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Property and Television

John G. Sprankling
Pacific McGeorge School of Law

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PROPERTY AND TELEVISION

John G. Sprankling*

Property rights are—in large part—based on societal expectations. What shapes those expectations? One factor is television, our culture's most important medium of communication. The modern "reality show" may be particularly powerful in affecting the attitudes of viewers because it presents a model of "real life" behavior. This essay is the first legal scholarship to explore the relationship between television and property rights. It focuses on Survivor, the CBS program that chronicles the lives of "castaways" trying to survive in a tropical wilderness, where property is both scarce and vital. Survivor is a "reality show"—and one of the most successful programs in television history. This essay explores four lessons that Survivor and similar programs teach the audience about property: (1) nature exists to provide property for humans; (2) a communal property system is feasible; (3) property is the reward for virtue; and, conversely, (4) property is the reward for vice. It concludes by suggesting that Survivor and other programs may push us backward toward Blackstone's absolutist view of property rights.

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INTRODUCTION

Property rights are—in large part—based on expectations. As Jeremy Bentham expressed it, "[p]roperty is nothing but a basis of

* Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law. I am grateful to Benjamin Olson for his excellent research assistance on this article.

expectation."¹ Expectations can arise from the legal system itself, because people may justifiably rely on existing law. Bentham recognized, however, that expectations may also develop outside of the legal system²—from what one scholar describes as “the currently accepted morals, mores, customs, and usages, and, in sum, the general social milieu.”³ Commentators ranging from Oliver Wendell Holmes⁴ to Joseph William Singer⁵ have observed that societal expectations directly affect the existence and scope of property rights.⁶ Similarly, for more than thirty years, the Supreme Court has acknowledged that the Takings Clause protects the “expectations”⁷ and “understandings”⁸ of property owners.⁹ At a more prosaic level,

1. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 68 (Richard Hildreth trans., Oceana Publications, Inc. 1975) (1802).

2. See *supra* text accompanying note 1.

What is it that serves as a basis to law, upon which to begin operations, when it adopts objects which, under the name of property, it promises to protect? Have not men, in the primitive state, a *natural* expectation of enjoying certain things—an expectation drawn from sources anterior to law? Yes. There have been from the beginning, and the [sic] always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things.

BENTHAM, *supra* note 1, at 69.

3. Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 25 (1997).

4. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897) (discussing adverse possession).

5. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 663-701 (1988) (discussing role of expectations and reliance in property law). Thus, “[b]ecause property is socially and politically constructed, the scope of property rights changes over time as social conditions and relationships change.” Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURISPRUDENCE 217, 228 (1993).

6. See, e.g., Craig A. Arnold, *The Reconstitution of Property: Property As A Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 347-48 (2002); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 28 (1986); Marc Poirier, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43, 50-55 (1997). In a similar vein, Eric Freyfogle explains that “ownership norms arise directly from community goals and values” and reflect “the circumstances, hopes, and ethical values of their creators.” Eric T. Freyfogle, *Ownership, Community, and Private Land*, 23 ECOLOGY L.Q. 631, 638 (1996).

7. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (considering the “distinct investment-backed expectations” of the owner in determining whether a regulatory taking occurred).

8. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (noting that takings jurisprudence is “guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property”). For an analysis of how the majority opinion in *Lucas* reflects Bentham’s approach, see Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. L. 1439, 1485-94 (1994).

citizens acting as jurors, officials, and voters regularly make decisions based upon their expectations about property rights.

So what shapes societal expectations about property? One factor may be television, "our culture's most pervasive form of communication."¹⁰ The average American spends four hours each day watching television—more time than on any activity other than work and sleep.¹¹ People probably learn more about the legal system from television than from any other source, through news broadcasts, entertainment programs, and, most recently, "reality" shows.¹² Studies demonstrate that the content of television programming affects the attitudes of viewers,¹³ including their attitudes toward the law.¹⁴ For example, negative pretrial publicity can alter the outcome in criminal cases; jurors exposed to such publicity through news broadcasts are much more likely to reach a guilty verdict.¹⁵ Cognitive psychologists explain that long-term exposure to television changes

9. In these formulations, the Court is primarily concerned with expectations or understandings that arise from an owner's putative knowledge of, and hence reliance on, existing law. However, expectations and understandings arising from other sources, such as custom, may also be relevant to the definition of property in a constitutional sense. For example, Justice Kennedy has noted: "The expectations protected by the Constitution are based on objective rules and customs that can be understood as *reasonable* by all parties involved." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (emphasis added).

10. L. J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers' Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUD. F. 257, 257 (1998). Indeed, "[o]ne of the means in which we achieve [our] understanding of [the] world is by watching television as it showcases the way in which individuals live, work, believe, act, and worship. . . . [t]elevision is one of the primary socializing agents of contemporary society. . . ." April L. Roth, *Contrived Television Reality: Survivor as a Pseudo-Event*, in SURVIVOR LESSONS: ESSAYS ON COMMUNICATION AND REALITY TELEVISION 35 (Matthew J. Smith & Andrew F. Wood eds., 2003).

11. See Earl Pomerantz, *Truth Is, We'd Rather Watch Bad TV Than No TV*, L.A. TIMES, Nov. 15, 2004, at E3 (quoting estimate from Nielsen Media Research). Thus, on average, a person who lives to age 80 will spend over 13 years watching television. Research suggests that some viewers are addicted to television. See, e.g., Cary W. Horvath, *Measuring Television Addiction*, 48 J. BROADCASTING & ELECTRONIC MEDIA 378, 380-82 (2004); Robert Kubey & Mihaly Csikszentmihalyi, *Television Addiction Is No Mere Metaphor*, SCI. AM., Feb. 2002, at 74.

12. For an overview of the impact of television programs and movies on public attitudes toward the law, see Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 92-97 (2005).

13. See, e.g., Rebecca L. Collins et al., *Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior*, 114 PEDIATRICS 280, 287-89 (2004).

14. See Mezey & Niles, *supra* note 12, at 92-97.

15. See, e.g., Nancy Merhkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219, 228 (1999).

viewers' understandings of reality, through what is called the "cultivation effect."¹⁶

Even entertainment programs seem to influence how people think about the law. For over fifty years, Americans have been fed a steady diet of lawyer shows (from *Perry Mason*¹⁷ through *Law and Order*¹⁸) and crime shows (from *Dragnet*¹⁹ through *CSI*²⁰).²¹ These shows have left their mark on the television audience.²² For instance, some authorities suggest that *CSI*, a fictional program that exposes viewers to techniques for collecting and interpreting forensic evidence in criminal cases, gives jurors unrealistic expectations about the quality of evidence in real cases, leading to fewer guilty verdicts.²³

But "reality" programs have the greatest potential to shape societal expectations about the law.²⁴ The audience watching a

16. See Michael Asimow, *Bad Lawyers In The Movies*, 24 NOVA L. REV. 533, 553-56 (2000) (summarizing research on cultivation effect caused by viewing television).

17. *Perry Mason* (CBS television broadcast 1957-66).

18. *Law and Order* (NBC television broadcast 1990-present).

19. *Dragnet* (NBC television broadcast 1952-59, 1967-70).

20. *CSI* (CBS television broadcast, 2000-present).

21. See generally David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993) (discussing crime and lawyer programs on television).

22. For example, Stephen Gillers observes that the television program *L.A. Law* "may be seen as the single most important influence on the popular conception of lawyers' work and ethics." Stephen Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607, 1622 (1989). One study found that viewers who watched *L.A. Law* were more likely to have a positive impression of attorneys than non-viewers had. Michael Pfau et al., *Television Viewing and Public Perceptions of Attorneys*, 21 HUM. COMM. RES. 307, 325 (1995); see also Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305 (2001) (discussing how television portrays legal ethics).

23. See, e.g., Janine Robben, *The 'CSI' Effect: Popular Culture and the Justice System*, 66 OR. ST. B. BULL. 8 (2005) (discussing effect of *CSI* in raising jurors' expectations regarding forensic evidence); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006) (questioning the existence of the "CSI effect"). But see Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2006) (arguing that, if anything, exposure to *CSI* may make jurors more likely to convict criminal defendants).

24. For example, one early reality show, *People's Court*, presented the complete trial of a real-life small claims court case during a 30-minute program. Viewers who later served as jurors in real cases became frustrated at the length and complexity of real trials, which conflicted with the expectations they developed from the show. Wende Vyborney Dumble, *And Justice For All: The Messages Behind "Real" Courtroom Dramas*, in TELEVISION STUDIES: TEXTUAL ANALYSIS 103, 105, 112 (Gary Burns & Robert J. Thompson eds., 1989). See also R. Lance Holbert et al., *Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Punishment and Gun Ownership*, 81 JOURNALISM & MASS COMM. Q. 343 (2004) (suggesting that watching

reality program sees ordinary people engaging in what appear to be unscripted, real-life activities, under the constant scrutiny of cameras and microphones.²⁵ It is presented as a faithful history of actual events.²⁶ In recent years, reality shows like *Survivor*,²⁷ *The Apprentice*,²⁸ and *The Amazing Race*²⁹ have come to dominate the airwaves.³⁰ These shows are powerful because they present models of "real-life" behavior to the audience. Accordingly, "[r]eality television continues to demand our attention because its stories replace our 'real ones,' becoming more immediate, more 'real' than our lived experience."³¹ This essay explores how *Survivor*, which chronicles the lives of "castaways" trying to survive in a tropical wilderness, depicts attitudes toward property—and may therefore affect the expectations of viewers.

I. THE WORLD OF SURVIVOR

A. *The "National Obsession"*

Survivor may have a significant impact on the popular understanding of property for two reasons. First, it strips away the complexity of modern life, returning the audience to a simpler world, where property is both scarce and vital to survival. We see the castaways experiencing life on a desert island at the most basic level, akin to a tribal group in a primitive hunter-gatherer society. Perhaps all of us sometimes yearn for a tropical paradise—a sanctuary far from the pressures of daily life—where we can begin anew, able to

police reality shows increases the likelihood that a viewer will endorse capital punishment).

25. Reality television "[a]s a genre . . . involves placing 'ordinary' people before the camera and deriving some entertainment value from the perception of their activities being unscripted." Matthew J. Smith & Andrew F. Wood, *Introduction: Culture, Communication, and Community Revealed through Reality Television*, in *SURVIVOR LESSONS: ESSAYS ON COMMUNICATION AND REALITY TELEVISION 2* (Matthew J. Smith & Andrew F. Wood eds., 2003) [hereinafter Smith & Wood, *Introduction*].

26. Accordingly, "[p]eople tend to perceive [reality television shows] as more realistic representations of life than pure fictional programs. . . . [Thus,] the voyeuristic and realistic portrayals of social life that are presented in reality programming obscure the traditional distinctions between fictional and non-fictional television." Deborah Halbert, *Who Owns Your Personality: Reality Television and Publicity Rights*, in *SURVIVOR LESSONS: ESSAYS ON COMMUNICATION AND REALITY TELEVISION 66-68* (Matthew J. Smith & Andrew F. Wood eds., 2003) (citation omitted).

27. *Survivor* (CBS television broadcast 2000-present).

28. *The Apprentice* (NBC television broadcast 2004-present).

29. *The Amazing Race* (CBS television broadcast 2001-present).

30. See generally UNDERSTANDING REALITY TELEVISION (Su Holmes & Deborah Jermyn eds., 2004).

31. Smith & Wood, *Introduction*, *supra* note 25, at 3.

value the important and ignore the trivial.³² In this spirit, Henry David Thoreau observed in *Walden* that, "[i]t would be some advantage to live a primitive and frontier life . . . if only to learn what are the gross necessities of life and what methods have been used to obtain them."³³ Imitating Thoreau, the castaways must obtain the "gross necessities of life"—food, water, shelter, fuel, and cooking equipment—the items most vital for human survival. In this sense, *Survivor* is a unique laboratory where the audience can study the attitudes of the castaways toward property rights.

Second, *Survivor* is one of the most successful programs in television history.³⁴ It premiered on May 31, 2000³⁵—and quickly captured the American imagination. The program became a "national obsession . . . the focus of much media attention as well as the topic of everyday conversation."³⁶ "Marooned" on a tropical island near Borneo, the castaways (all known by their first names) became instant celebrities, adored or despised by millions of fans. In its first season, *Survivor* became the most-watched reality show on American television, and the final episode—seen by almost 52 million people—was the eleventh most-viewed series episode ever.³⁷ The first season

32. In fact, not all of the locations are truly paradises. In *Survivor: Africa*, the program producers had to hire ninety guards, armed with AK-47 automatic rifles, to protect the contestants and the crew from attacks by elephant poachers. MARK BURNETT, *JUMP IN! EVEN IF YOU DON'T KNOW HOW TO SWIM* 125 (2005) [hereinafter BURNETT, *JUMP IN!*]. Of course, the guards never appeared on camera.

33. HENRY DAVID THOREAU, *Walden, in A WEEK ON THE CONCORD AND MERRIMAC RIVERS; WALDEN, OR LIFE IN THE WOODS; THE MAINE WOODS; CAPE COD* 332 (Library of America, 1985) (1854).

34. UNDERSTANDING REALITY TELEVISION, *supra* note 30, at 271.

35. Paul Brownfield, *Switching to Survival Mode*, L.A. TIMES, Aug. 23, 2000, at F1.

36. Smith & Wood, *Introduction*, *supra* note 25, at 5. *Survivor's* executive producer, Mark Burnett, offers a sobering anecdote about the power of the program. *Survivor: Marquesas* premiered in February, 2002, after the 9/11 tragedy. BURNETT, *JUMP IN!*, *supra* note 32, at 158. Yet he "later saw a *National Geographic* knowledge test asking U.S. college kids to pinpoint the following locations: Iraq, Afghanistan, and the Marquesas. Less than twenty-five percent knew where to find Iraq or Afghanistan. More than half, however, could point out the Marquesas. We were playing our part in geography education!" *Id.* at 155.

37. Bill Carter, "Survivor" Puts CBS in Land of Superlatives, N.Y. TIMES, Aug. 15, 2000, at C1. CBS Television President and CEO Les Moonves commented that the final episode of the first season might be "the most profitable night in the history of television," because the strong ratings allowed CBS to charge high prices for advertising time. PETER LANCE, *THE STINGRAY: LETHAL TACTICS OF THE SOLE SURVIVOR* 140 (2000). The program was particularly valuable in attracting younger viewers, aged between 18 and 34, who are prized by advertisers. *Id.* at 141. "When 'Survivor' premiered May 31, the average age of a CBS viewer was 53, the oldest among the big four networks. According to a network estimate, that median age today is around 48, with last week's 'Survivor' episode drawing a median age of 39.5. . . . Last week also marked the first time CBS' weekly median age was younger than one of

spawned a series of popular sequels in later years, all generally following the same format. Thus, successive groups were "marooned" in remote, uninhabited locations in Australia, Africa, the Marquesas, Thailand, the Amazon, the Pearl Islands, Vanuatu, Palau, Guatemala, and the Cook Islands.³⁸ *Survivor* can be seen today on television in many nations around the world—and sixteen countries have created their own version of the program.³⁹ As the Seventh Circuit summarized, "CBS, through its show *Survivor*, has (for better or for worse) revolutionized the world of reality television."⁴⁰

Thus, the message that *Survivor* delivers to the audience about property may be particularly powerful.⁴¹ As one authority notes, "Classifying *Survivor* as 'reality TV' . . . allows the audience to assume that the castaway interaction is a representation of contemporary morals, beliefs, and values."⁴² In the property context, viewers may believe that the castaways are mirroring societal expectations about the existence and scope of property rights. This belief may, in turn, influence the attitudes of viewers and thereby affect the evolution of property law.

B. *Survivor Basics*

The premise of *Survivor* is simple: place ordinary Americans on a deserted tropical island with minimal food and equipment, where they must struggle to survive for thirty-nine days; subject them to

the other major networks, in this case ABC's. 'Survivor,' then, is CBS' Viagra—a magic pill that has made the network virile among young viewers . . ." Brownfield, *supra* note 35, at F1.

38. The CBS website contains extensive material about each season. CBS, <http://www.cbs.com> (last visited June 21, 2006).

39. For a general overview of the impact of *Survivor* and *Survivor*-inspired shows in other nations, see http://en.wikipedia.org/wiki/Survivor_%28TV_series%29 (last visited Dec. 9, 2006).

40. *Sullivan v. CBS Corp.*, 385 F.3d 772, 779 (7th Cir. 2004).

41. Inveterate television watchers may, of course, suggest that two other programs provided similar laboratories—*Gilligan's Island* (CBS television broadcast 1964-1967) and *Lost* (ABC television broadcast 2004-present). Like *Survivor*, both involve stranded people who work to survive on tropical islands. However, both programs were presented as pure fiction. *Gilligan's Island* was a situation comedy with a laugh track, which prevented viewers from taking it seriously. Moreover, food and other forms of property appeared to be plentiful, so property rights were rarely at issue on the show. Still, as one scholar commented, "[i]t is impossible to overstate the influence of *Gilligan's Island* on American life . . ." Robert M. Jarvis, *Legal Tales from Gilligan's Island*, 39 SANTA CLARA L. REV. 185, 195 (1998). Almost 30 years after its production stopped, reruns of the show are still broadcast daily in many American cities. *Id.* at 193. In contrast, *Lost* is a mysterious drama that verges on science fiction; it cannot be interpreted as a depiction of real life. Nonetheless, it has been suggested that *Lost* is a "reality-based program" which was inspired by the success of *Survivor*. Smith & Wood, *Introduction*, *supra* note 25, at 6.

42. Roth, *supra* note 10, at 35.

mental and physical contests; compel them to vote one of their number off the island every three days; award the last "survivor" a million-dollar prize; and film every moment of the experience.⁴³ As Mark Burnett, the show's executive producer, explained, "[t]he barriers between TV and survival, between what's real and what's not real, will be blurred in the total immersion into a quest to outwit, outlast, and outplay one's fellow castaways."⁴⁴

Accordingly, on a sunny day in March 2000, sixteen people⁴⁵ were "marooned" on Pulau Tiga,⁴⁶ a hot, humid, and insect-infested island in the South China Sea, twenty miles off the coast of Borneo.⁴⁷ The producers divided the group into two units: the "Pagong Tribe" and the "Tagi Tribe."⁴⁸ Each tribe was given scant food and limited equipment, and then directed to its own beach and surrounding territory.⁴⁹ Thus began a "game" in which the castaways were urged to "outwit, outplay, and outlast"⁵⁰ each other, while cameras and microphones recorded their every word and action.⁵¹

The program was planned in three-day cycles.⁵² During each cycle, the castaways participated in a "reward challenge," a mental or physical contest in which the successful tribe or individual earned a reward, such as extra food or special equipment.⁵³ The next step was

43. See generally MARK BURNETT, *SURVIVOR: THE ULTIMATE GAME* (2000) (chronicling the first season of *Survivor*) [hereinafter BURNETT, *SURVIVOR*]. Burnett, who both created *Survivor* and serves as its executive producer, "envisioned something akin to 'Gilligan's Island' meets *Lord of the Flies* meets *Ten Little Indians* meets 'The Real World.'" *Id.* at 10.

44. *Id.* at 12.

45. The producers chose a diverse group of contestants for two reasons: "to attract viewers of most ethnic, cultural, and socio-economic backgrounds, and to add drama to the show as the producers knew that some castaways had conflicting moral, ethical, and religious beliefs." Roth, *supra* note 10, at 33.

46. As Burnett explains: "Pulua Tiga is perched almost atop the equator. The average temperature and percent humidity are the same: 95. Sand flea nests pock the beaches, making a barefoot stroll an exercise in endurance. . . . The deceptively serene-looking blue waters around the island are home to stinging jellyfish and the world's highest concentration of deadly sea snakes. The jungle interior is choked with pythons, kraits, adders, monkeys, monitor lizards, and white-bellied sea eagles." BURNETT, *SURVIVOR*, *supra* note 43, at 10.

47. The information in Section I.B that describes the general format of *Survivor* is extracted from the CBS website. CBS—*Survivor*, <http://www.cbs.com/primetime/survivor13> (last visited Oct. 6, 2006). See generally BURNETT, *SURVIVOR*, *supra* note 43.

48. BURNETT, *SURVIVOR*, *supra* note 43, at 14.

49. See *id.*

50. The official motto of *Survivor*, as shown on the program logo, is "Outwit, Outplay, Outlast." CBS—*Survivor*, *supra* note 47.

51. BURNETT, *SURVIVOR*, *supra* note 43, at 14.

52. *Id.* at 13.

53. *Id.*

a similar contest, called an "immunity challenge," but with a different prize: the winners became immune from being voted off the island for at least three days.⁵⁴ Finally, the cycle culminated in a "tribal council," where the castaways secretly voted out one tribe member.⁵⁵ All of these activities were initially contests between tribes. About halfway through the thirty-nine day period, the remaining castaways were merged into a new unit, the "Rattana Tribe."⁵⁶ After this merger, all challenges were contests among individuals.⁵⁷ However, voting "alliances" soon developed among the Rattana members, and castaways were progressively voted off the program.⁵⁸ Only two contestants remained on the thirty-ninth day, when a "jury"—consisting of the seven castaways voted off most recently—selected Richard as the winner of the million-dollar prize.⁵⁹

C. Property on Television

Property may be broadly defined as rights among people that concern things.⁶⁰ Under this definition, three "things" are the subject of property rights on *Survivor*.⁶¹ First, the program assumes the existence of real property, at least to some extent.⁶² Each tribe occupies a designated territory and implicitly has rights in that land, including the right to use and possess it, and the right to exclude members of another tribe. As part of the right to use land, the castaways may harvest wild plants, hunt game, catch fish, and build

54. *Id.*

55. *Id.*

56. *Id.* at 13, 122.

57. *Id.* at 13.

58. *Id.*

59. *Id.* at 223. This basic program format has been followed in later seasons, with occasional modifications, as the CBS website demonstrates. CBS—*Survivor*, *supra* note 47.

60. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 2 (2000).

61. The information in this section is distilled from the detailed materials available on the CBS website, which has separate entries for each season. CBS—*Survivor*, *supra* note 47.

62. Secrecy pervades the production of *Survivor*. The precise rules that the program imposes on contestants concerning property and other matters are unknown. The CBS website does contain a list of six rules, but these rules are both vague and brief. CBS—*Survivor* Rules, <http://www.cbs.com/primetime/survivor6/about/rules.shtml> (last visited Oct. 17, 2006). The contract that *Survivor* contestants must sign is extraordinarily detailed, and refers to "the Series rules attached hereto as Exhibit A." Although the basic contract form has been made public, its Exhibit A is still a secret. "Applicant Agreement" between *Survivor* Entertainment Group, Inc. and Contestant (on file with author).

structures.⁶³ However, a tribe apparently does not have the right to alienate its territory.⁶⁴

Second, rights exist in intangible personal property, either obtained from the natural environment or provided by the program staff.⁶⁵ For example, the castaways have harvested food from their territories, including bananas, coconuts, tapioca roots, and wild garlic; they have successfully hunted animals such as pigs and rats; and they have caught sea creatures, including clams, crabs, eels, fish, lobsters, oysters, sharks, and squid.⁶⁶ Similarly, the castaways have collected firewood and water from their surroundings.⁶⁷ The program staff has provided tangible personal property in two ways. First, each tribe is given certain items in the first episode of the season; these usually include cooking gear, flint and steel for making fire, machetes, and water containers, and may also include food, boats, paddles, and other equipment.⁶⁸ In addition, luxury items such as fishing gear, soap, hammocks, and special food items can be obtained by winning reward challenges.⁶⁹

Finally, each castaway is ultimately competing for a form of intangible property: the right to receive a million dollar prize.⁷⁰ Only one person—the last “survivor”—wins this prize. However, the other contestants win smaller monetary prizes, depending on how long each remains in the game. For example, the first runner up receives \$100,000, while the first person voted off the island gets only \$2,500.⁷¹

63. *Survivor: Borneo* (CBS television broadcasts May 31, June 7, June 14, June 21, June 28, July 5, July 12, July 19, July 26, Aug. 2, Aug. 9, Aug. 16, Aug. 23, 2000) [hereinafter *Survivor: Borneo*].

64. *Id.*

65. During the first season, each castaway was also permitted to bring one “luxury” item from home. For example, Sean’s luxury item was a razor. LANCE, *supra* note 37, at 33. Ironically, the first “island survival” television program, *Gilligan’s Island*, arose from a similar situation; the developer of the program, Sherwood Schwartz, was intrigued by the question: “If you were alone on a desert island, what one thing would you like to have?” Jarvis, *supra* note 41, at 186.

66. *Survivor: Borneo*, *supra* note 63.

67. *Id.*

68. *Id.*

69. *Id.*

70. Arguably, another form of intangible property is also at stake: fame. For example, Sean, a physician who competed during the first season, joined the show in order to “be the next celebrity” from his hometown. DVD: *Survivor Season One: The Greatest and Most Outrageous Moments* (Survivor Productions, LLC 2000) (on file with author).

71. LANCE, *supra* note 37, at 152; see also http://en.wikipedia.org/wiki/Survivor_%28TV_series%29#Prizes (describing the *Survivor* payment system) (last visited Dec. 9, 2006).

II. PROPERTY LESSONS FROM SURVIVOR

A. *Nature Exists to Provide Property for Humans*

Survivor presents an anthropocentric vision of the natural environment, one that I have elsewhere called an ideology of exploitative utilitarianism.⁷² Under this approach, nature exists for the sole purpose of providing property for humans, to be consumed as quickly as possible.⁷³ Like Robinson Crusoe on his island, the Survivor castaways exploit the wilderness to survive, without regard to the ecological impact of their actions.⁷⁴ They cut bamboo, palm fronds, and tree branches to make shelter; they kill animals and marine life, and harvest wild plants for food; they burn branches and logs for fuel; and they gather shells and feathers for decorations.⁷⁵ The castaways never express concern on camera about protecting the environment. In fact, words such as "ecology" or "environment" are never mentioned on the program.

There are no environmentalists on Survivor. The castaways seem to be caught in a time warp, transported backward to an era before environmentalism arose. The natural environment is implicitly seen as infinite, and there is no apparent constraint on the ability of the castaways to destroy it as they wish.⁷⁶ On Survivor,

72. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 856 (1994).

73. See *id.*

74. In fact, the official rules for *Survivor* which are posted on the program website appear to restrict these practices. They provide that "[o]nly designated fruits, vegetables, and animals are allowed to be harvested as food," and "the Survivors . . . will be obliged to give full consideration to the ecological impact of everything they do on the island." CBS—Survivor Rules, *supra* note 62. However, perhaps due to careful editing, the program as broadcast contains no reference to any such restrictions, so the audience is unaware that they exist.

75. Although the castaways are shown in what appears to be an entirely natural environment—the audience never sees the ever-present camera crew—one contestant from the first season suggested that the program producers had interfered with nature, by planting tapioca and sugar cane on the island, neither of which grew there naturally. Jim Rutenberg, "Survivor" Suit: Test of Faith for Contestant and Viewers, N.Y. TIMES, June 4, 2001, at C5.

76. In fact, People for the Ethical Treatment of Animals (PETA) has protested against what it sees as animal cruelty on *Survivor*. For example, in 2000 it objected to the castaways "giggling as they tried to club rats to death." Bryan Smith, *Activists Take Rats' Side over CBS Show*, CHICAGO SUN-TIMES, June 17, 2000, at 3. PETA later convinced the Royal Society for the Prevention of Cruelty to Animals to investigate the manner in which a wild boar was killed in *Survivor: Australia*. Lisa de Moraes, *The Pig is Dead but the Squealing Hasn't Stopped*, WASH. POST, June 14, 2001, at C7. In response to this controversy, CBS stated: "We firmly believe that our viewers recognize that hunting and fishing as a means of sustenance have been acceptable from the dawn of time." PETA Roasts 'Survivor', DAILY NEWS, Feb. 19, 2001, at 98.

humans are free to plunder the wilderness for their own ends, without fear of the consequences.

Survivor presents a world where the first persons to take possession of a natural resource own it, the familiar "first-in-time" approach to property rights. If the members of tribe A gather bamboo for a hut, for example, they own the bamboo, simply because they were the first persons to separate it from the natural environment. Or if the members of tribe B kill a wild pig, they acquire property rights in the pig because they were the first to kill it.

The theory that the natural environment exists to provide property for the first person to possess it has a long pedigree in American property law.⁷⁷ Upon gaining independence from Great Britain, the new United States consisted mainly of wilderness lands. But wilderness was seen as "a barrier to progress, prosperity, and power."⁷⁸ Accordingly, the policy of the federal government, including the judiciary, was to encourage the exploitation and development of wilderness lands.⁷⁹ American courts thus adopted the "capture rule"—the doctrine that property rights in wild animals and certain other natural resources were owned by the first person to possess or "capture" them.⁸⁰ Because the capture rule offered no incentive to conserve natural resources, its impact on the environment was a disaster. For example, it encouraged the rapid destruction of wild animals, leading to the mass slaughter of species such as the passenger pigeon and the bison.⁸¹

This approach to natural resources reflects the absolutist view of private property rights that prevailed in our early legal history. The era was dominated by Sir William Blackstone's sweeping definition of property rights as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."⁸²

77. See generally Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985) (discussing first-in-time approach to property rights); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996) (discussing first-in-time approach in the context of wilderness lands).

78. RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 40 (1982).

79. See Sprankling, *supra* note 77, at 528-33.

80. See, e.g., *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805) (holding that property rights in wild fox were obtained by killing it).

81. See Dale D. Goble, *Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 ENVTL. L. 807, 814-17 (2005) (discussing impact of capture rule on bison, pigeons, and other species).

82. WILLIAM BLACKSTONE, 2 COMMENTARIES *1, *2. For an analysis of how Blackstone's approach affected American property law, see Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67 (1985); Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980). But see Carol M. Rose,

Under this view, which venerates private property rights with almost religious zeal, the role of the state is to safeguard property against any interference by non-owners. Thus, governmental regulation of property in any form is anathema.

Today, the ideology of exploitative utilitarianism is obsolete. Our society now understands that the environment is both finite and fragile—and that preservation and non-consumptive use of natural resources are important, where possible.⁸³ For example, when enacting the Endangered Species Act, Congress stressed the need to conserve endangered plant and animal species, to the extent practicable, because of their “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”⁸⁴ If components of the natural environment are destined to be consumed by humans, the legal system encourages that this be done in a sustainable manner, such as through the use of a permit system to restrict hunting and thereby conserve animal species. Accordingly, if *Survivor* were filmed within the United States, the activities of the castaways would probably violate a network of federal, state, and local laws.

Moreover, many scholars argue that humans have a moral duty to protect the natural environment, regardless of its instrumental value. Aldo Leopold, the leading advocate for this approach, emphasized the need for a “land ethic” that would respect the existence of non-human species and ecosystems in general.⁸⁵ The key, according to Leopold, was changing the role of the human “from conqueror of the land-community to plain member and citizen of it.”⁸⁶ Eric Freyfogle⁸⁷ and other modern disciples⁸⁸ of Leopold suggest that this land ethic is slowly gaining public support.

By portraying the natural environment as a commodity, *Survivor* may render its audience more callous toward environmental destruction—and thus more inclined to protect absolutist private property rights, in the tradition of Blackstone. True, the amount of

Canons of Property Talk, or, Blackstone's Anxiety, 108 YALE L.J. 601, 604-06 (1998) (arguing that Blackstone's definition was inconsistent with existing English property law).

83. See generally Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974).

84. Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(3) (2000).

85. ALDO LEOPOLD, *A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 237 (Ballantine Books ed. 1970) (1949).

86. *Id.* at 240.

87. See, e.g., Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 U. COLO. L. REV. 217 (1990).

88. See, e.g., James P. Karp, *Aldo Leopold's Land Ethic: Is An Ecological Conscience Evolving In Land Development Law?*, 19 ENVTL. L. 737 (1989).

actual damage the castaways cause is trivial; but their conduct symbolizes a dangerous attitude. The behavior of the castaways in damaging the environment is presented as routine, as a normal part of life—the way that ordinary people may properly behave in the wilderness. The castaways do not attempt to balance the environmental cost against their personal benefit; they simply act, without considering the consequences.

This orientation clashes sharply with the usual reverence for nature that television has presented for decades in documentary programs about rain forests, wild animals, and the like.⁸⁹ The typical documentary presents an almost idealized vision of the natural world, in which humans have no place. Indeed, a standard feature of this genre is that humans are rarely seen on camera, creating the illusion that the viewer is alone with nature. *Survivor* is all the more disturbing because it presents humans interacting with nature in a destructive manner.

Even viewers with ecological concerns can always rationalize that the damage on *Survivor* is the product of necessity. After all, one might argue, the castaways are struggling to survive under harsh conditions, much like nineteenth-century pioneers in the American West. Sentiments like this might lead a contemporary land developer to plead economic “necessity” to justify filling wetlands, cutting forests, or bulldozing meadows in order to construct a shopping center or other project, free from government oversight. *Survivor* may make its audience members—whether serving as jurors, public officials, voters, or otherwise—somewhat more sympathetic to this plea. Perhaps environmentalism is a luxury that the desperate cannot afford. But, at least outside of the *Survivor* set, our nation is far from desperate.

B. A Communal Property System Is Feasible

Individual private property is the heart of the American economic system.⁹⁰ But on *Survivor*, most property is owned in common,⁹¹ held by the tribe as a whole, and this approach works well. The communal ownership system extends to three main

89. Examples include the classic *Wild Kingdom* (NBC television broadcast 1963-71; in syndication, 1971-88; Animal Planet television broadcast, 2002-present) and, more recently, *Nature* (PBS television broadcast 1982-present), one of the most-watched documentary programs in history.

90. See WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 1-3 (3d ed. 2000); see generally JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988).

91. However, the castaways follow a system of individual private property as to: (1) the clothes they bring to the program; (2) any “luxury” items they are allowed to bring from home; and (3) the prizes won in individual reward challenges. See BURNETT, *SURVIVOR*, *supra* note 43, at 13, 15, 29, 64, 80-81, 95, 159, 184, 187.

categories: (1) the territory and structure occupied by each tribe; (2) tangible items the castaways gather from the natural environment; and (3) tangible items provided by the program staff.⁹² Thus, one lesson from *Survivor* is that a communal property system is feasible.⁹³

Each tribe is assigned a specific territory, usually consisting of hundreds of acres of unimproved land—jungle, forest, or grassland—which is far from the lands assigned to the other tribe.⁹⁴ Each tribe member appears to have an equal right to possession and enjoyment of the whole territory.⁹⁵ The tribe usually builds a hut or other shelter, to avoid the inevitable rain at *Survivor* locations; the typical shelter has a bamboo floor raised off the ground (to avoid rats and snakes), with a slanting roof made from bamboo, vines, and palm fronds.⁹⁶ Occasionally, tribe members reside in natural caves, without the need to build an artificial structure. Sleeping space within the shelter is also shared in common by the tribe members, and no member has ever been excluded from it. Presumably, however, a tribe has the right to exclude the members of other tribes from its territory.

This ownership method closely resembles the common law tenancy in common,⁹⁷ because each member has an equal right to possession of the entire tribal territory. With respect to the underlying land, at least, the tribe members have rights similar to those that owners of condominium units hold in the common area of a condominium project. On *Survivor*, this ownership structure is essentially imposed by the program staff, because each tribe, as a whole, is expressly assigned a particular territory; it does not reflect any decision by the castaways.

The communal ownership system in tangible personal property is more interesting, because it is presented to the audience as a

92. The factual information about *Survivor* in this section is extracted from the CBS website, which has separate entries for each season. CBS, *supra* note 38.

93. For an overview of communitarian approaches to property, see Thomas F. McInerney III, *Common Ground: Reconciling Rights and Communal Concerns in Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 831 (1998).

94. See BURNETT, *SURVIVOR*, *supra* note 43, at 9-15.

95. There are rare exceptions. For instance, during *Survivor: Panama*, Bruce claimed the right to exclusive use of a beach area, where he built a rock garden; while most tribe members respected this claim, others did not. CBS—*Survivor Panama* (Episode 5), <http://www.cbs.com/primetime/survivor12/show/ep05/> (last visited June 27, 2006).

96. For example, during the first season the Pagong Tribe constructed an A-frame structure covered with palm branches, while the Tagi tribe built a lean-to. *Survivor: Borneo*, *supra* note 63.

97. For a general description of tenancy in common, see STOEBUCK & WHITMAN, *supra* note 90, at 176-82.

routine part of everyday life. The castaways are never seen on camera debating the relative merits of individual property and communal property.⁹⁸ Rather, they appear to assume that communal property is normal.⁹⁹ Food, water, firewood, and other tangible items gathered from the environment by tribe members are held as communal property, regardless of who gathers them.¹⁰⁰ For example, if a member catches a fish, the fish is viewed as common tribal property from the onset—rather than as a gift of property from the individual to the tribe—even if tribal fishing equipment is not used in the process.¹⁰¹ Accordingly, each tribe member is entitled to an equal portion of each food item, regardless of body weight.¹⁰² Probably because it is more plentiful, water is not rationed in equal portions; each may drink as much as he or she wishes from the common supply.¹⁰³ In the same manner, all tribe members are entitled to equal use and enjoyment of communal firewood.¹⁰⁴

The items of tangible personal property received from the program staff, whether at the onset of the program or later as rewards for winning challenges, are either food or equipment.¹⁰⁵ Tribes routinely follow the view that each member is entitled to an equal portion of any such communal food item, again regardless of body weight. However, tribe members also apparently have the right to transfer their food portions to other members, usually through an exchange. Because the equipment is held in common, any tribe member has the right to use it at any time, without receiving special permission. Thus, items such as flint and steel, machetes, boats, and paddles may be used freely. Disagreements have arisen on occasion

98. *Survivor: Borneo*, *supra* note 63.

99. Because the official rules for the program are secret, it is difficult to assess the extent to which the producers of *Survivor* cause or contribute to the communal ownership system as to tangible personal property. Certainly, the producers encourage each group to think of itself as a "tribe." However, from the perspective of the audience, it appears that the castaways have voluntarily adopted communal property in tangible items.

100. Although the issue rarely arose on *Gilligan's Island*, on at least one episode it was suggested that the natural resources of the island were owned by the castaways on a communal basis; communal ownership was extended to a treasure chest that one of the castaways unearthed. Jarvis, *supra* note 41, at 197-98.

101. For example, in the first season, Richard (the eventual winner) spent five to six hours each day fishing in order to gain status with his tribe; all viewed the fish as communal property. See BURNETT, *SURVIVOR*, *supra* note 43, at 84-85; LANCE, *supra* note 37, at 48-49.

102. Thus, on day fourteen of the first episode, each member of the Pagong Tribe received only a "single half-swallow of rat meat." BURNETT, *SURVIVOR*, *supra* note 43, at 89.

103. *Survivor: Borneo*, *supra* note 63.

104. *Id.*

105. *Id.*

concerning the appropriate uses for unusual reward items; although the working assumption is that such items are communal property—and thus, that the entire tribe should determine their use—tribes are sometimes unable to agree, leading to conflict.¹⁰⁶

The leading theorist to explore the process by which unowned natural resources become private property was John Locke. Locke reasoned that a person could obtain property rights by “mixing” her labor with a thing that existed in nature.¹⁰⁷ Thus, a person who netted a fish mixed her labor (which belonged to her) with the fish (which was not yet owned) and thereby acquired ownership of the fish in the net, leading to the capture rule discussed above.¹⁰⁸ The logical extension of Lockean theory is that each tribe member on *Survivor* would acquire property by adding her labor to the natural environment, thus creating individual private property. The tribe member with the most energy, knowledge, and skill would obtain the most property, and therefore be able to survive more effectively than the others. So why does each tribe on *Survivor* adopt a communal property system?

Most authorities agree that early hunter-gatherer societies recognized communal property in food and, implicitly, in land.¹⁰⁹ In a small group struggling for survival in the wilderness, each member must depend on the others. Some tasks, such as hunting, may be

106. In one instance, for example, a tribe won an outhouse in a reward challenge. Some members wanted to use it as a waterproof storage shed, while others insisted it be used as an outhouse. CBS—*Survivor* Panama (Episode 4), (last visited June 27, 2006).

107. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge University Press 1988) (1689).

108. See LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 33-36 (1977).

109. See, e.g., E. SIDNEY HARTLAND, *PRIMITIVE LAW* 85 (Kennikat Press 1970) (1924). Modern hunter-gatherer societies sometimes demonstrate the same communal system. Among the Hadza people of Tanzania, for example, the successful hunter has no control over the meat of the animal he kills. Thus, for instance, certain cuts of meat belong only to initiated men: “The meat is not said to belong to the hunter who has obtained it. If he were to consume any of it in any context outside the meeting of the initiated men, he might well be accused of theft and would be liable to be attacked . . .” James Woodhurn, “*Sharing Is Not A Form of Exchange: An Analysis of Property-Sharing in Immediate-Return Hunter-Gatherer Societies*,” in *PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL TRADITION* 51 (C.M. Hann ed., 1998). Similarly, communal property regimes were occasionally established on remote islands by European pioneers. See, e.g., Joseph Bockrath, *Law on Remote Islands: The Convergence of Fact and Fiction*, 27 *LEGAL STUD. F.* 21, 60-61 (2003) (discussing the communal property system established by British settlers on Tristan da Cunha). But see 1 THOMPSON ON REAL PROPERTY § 1.05 (David A. Thomas ed., 1994) (arguing that primitive cultures generally recognized individual property rights).

more effectively performed on a group basis.¹¹⁰ Moreover, particular group members will inevitably be more skilled than others in various functions, so specialization of labor makes sense. Accordingly, pooling common labor to produce communal property is mutually advantageous in this setting. In such a small group, the risk of laziness (or what law and economics scholars would call free-riding) is low, because the nonproductive member is obvious.¹¹¹ In contrast, communal property has proven to be relatively unsuccessful in more complex societies. For example, in the United States almost all utopian communities based on shared property, including the communes of the post-Woodstock era, have failed.¹¹²

Like the members of a primitive hunter-gatherer society, the Survivor castaways find that communal property in food, water, wood, equipment, and other items best serves their collective self-interest. The members of each tribe are interdependent. Each has an interest in keeping the entire tribe well-nourished and healthy in order to win immunity and reward challenges; each has skills and talents that can help the tribe succeed;¹¹³ and each is acutely aware that a nonproductive member is likely to be eliminated.

This communal property arrangement roughly corresponds with the distributive justice approach proposed by philosopher John Rawls.¹¹⁴ Rawls sought to develop a theory of justice for a society that was a "closed system isolated from other societies,"¹¹⁵ much like a tribe on Survivor. He suggested a hypothetical situation, where rational people come together to form a new society, but are ignorant of the status each will have there.¹¹⁶ In this situation, "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and

110. A modern example of this principle is found on Pitcairn Island, the refuge of the *Bounty* mutineers, where the thirty remaining residents treat fish as communal property. "Fish caught are divided equally among the families as fishing is too dangerous to be an individual enterprise." Bockrath, *supra* note 109, at 80.

111. See Paul H. Rubin, *Evolved Ethics and Efficient Ethics*, 3 J. ECON. BEHAV. & ORG. 161, 166 (1982).

112. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1359-62 (1993). The Hutterite colonies in the Midwest are a major exception to this rule. As a matter of strict religious belief, all land and most products of labor are shared with the entire group. *Id.* at 1346-47.

113. During the first season, Richard was a productive fisherman and relied on this talent to maintain his status in the tribe. He worked "five to six hours every day in the ocean spearing fish." BURNETT, *SURVIVOR*, *supra* note 43, at 85, 149. In the same manner, only Kelly and Sue had the ability to find tapioca roots in the jungle. *Id.* at 84.

114. See JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

115. *Id.* at 7.

116. *Id.* at 11.

abilities"¹¹⁷ Rawls reasoned that people forced to plan from behind this "veil of ignorance" would initially adopt an arrangement where all the "social primary goods," including "income and wealth[,] are evenly shared."¹¹⁸ In a similar manner, on *Survivor*, each tribe of castaways must plan its society in the first episode of the season, when each member is still somewhat unsure how his abilities and skills compare to those of others. In fact, the castaways know virtually nothing about each other before they reach the program location, because the producers intentionally prevent them from speaking together in order to ensure the spontaneity of the program.¹¹⁹ Thus, the castaways are partially behind Rawls' "veil of ignorance" when they adopt a communal property regime.

By demonstrating that communal property in food, equipment, and other tangible items is feasible—even for a short period—*Survivor* and similar reality shows that depict "group living"¹²⁰ nudge us away from Blackstone's absolutist vision of individual property rights, toward a more nuanced approach. In the real world, perhaps the closest parallel would be property rights among roommates sharing a dwelling,¹²¹ much like an extended family.¹²² It is certainly possible to maintain strict individual property rights among roommates, even as to food, bottled water, soap, and other items that are routinely consumed through use. But *Survivor* reminds us that such a system is not inevitable.

117. *Id.*

118. *Id.* at 54-55.

119. BURNETT, *SURVIVOR*, *supra* note 43, at 11, 13-14; BURNETT, *JUMP IN!*, *supra* note 32, at 166.

120. The group living arrangement is a central theme on many reality shows. Typically, a large group of young adults occupies a house or apartment as temporary roommates, treating food and other items as communal property, at least from the perspective of the audience. Examples include *Big Brother* (CBS television broadcast 2000-present) and *The Apprentice* (NBC television broadcast 2004-present).

121. See Ellickson, *supra* note 112, at 1394-95 (suggesting that any multimember household recognizes common property to some extent); David D. Haddock & Lynne Kiesling, *The Evolution of Property Rights: The Black Death and Property Rights*, 31 J. LEGAL STUD. 545, 565 (2002) (noting that "[m]any household possessions are communal property—a commons in the medieval sense").

122. Dirk, a contestant from the first season, compared the castaways to a family: "I really feel like the other 15 people out there kind of became family. When you go through I guess what I could call a traumatic event, . . . very-life changing, and all 16 of us went through it together, you have a certain bond with these people. . . . So I considered them more than friends . . . I guess family." Deposition of Dirk Been, April 10, 2001, at 22, taken in *SEG, Inc. v. Stillman*, Case No. BC 245328, Superior Court for the State of California, County of Los Angeles, available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/survivor/segstillmanbeendp525.pdf> (last visited Oct. 18, 2006).

In particular, courts have been increasingly willing to recognize the property rights of unmarried couples, often based on a theory of implied contract that property acquired through mutual effort is jointly owned, and thus will be fairly divided when a couple separates.¹²³ Unmarried cohabitants who watch shows like *Survivor* may indeed expect that the same communal property arrangements they see on television will be applied to their own relationships. And *Survivor* viewers who serve as jurors in property disputes between unmarried couples may thereby be more receptive to a claim that the couple formed an implied contract to share assets.

C. *Property Is the Reward for Virtue*

Property rights arise on *Survivor* through success in challenges, which test the determination, endurance, expertise, intelligence, strength and teamwork of the castaways. The winning tribe or individual earns either tangible personal property or the guaranteed right to remain longer on the program. Accordingly, *Survivor* reflects the perspective that property is the reward for successful competition—for virtue.¹²⁴ This view is as old as the *Iliad*, where the heroes favored by the gods—the virtuous—won funeral games that followed the death of Patroklos.¹²⁵

During roughly the first half of each season, the tribes compete with each other in group reward challenges. Each is akin to a social Darwinian competition, testing intellectual and physical abilities, in which victory goes to the most able side. For example, during the first season, the tribes competed against each other in a competition that measured their accuracy in shooting blow darts, using slingshots, and throwing spears.¹²⁶ The winning tribe received a reward of three egg-laying chickens and a basket of fresh fruit.¹²⁷ Other first season challenges featured activities such as carrying an "injured" castaway on a stretcher, racing for "buried treasure," remembering personal data about other castaways, running an

123. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (recognizing implied property rights between unmarried cohabitants); see generally SPRANKLING, *supra* note 60, at 148-50 (discussing property rights of unmarried cohabitants).

124. One reason that states initially adopted property qualifications for Senate candidates was that "since education and talent often accompanied wealth, and since wealth (unlike talent or virtue) could be easily quantified, property was the most appropriate criterion for identifying the 'natural aristocracy' . . ." CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 131 (1994).

125. See, e.g., HOMER, *THE ILIAD OF HOMER* 470-71 (Richard Lattimore trans., University of Chicago Press 1961) (discussing how Odysseus won the footrace at the games because he was favored by Athene).

126. BURNETT, *SURVIVOR*, *supra* note 43, at 90-94.

127. *Id.*

obstacle course, solving puzzles, starting fires, swimming underwater, and walking a balance beam.¹²⁸ During the second half of the season, after the two tribes merge into one, reward challenges are conducted on an individual basis and involve similar activities.¹²⁹ Prizes for reward challenges have included blankets, canned food, cars, knives, letters from home, meals, spices, soap, and special trips.¹³⁰

Each episode also features an immunity challenge, in which tribes or individuals compete to win immunity from being voted out at the next tribal council.¹³¹ The immunity challenges are much like reward challenges, and test the same skills, except that the prize is different. In effect, the winner receives the right to remain on the program for three additional days, and thereby earns both a better chance of gaining the million dollar prize and, if not, the guarantee of a larger consolation prize award.¹³²

In challenges, each tribe member must stand or fall on personal merit. The usual trappings of success that the castaways enjoy in real life—jobs, personal connections, possessions, social status, and wealth—are irrelevant on their island world.¹³³ In undertaking a challenge, a castaway is equipped only with the clothes on his back and whatever knowledge or skills he developed in the real world. Broadly speaking, challenges place more emphasis on physical fitness than on mental ability. As a result, younger, more athletic castaways tend to perform better than their older, more experienced colleagues. With that limitation, however, the challenges create a meritocracy—an egalitarian world in a state of nature where each person is judged on individual merit.

The meritocracy theme is at the core of American culture.¹³⁴ The Founding Fathers were well aware that an unequal distribution of

128. See generally BURNETT, *SURVIVOR*, *supra* note 43.

129. See *id.* at 13.

130. *Id.*

131. *Id.* at 13. One court described the *Survivor* immunity challenges as “tribal contests in which the participants . . . tested, and placed a premium on, the team work of each tribe and the physical and mental stamina of each of its members.” *SEG, Inc. v. Stillman*, No. B151712, 2003 WL 21197133, at *1 (Cal. Ct. App. May 22, 2003).

132. BURNETT, *SURVIVOR*, *supra* note 43 at 13.

133. Thus, during the first season, BB (a former real estate developer) had difficulty adjusting to life on *Survivor* and asked his fellow tribe members to vote him off the island; he later commented that he was “happy to be voted off.” DVD: *Survivor* Season One: The Greatest and Most Outrageous Moments, *supra* note 70.

134. For example, the author of Federalist No. 57 stressed that merit would be the only qualification for elected office under the Constitution, unlike the situation in Great Britain, where status and wealth brought political success: “Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious

property threatened our new democracy. Thus, the Jeffersonian ideal was the yeoman farmer, holding fee simple title to his own land,¹³⁵ who was entirely free from economic and political pressure, and thus able to vote as he saw fit, unlike the captive voters in Britain's notorious "rotten" boroughs.¹³⁶ As civic republican theory teaches, one reason that our legal system recognizes private property is that it facilitates democratic self-government.¹³⁷ Toward this end, Thomas Jefferson and others pressed for reforms to avoid the creation of perpetual landed dynasties, through the abolition of fee tail and primogeniture.¹³⁸ The same theme animates the Horatio Alger story, the familiar belief that anyone can rise from poverty to worldly success through hard work. But at the same time, as Jefferson's reforms implied, one lacking personal merit may plummet from wealth into poverty. As the adage goes, "it is but three generations from shirt-sleeves to shirt-sleeves."¹³⁹

The Survivor challenges also reflect the axiom of traditional utilitarianism that recognizing private property encourages socially-productive effort. Utilitarian theory—the dominant justification for American property law—teaches that property is merely a "means to an end."¹⁴⁰ As one court summarized: "Property rights serve human values. They are recognized to that end, and are limited by it."¹⁴¹ Thus, utilitarians hold that private property exists to maximize the general happiness of society. The patent system, for example, is unabashedly utilitarian. The Constitution authorizes Congress to give "inventors the exclusive rights to their . . . discoveries" for a particular purpose: "[t]o promote the progress of science and the useful arts."¹⁴² Thus, an inventor is willing to exert her creativity, labor, and skill to invent a new machine because she has an

faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." THE FEDERALIST NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

135. Jefferson wrote: "[I]t is not too soon to provide by every possible means that as few [citizens] as possible shall be without a little portion of land. The small landowners are the most precious part of a state." Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in THOMAS JEFFERSON: WRITINGS 842 (Merrill D. Peterson ed., 1984).

136. See generally Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976) (discussing Jefferson's views on property rights).

137. See SPRANKLING, *supra* note 60, at 19-20; see also BECKER, *supra* note 108, at 75-80; Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

138. Katz, *supra* note 136.

139. Succession of Louis Lauga, Sr., 624 So.2d 1156, 1161 (La. 1993).

140. BECKER, *supra* note 108, at 57.

141. State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

142. U.S. CONST. art. I, § 8.

incentive: the patent will allow her to profit from the device. By giving the inventor a property right in her invention—a time-limited monopoly—we induce her to work to create a new product that will benefit society in general. In the same manner, utilitarian theorists argue, we recognize private property in order to encourage socially-useful behavior throughout the economy.¹⁴³

The *Survivor* castaways who win challenges send the same message to the television audience: skill and hard work will be rewarded with property. Cheating and other forms of unfair conduct are impossible in these contests because the castaways are under constant scrutiny by the camera crew, and by extension the audience. It is true, of course, that winning such challenges on television does not itself produce any good or service that benefits society.¹⁴⁴ Transplanted to the real world, however, this model presumably encourages the audience to engage in socially-useful behavior.

This third property lesson from *Survivor* is in large part the same message that Americans have received from television quiz shows for over fifty years: the successful competitor earns property. From *The \$64,000 Challenge*¹⁴⁵ of the fifties to modern programs like *Jeopardy*,¹⁴⁶ quiz shows have routinely awarded large sums to contestants who are intelligent, knowledgeable, and quick—and who have presumably cultivated these talents over time. It is part of our culture, undoubtedly influenced by television to some extent, that hard work eventually brings success. Indeed, the vast majority of Americans agree that “being wealthy is mostly a matter of” hard work, not luck.¹⁴⁷ Yet *Survivor* delivers this familiar precept in a more powerful manner than traditional quiz shows, because it purports to present “real life”—unscripted, filmed outdoors, and wildly unpredictable. While quiz show contests are purely intellectual, the *Survivor* challenges test a mixture of mental and physical skills, which more fully represents the complexity of the real world. Thus, *Survivor* repackages the traditional message that

143. It might also be argued that the *Survivor* challenges reflect Lockean labor theory, in that the winning individual owns her labor, and, accordingly, the product of her labor. See *supra* Section II.B.

144. However, it does entertain an audience—which might be seen as a socially beneficial result.

145. *The \$64,000 Challenge*, which premiered on CBS in 1955, was an instant success. Much like *Survivor*, it inspired an avalanche of similar shows. Tara Brenner, Note, A “Quizzical” Look into the Need for Reality Television Show Regulation, 22 CARDOZO ARTS & ENT. L.J. 873, 881 (2005).

146. *Jeopardy* (NBC television broadcast 1964-75; syndicated program, 1975-present).

147. Beldon, Russonello & Stewart, *Money and the American Family* (Question 41) (2000) (prepared for AARP’s Modern Monthly Magazine).

property is the reward for virtue and delivers it to the audience in a new, more effective fashion.

D. Property Is the Reward for Vice

Mark Burnett, the executive producer of *Survivor*, once asked: "[H]ow far would you bend your morals for a million dollars?"¹⁴⁸ Most contestants conclude that deceit and betrayal are necessary to win the million-dollar prize—and they act accordingly.¹⁴⁹ The key to the prize is forming a voting alliance with others, in order to arrange the progressive elimination of rivals.¹⁵⁰ As the number of contestants shrinks, however, conditions change and alliances fracture. Ultimately, only one person can win the million dollars, and the rules provide that no agreement can be made to share that prize.¹⁵¹ Contestants find it in their self-interest to betray former colleagues and friends in order to avoid elimination, in the hope of being the "last survivor."¹⁵² Thus, contestants routinely lie about how they and others intend to vote at tribal council. Allegations of deceit, betrayal, breach of trust, and similar conduct are common on the show.¹⁵³ As

148. BURNETT, *SURVIVOR*, *supra* note 43, at 91-92.

149. For an analysis of the ethics displayed by *Survivor* contestants, see Marilyn Fuss-Reineck, *The Communication Ethics of Survivor*, in *SURVIVOR LESSONS: ESSAYS ON COMMUNICATION AND REALITY TELEVISION* 199 (Matthew J. Smith & Andrew F. Wood eds., 2003). She explains that,

[t]he cumulative effects of deceptive communication [during the second season] took their toll when alliance members were uncertain if they could trust each other. This created a society where relationships deteriorated, people felt degraded, promises were broken, and contributions to the greater good were withheld. In some cases, people lied without guilt because they rationalized that the other deserved this treatment.

Id. at 202.

150. See Roth, *supra* note 10, at 34.

151. The rules provide: "The million dollars may be won by one and only one individual. Survivors are prohibited from sharing or making any agreement to share all or any portion of the prize." CBS—*Survivor* Rules, *supra* note 62.

152. In *Survivor: Thailand*, for example, Brian—the ultimate winner—promised Helen that he would not vote against her at tribal council, but, moments later, joined two others in voting her off the island. Helen commented: "That was a shock . . . I guess of the three knives in my back, [Brian's vote] . . . is the one that hurts the most." CBS—*Survivor* Thailand (Episode 13), <http://www.cbs.com/primetime/survivor5/show/episode13/s5story2.shtml> (last visited Jan. 31, 2007). Helen later told Brian: "You duped me, you made a fool of me, you strung me along." CBS—*Survivor* Thailand (Episode 13), <http://www.cbs.com/primetime/survivor5/show/episode13.s5story5.shtml> (last visited Jan. 31, 2007).

153. For example, after Judd's alliance voted him out of *Survivor: Guatemala*, he pulled no punches: "I hope you all get bit by a freaking crocodile. Scumbags! I think you're a bunch of scumbags. It sucks being lied to." CBS—*Survivor* Guatemala (Episode 12), <http://www.cbs.com/primetime/survivor11/show/ep12/index.shtml> (last visited Nov. 8, 2006). Similarly, the success of the seventh season, *Survivor: Pearl*

Richard, the winner of the first season, expressed it: "Outright lying is absolutely essential."¹⁵⁴ Thus, a fourth lesson from *Survivor* is that property is a reward for vice—one that contradicts the prior lesson.

Castaways who try to win by honorable methods are generally unsuccessful.¹⁵⁵ For example, during the first season, the program staff was "almost unanimous" in wanting Gretchen to win.¹⁵⁶ Even producer Burnett conceded that, "[i]n a perfect world, if anyone deserved to win the million dollars, it was Gretchen."¹⁵⁷ But Gretchen, whose heroes included Mother Theresa, refused to lie: "I wouldn't feel right about myself winning the million dollars if I had to change my behavior to do it."¹⁵⁸ As a result, she was voted off the island during the seventh episode.¹⁵⁹

A more common pattern is seen in the story of Kelly and Sue, also from the first season. Sue developed a close friendship with Kelly during the early weeks, characterizing her as the first friend she had made in twenty years, "like a sister."¹⁶⁰ Kelly, Sue, Richard, and others formed a voting alliance, pledging that they would never vote against each other. But Kelly cast the tie-breaking ballot that forced Sue off the island. As she spoke to Kelly at the final tribal council, where the jury had to award the prize to either Kelly or Richard, Sue's words reflected her pain: "If I was ever to pass you

Islands, was largely attributed to the outrageous lies of "Jonny Fairplay." As one writer summarized, "Survivor is back on top with its seventh season, in the Pearl Islands of Panama, thanks in large part to Jonny Fairplay, the consciously obnoxious beach bum who fabricated his grandmother's death to buy three more days on the island, and then bought three more by swearing allegiance on her nonexistent grave." Michael Booth, *Liar, Liar—TV Producers Find the Secret to Reality Shows' Survival: Dishonesty Is the Best Policy*, DENVER POST, Dec. 11, 2003, at F.01.

154. LANCE, *supra* note 37, at 101.

155. For instance, during the first season Dirk came to the program "adamant that he would ignore temptation, and not compromise himself for television or fame or fortune. Most of all, he would not turn his back on Christ during that time." BURNETT, *SURVIVOR*, *supra* note 43, at 95. *But see* Ed Wingenbach, *Survivor, Social Choice, and the Impediments to Political Rationality: Reality TV as Social Science Experiment*, in *SURVIVOR LESSONS: ESSAYS ON COMMUNICATION AND REALITY TELEVISION* 132, 148-49 n.7 (Matthew J. Smith & Andrew F. Wood eds., 2003) (suggesting that, during the second season, Colby acted ethically in honoring his agreement to select Tina to accompany him to the "final two," even though Tina's popularity meant that he would lose the million dollar prize—which he indeed lost—because his "real motive" was appearing to be a "man of character" in order to promote his acting career after the program ended).

156. *Survivor: Borneo*, *supra* note 63.

157. BURNETT, *SURVIVOR*, *supra* note 43, at 91.

158. *Id.*

159. See CBS, *Gretchen Goes Mainland*, CBS NEWS, July 13, 2000, <http://www.cbs/news.com/stories/2000/07/13/entertainment/main214762.shtml> (last visited Feb. 2, 2007).

160. LANCE, *supra* note 37, at 160.

along in life . . . and you were laying there dying of thirst . . . I would let the vultures take you and do whatever they want with you, with no ill regrets."¹⁶¹ Kelly defended herself by asserting that Sue "betrayed me" and "was lying to me, and was plotting against me from very early on."¹⁶²

Children in American society are taught to tell the truth from infancy; lying is condemned as morally wrong.¹⁶³ Entertainment television programs have reinforced that principle for decades: heroes tell the truth, while villains lie. But reality television is a different medium. It represents itself as "real life," not fiction, and thereby sends a more potent message about social mores. By repeatedly showing people lying in "real world" situations, *Survivor* implies that this is a socially acceptable method of obtaining property. It is the first "real life" program in the history of television to legitimize betrayal and deceit. Of course, contestants on *Survivor* routinely defend such behavior in "confidential" confessions to the ubiquitous camera, pointing out that they are merely "playing the game."¹⁶⁴ Despite this reassurance, however, the audience may find it difficult to separate the "game" from what appears to be the "real life" of the castaways.

The thesis that property may be obtained through deceit is, of course, anathema to our legal system¹⁶⁵—it violates every jurisprudential justification for the existence of private property.¹⁶⁶ Teleological approaches—those that justify private property because it has beneficial consequences—condemn deceit because it undercuts those benefits.¹⁶⁷ Consider an example from utilitarian theory.

161. *Id.* at 174.

162. DVD: *Survivor* Season One: The Greatest and Most Outrageous Moments, *supra* note 70.

163. Thus, one study found that 98% of high school students agreed or strongly agreed that "honesty and trust are essential in personal relationships." JOSEPHSON INSTITUTE OF ETHICS, Report Card 2004: The Ethics of American Youth, Question 6, available at <http://www.josephsoninstitute.org> (last visited June 2, 2006). *But see* Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 165-66 (1999) (discussing prevalence of lying in everyday life).

164. *See* BURNETT, *SURVIVOR*, *supra* note 43, *passim*.

165. *See* Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 162-74 (2001).

166. As Sissela Bok explains, "every major religious, moral, or legal tradition has recognized the need for at least some restraints" on deceit. Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. PA. L. REV. 913, 916 (1990). Bok notes that: "You can hurt someone as much through deceit as through violence; and deceit, being surreptitious, often brings results that violence cannot muster." *Id.*

167. For an overview of teleological approaches, see James E. Macdonald & Caryn L. Beck-Dudley, *Are Deontology and Teleology Mutually Exclusive?*, 13 J. BUS. ETHICS 615 (1994).

Suppose C purchases a tract of land, and invests the time and money necessary to establish a producing orange grove there. Because we recognize C's private property rights, she has an adequate incentive to invest in creating the grove—to the benefit of everyone who eats oranges. But C will want to sell the grove at some point, in order to retire or to invest elsewhere. In order for C to receive fair value for her investment, she must be protected against deceit. If D, pretending to be a good faith buyer, can legally acquire title to the orange grove by deceiving C, C has a smaller incentive to invest in the first place. Thus, deceit is normally inconsistent with utilitarian theory. As one scholar summarizes, "truth-telling encourages the trust that is a basis for mutual reliance in commerce, government, social life and families."¹⁶⁸ Deceit is permissible under this view only on those rare occasions when it is necessary to avoid a greater injury, such as to save a human life.¹⁶⁹

The second major category of jurisprudential theories that support private property consists of deontological approaches. These approaches ignore the consequences of recognizing private property; its benefits and costs are seen as irrelevant. Rather, these theories recognize property rights based on justice or natural law. Thus, they reject deceit because it is fundamentally incompatible with morality.¹⁷⁰ Under this view, obtaining property through fraud is unacceptable simply because it is wrong.

Perhaps unsurprisingly, the deceitful castaways on *Survivor* are modeling behavior that would be illegal in the real world. Suppose A makes an intentional misrepresentation to B, or makes a promise to B without any intent to perform it, all for the purpose of inducing B to enter into an agreement. Such conduct is uniformly viewed as actionable fraud, justifying a tort action.¹⁷¹ Indeed, under some circumstances, such fraud may result in criminal sanctions.

By suggesting that deceit is a socially-acceptable method of acquiring property, *Survivor* may potentially cause two types of harm. First, it could conceivably foster more fraud in the real world. A majority of American high school students believe that: "[I]n the real world, successful people do what they have to do to win, even if

168. Allen, *supra* note 163, at 169.

169. See Green, *supra* note 165, at 169-70.

170. For an overview of deontological approaches, see Macdonald & Beck-Dudley, *supra* note 167. See also STEPHEN L. CARTER, INTEGRITY (1996) (exploring the moral bases for integrity).

171. See, e.g., CAL. CIVIL CODE § 1572(1) & (4) (West 1982 & Supp. 2006) (actual fraud includes "[t]he suggestion, as a fact, of that which is not true, by one who does not believe it to be true" and "[a] promise made without any intention of performing it").

others consider it cheating.”¹⁷² At a minimum, *Survivor* and similar reality shows tend to desensitize viewers—particularly younger viewers—to our core value that deceit is morally wrong. Of course, many other factors are fueling the rise of deceit in modern society,¹⁷³ but *Survivor* and its progeny¹⁷⁴ may play a role in the process.

Conversely, *Survivor* implies that some property owners in the real world have obtained their wealth through fraud. Although this is undoubtedly true to a limited extent, *Survivor* suggests that the phenomenon is common. Many Americans are already suspicious of wealthy people, a wariness fueled by well-publicized corporate scandals. For instance, one study showed that 61% of the public believes that “most people on Wall Street would be willing to break the law if they believed they could make a lot of money and get away with it.”¹⁷⁵ At some point, such suspicion may diminish the respect traditionally accorded to private property rights, at least those of the wealthy. After all, if it is improper to obtain property through deceit, then logically society should not honor those rights.

But people lie every day in the real world—often several times. If “lying is a perfectly ordinary event,”¹⁷⁶ then why should we care about the potential impact of televised deceit on *Survivor*? The answer is found in context. The routine lies of everyday living cause no harm; rather, they tend to be innocuous mistruths that benefit the liar without injuring the recipient.¹⁷⁷ Thus, for example, K may explain her late arrival for an appointment by falsely claiming traffic

172. In one study, 59% of high school students agreed with this statement. See Report Card 2004, *supra* note 163, at Question 8. Conversely, 92% of the students in the same survey agreed that: “People should play by the rules even if it means they lose.” *Id.* at Question 24.

173. See DAVID CALLAHAN, *THE CHEATING CULTURE: WHY MORE AMERICANS ARE DOING WRONG TO GET AHEAD* 13 (2004) (describing cheating as “a profound moral crisis that reflects deep economic and social problems within American society”).

174. Largely inspired by the popular success of *Survivor*, a number of reality shows have featured some form of deceit or betrayal. Examples include *The Bachelorette* (ABC television broadcast 2003-05), *Big Brother* (CBS television broadcast 2000-present), *Joe Millionaire* (FOX television broadcast 2003-05), *Temptation Island* (FOX television broadcast 2001-03), and *The Mole* (ABC television broadcast 2001-04). For an overview of this genre, see Murray Pomerance, *Reality TV's New Losers—Women*, *NEWSDAY*, Jan. 24, 2003, at A39.

175. Harris Poll, *Public Attitudes Toward Wall Street Are (Surprisingly) Only Slightly More Hostile How than They Were Two Years Ago*, Nov. 6, 2002, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID+339 (last visited June 2, 2006).

176. Allen, *supra* note 163, at 165.

177. For a catalogue of the most common reasons that people lie, see Paul Eckman, *Deception, Lying, and Demeanor*, in *STATES OF MIND: AMERICAN AND POST-SOVIET PERSPECTIVES ON CONTEMPORARY ISSUES IN PSYCHOLOGY* 93, 98 (Diane F. Halperin & Andrew E. Voiskounsky eds., 1997).

delay, in order to avoid social embarrassment. But the deceit shown on *Survivor* is fundamentally different. The castaways lie for the purpose of causing substantial harm to the recipients: loss of the opportunity to win the million dollars.

Justice may yet triumph. Remarkably, Richard—*Survivor*'s first winner—failed to pay income taxes on his million-dollar prize and other earnings.¹⁷⁸ As a result, he was sentenced to fifty-one months in prison; the sentence was unusually long because the judge concluded that Richard had committed perjury during the trial.¹⁷⁹ Predictably, Richard insisted that he had been "completely truthful and completely forthcoming throughout the whole process."¹⁸⁰ But while *Survivor* continues to showcase deceit and betrayal weekly on prime time television, Richard's fate has attracted little media attention—and is thus probably unknown to most *Survivor* viewers.

III. REFLECTIONS ON THE FUTURE OF PROPERTY LAW

It is axiomatic that property law evolves over time.¹⁸¹ Just as feudal tenures, primogeniture, dower, curtesy, and similar doctrines were jettisoned over the centuries,¹⁸² our current views about the nature and scope of property rights will eventually yield to new perspectives. As we look toward the future, our most fundamental challenge will be how to strike the difficult balance between the rights of individual property owners, on the one hand, and the needs of society, on the other. The conventional wisdom is that Blackstone's insistence on absolutist private property rights seems to be fading

178. Lawrence Van Gelder, *First 'Survivor' Winner Is Sentenced*, N.Y. TIMES, May 17, 2006, at E2.

179. *Id.*

180. *Id.*

181. As the dissent noted in one of the most famous American property cases: "[W]e have only to say *tempora mutantur*; and if men themselves change with the times, why should not also laws undergo an alteration?" *Pierson v. Post*, 3 Cai. R. 175, 181 (N.Y. 1805) (Livingston, J., dissenting). See generally 1 RICHARD A. POWELL, POWELL ON REAL PROPERTY § 2.06 (Michael A. Wolf ed., 2005) (explaining that the concept of property is subject to "constant change"); Rose, *supra* note 82 at 631 (discussing the "changing and subtly renegotiated relationships" that embody property rights).

182. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1446-49 (1993) (chronicling the evolution of American property law). See generally Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938). Another scholar describes property as "among the most malleable of social and legal constructs, best understood as a transitory embodiment of historically contingent conceptions that are prevalent in a particular culture at a specific point in time, not some universal and immutable concept." Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 905 (2000).

gradually away.¹⁸³ Thus, one authority explains that today the "arguments are about how far, not whether, private property must yield to the public weal."¹⁸⁴ Indeed, some scholars have predicted the "decline"¹⁸⁵ or "demise"¹⁸⁶ of private property, implying that social concerns will ultimately eclipse individual rights.

As our culture increasingly shifts toward electronic media, forces such as the Internet, movies,¹⁸⁷ music-sharing programs,¹⁸⁸ video games,¹⁸⁹ and other technologies will presumably affect attitudes toward property rights over time. No single medium such as television, much less any single television program, will have a determinative effect on the future. Survivor and the tidal wave of reality shows it inspired will soon vanish from the airwaves. But their contributions to the accepted "morals, mores, customs, and usages"—the raw material from which property rights are forged—will remain behind in the attitudes and beliefs of viewers.¹⁹⁰

Beyond the four specific (and somewhat inconsistent) property lessons discussed above, Survivor and other reality programs seem to share a common underlying theme. All implicitly proclaim that the highest goal in life is the acquisition of property. Thus, Survivor presents ordinary people who voluntarily endure horrible, even dangerous, conditions¹⁹¹ for weeks, far from their families and

183. Thus, "[a]s one looks back along the historic road traversed by the law of land in England and the United States, one sees a change from the view that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship: which grudgingly, but steadily, broadens the scope of social interest in the utilization of things." *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971) (quoting 5 RICHARD A. POWELL, *THE LAW OF REAL PROPERTY* § 746 (Rohan ed., 1970)).

184. Charles M. Haar & Jerold S. Kayden, *Zoning at Sixty—A Time for Anniversary Reckonings*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP*, at ix (Charles M. Haar & Jerold S. Kayden eds., 1989).

185. Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 481 (1983) (suggesting that "property rights are being fundamentally redefined to the disadvantage of property owners").

186. See, e.g., E.F. Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1 (1971).

187. Cf. Asimow, *supra* note 16 (exploring how the portrayal of lawyers in movies affects the public image of the legal profession).

188. Many teenagers have been introduced to the copyright laws through recent disputes about computer programs that permit music to be shared with others. For an analysis of the controversy, see Peter J. Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473 (2002).

189. Given the popularity of electronic games, the property norms utilized in such games may play a role in shaping societal expectations. For an analysis of property rules in the virtual world, see F. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CAL. L. REV. 1, 29-51 (2004).

190. Kuklin, *supra* note 3, at 25.

191. For example, during the first season, Greg lost a great deal of weight on the standard diet of rice and water, which "left him often tired." Worse, the "lack of food

friends, in the pursuit of property: the million dollar prize. The castaways risk everything—health, safety, family, and perhaps honor—to reach this goal. There are no philosophers on *Survivor*, no one seeking moral perfection. There are no altruists either, no one helping the needy. Rather, the castaways devote their extraordinary efforts to helping themselves—to a million dollars. Ultimately, *Survivor* is a commercial for materialism, like most television programming.¹⁹²

Accordingly, *Survivor* and its progeny seem to push us backward toward Blackstone's position. They expose the audience to "real life" situations where people make extraordinary sacrifices in the quest for property. As a result, the audience may well believe that property won at such a cost should be more strongly protected by the law—an attitude that might extend to the property rights of all owners. Thus, at the most fundamental level, the juror in an adverse possession case may tend to favor the record owner; the planning commissioner faced with a discretionary decision to approve a subdivision may incline toward the developer; and the voter considering an initiative to curtail sprawl may vote instead for growth.

A baseball player can predict the destination of a fly ball by studying its trajectory. In the same manner, we can tentatively glimpse into the future of property law by examining the forces that are now molding societal expectations. Of course, our expectations about property rights are shaped by many influences. For the last fifty years, television has been one such influence, but its potential impact on property law remains largely uncharted. Indeed, despite the Supreme Court's veneration of the "expectations"¹⁹³ held by American property owners, our knowledge of those expectations is both fragmentary and anecdotal.¹⁹⁴

made Greg susceptible to disease, and he developed an internal ear infection. Sleeping in the jungle exposed Greg to more insect bites than his tribal members . . . The scars on his legs and elbows grew larger every day. His body odor was palpable several feet away." BURNETT, *SURVIVOR*, *supra* note 43, at 70-71.

192. Product placement—the technique of incorporating commercial products into plot lines—is an art form on *Survivor*. During *Survivor: Palau*, for example, a reward challenge prize included three containers of Pringles. The castaways were so obviously starved for food that anything edible—even Pringles—was a treat. The CBS website notes that the Pringles were "mouthwatering." CBS.com—*Survivor* Palau (Episode 6), <http://www.cbs.com/primetime/survivor10/show/ep06/ep/index6.shtml> (last visited Feb. 2, 2007). Producer Burnett initially interested CBS in the program, in part, because advertisers were to be offered "on-air product placement if they put their money behind *Survivor*," which was a "relatively new [concept] for a network television series . . ." BURNETT, *JUMP IN!*, *supra* note 32, at 86.

193. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

194. See, e.g., William F. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1792 (1988).