its outcome; hence, the action that is morally correct is one that creates the greatest aggregate level of social utility.

Freyfogle asserts that utilitarianism is the dominant moral justification for private property ownership in the United States:

> Private property exists and is legitimate because of the overall utility it generates for society as a whole. With reasonably secure rights, a person can plant in the spring confident that she can harvest in the fall; as she plants and harvests, she adds to the overall stock of food. Homes will be built, farms cleared, canals

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71. *See* Rutherford Platt, et al., *Fire Island: The Politics of Coastal Erosion, in* DISASTERS AND DEMOCRACY: THE POLITICS OF EXTREME NATURAL EVENTS 167-214, (Rutherford Platt ed., 1999), for a case study of repeated government bailouts of reckless beachfront development.

72. FREDERIK A. KAUFMAN, FOUNDATIONS OF ENVIRONMENTAL PHILOSOPHY 9 (McGraw-Hill 2003).

73. *Id.* at 10 (quoting John Stuart Mill).

> dug, factories built, all because secure rights encourage owners to make long-term investments.[74]

Although arguments based on the aggregate social utility or labor theories at times tend to run together, the moral right in the latter comes from investing one's labor (or labor that one has purchased) in the land, while the moral right in the former comes from creating a system that yields the greatest good.

But how do we know whether an assignment of property rights creates the greatest happiness when we have no way of measuring happiness? As Timothy Beatley explains, for many, the free market provides an easy solution to this seemingly difficult problem:

> While there is an active debate over how to define or conceive of utility or welfare, for many the question is easily resolved through reliance on private markets. Through market mechanisms it is up to each individual to determine his or her own preferences or life plans and to pursue them accordingly—that is, through one's "dollar votes." The market model is viewed . . . as the most effective social mechanism by which to achieve the utilitarian ethic.[75]

While a great deal has been written about the shortcomings of market mechanisms and potential ways for dealing with them, one does not have to delve into most of them to answer the question of whether private ownership of dry sand beaches can be justified by the aggregate social utility theory.[76] The prominent question is whether this property arrangement creates the greatest happiness for the greatest number. Certainly owning a nice sandy beach creates a good deal of happiness in the owner—a fact to which the real estate prices of beachfront property attest. Still, we have to ask what is in it for the rest of society, particularly in light of Mill's Greatest Happiness Principle, which states that the happiness of everyone matters. One argument would be that the "dollar votes" have been counted and the owner of the beach, by bidding the most for the

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74. FREYFOGLE, *supra* note 1, at 118.

75. BEATLEY, ETHICAL LAND USE: PRINCIPLES OF POLICY AND PLANNING 33 (The Johns Hopkins University Press 1994).

76. See GEOFFREY HEAL, NATURE AND THE MARKETPLACE: CAPTURING THE VALUE OF ECOSYSTEM SERVICES (Island Press 2000) for a discussion of the benefits of using market mechanisms to manage the environment. See BEATLEY, *supra* note 75, at 33-53 for discussions concerning the ethical difficulties of relying on markets; *see also* MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (Cambridge University Press 1998).

property, has assured that the beach is being put to its best use—that is, the one that will create the greatest utility.

One of the dangers of blindly relying on market measures of utility is that inequalities in wealth can greatly skew estimates of utility.[77] Simply put, initial allocations of wealth skew future distributions of wealth and hence utility. When it comes to the distribution of the Nation's beaches, utilitarianism seems to fall flat on its face. If most of the country is crowded onto a small fraction of the nation's beaches while the large majority of the beaches fall under the control of increasingly wealthy people, how does this serve the greatest aggregate good?

Beaches provide a striking example of how money can be an astoundingly poor substitute for measuring utility. While the people sitting isolated on their private beaches may have more wealth than all of the thousands of visitors crowded onto a nearby public beach, it seems difficult to argue that restricting access to the private stretch of beach to the private owners creates greater total happiness than allowing the thousands of people crammed onto the public beach to spread themselves out along the shoreline. One might argue that if this is the case, then the state should buy the stretch of beach and, as I will argue later, perhaps the state should. But this misses the point: saying that the state can buy the beach back is simply not a moral justification for allowing the private ownership of the beach in the first place.

IV. CONCLUSION

Even if there are no moral theories to justify the initial establishment of private, exclusive ownership of dry sand beaches, one could argue that most states now consider dry sand to be fair game for private ownership with the right to exclude, thus creating moral, political, and legal dilemmas that cannot be ignored. While this is the current understanding in most states, the foregoing analysis showing the absence of moral justifications should not be a purely academic exercise. It should instead encourage those who are concerned about access to the dry sand to do something to rectify this misallocation of resources. This Article closes by offering three strategies.

77. *See* FREYFOGLE, *supra* note 1, at 119.

A. Establish the Actual Historic Use

Rose has noted that property theorists often use narratives to support their theories, but that these narratives are often not grounded in fact.[78] It is quite possible that if one reconstructed the history of use of the dry sand beach along the American coast, it would not be a story of exclusive private ownership in the dry sand beach, but instead largely a story of common use. The extension—or at least the enforcement—by courts of a private right to exclude the public from the dry sand beach seems to be a relatively recent development and one that has not always been recognized by the public. In *Stevens v. City of Cannon Beach,* the court recognized this disconnect between relatively recent rulings concerning ownership of the beach and actual practice on the beach:

> Although the early cases did not distinguish between dry sand and wet sand areas, this court has noted that the distinguishing line was considered to be "the 'high-water' line, a line that was then assumed to be the vegetation line." It was not until 1935 that the United States Supreme Court redefined this boundary as extending to the mean high-tide line [in *Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935)]. This court has noted that, although *Borax* "may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians . . . [and] had no discernible effect on the actual practices of Oregon beachgoers and upland property owners."[79]

Although some have criticized the *Stevens* court for its interpretation of custom,[80] the actual use of the dry sand is essential to determining the property rights to which the public actually consented.

Presently, some states recognize various customary rights of access and use of the beach (e.g., Texas, Florida, Oregon, and Hawaii), while other states have rejected the doctrine (e.g., Georgia, Maryland, and Maine).[81] But even if the courts in a state decline to apply the doctrine of custom, a clearly documented history of public use in specific places could establish

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78. CAROL ROSE, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, *in* PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 24-45 (1994).

79. 854 P.2d 449, 455 (Or. 1983) (internal citations omitted).

80. *See, e.g.,* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

81. *See* Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as a Categorical Takings Defense*, 29 HARV. ENV. L. REV. 321, 350 (2005).

a right to public use under the theories of implied dedication or public easement by prescription. If a history of public use sufficient to establish a public easement by prescription was shown to exist, it would prove that the public did not accept that there was an adequate moral argument to justify a private right to exclude the public.

B. Taking it Outright

Even if a current public right to use the dry sand beach cannot be established through custom, implied dedication, or prescription, this does not mean that such a right cannot be created. In other words, if the dry sand beaches have been misallocated to private owners, state governments should legislatively establish a public right to use the dry sand or simply establish public ownership over the dry sand. Of course, this would constitute a legislative taking of private property for which compensation must be paid. At first glance, the cost would seem to be enormous. After all, this is beachfront property and it is worth a tremendous amount of money. However, a closer examination suggests that the cost may not be very high at all. First of all, the owners would be left with the entire buildable portion of their lots. They would also be left with their beautiful views, although the beach portion might be more cluttered with people. Still, the owners would retain a great deal of value in their property.

Moreover, it is not clear that opening the beaches to the public would reduce the market value of shorefront property substantially. Buyers might be willing to pay a lot more money for a private beach, but there would no longer be private beaches available in the state. It is conceivable that the demand curve would not change much, particularly if potential buyers are unwilling or unable to go to another state to buy a private beach. One of the interesting facts in *Nollan v. California Coastal Commission* was that while the Nollans felt the need to sue the State of California when it conditioned a building permit on a requirement to provide a public easement across their beach, forty-three other property owners in the same subdivision, subject to the same requirement, did not sue.[82] In fact, Justice Brennan stated in his dissent that "[the Nollans] can make no tenable claim that either their enjoyment of their property *or its value is diminished* by the public's ability merely to pass and repass a few feet closer to the seawall beyond which appellants' house is located."[83]

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82. 483 U.S. 825, 829 (1987).

83. *Id.* at 855 (Brennan, J., dissenting) (emphasis added).

Of course, in *Nollan* the easement only allowed the public to pass across the beach and not to linger.[84] However, as we saw in *Raleigh Ave. Beach Ass'n* the Supreme Court of New Jersey held that the public does indeed have a right to linger on the dry sand beach pursuant to the public trust doctrine.[85] Consequently, New Jersey provides a test case to see the extent to which allowing public access to the dry sand will lower beachfront property prices. If beachfront property values are not markedly lowered by the *Raleigh* court's ruling, then other states should feel emboldened to legislatively condemn the right to exclude, and thereby reopen the beaches to the public.

C. The Transfer Tax

If a state is unwilling to establish public use rights or ownership over all of its dry sand beaches outright, it might still be willing to take more conservative steps to purchase beaches incrementally. The funds for these purchases could come from a transfer tax on all sales of beachfront property. As discussed above, the value of beachfront property comes from the ocean and not the efforts of the owner. Thus, in the tradition of Henry George, beach communities should establish a real estate transfer tax on all sales of beachfront property to recapture some of the natural value of the property. Those revenues can then be used to buy more beach, thereby creating greater opportunities for the public to enjoy that natural value. In recent decades, the value of beachfront property has increased dramatically, so even a low tax rate could generate sizable income. Moreover, if the state or community primarily purchased beach rights rather than entire parcels, the money could be spread over a longer stretch of shoreline.

While these suggestions may strike many as controversial, they should not. What is truly controversial is the present system which excludes the vast majority of Americans from the vast majority of the nation's dry sand beaches. It is important to lay bare the absence of a clear moral grounding for the present system. If we accept that the present system is morally unjustifiable, then political resistance to correcting this misallocation of property rights might be reduced. After all, property is a form of state-sanctioned power, and if the exercise of that power is unjustifiable in a particular setting—such as on dry sand beaches—then the state should use its power to rectify the problem instead of perpetuating it.

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84. *Id.* at 828.

85. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112 (2005).