REFRAMING KĀNĀWAI:
Towards a Restorative Justice Framework for Indigenous Peoples

N. Mahina Tuteur[1]

Table of Contents

[1] Post-Juris Doctor Fellow at Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law; PhD student in Indigenous Politics, University of Hawai'i at Mānoa. Mahalo nui to Melody Kapilialoha MacKenzie, Susan Serrano, and Kapua Sproat for their invaluable guidance, support and aloha.

I. Introduction[2]

This article introduces a developing analytical framework for decolonizing legal education, critical analysis, and advocacy from and for Native communities. The second edition of Native Hawaiian Law: A Treatise, the definitive resource for understanding both historical and emerging legal issues affecting Kānaka Maoli (Native Hawaiians),[3] will employ this contextual inquiry framework to encourage academic discourse and critical thinking about not only what the law is, but what it should be. The Treatise's contextual framing is born from the idea that legal analysis cannot focus solely on "traditional" notions of rights because such notions are grounded in western concepts of property that are not universally applicable, especially in Hawai'i.

Contextual analysis requires paying close attention to the language used by the courts, political power players, and affected communities knowing that our social world, "with its rules, practices, and assignments of prestige and power, is not fixed; rather, we construct with it words, stories and silence."[4] This is especially important in Native Hawaiian law, where words in the form of laws also confer rights and impose responsibilities. For instance, the word "kuleana" means both "rights" and "responsibilities" and in the legal context, imposes specific requirements for government agencies to uphold and protect Native Hawaiian traditional and customary practices.[5] "I ka ʻōlelo no ke ola, i ka ʻōlelo no ka

---

[2] Portions of this article will appear in the Introduction of the second edition of Native Hawaiian Law: A Treatise (forthcoming 2023), to be co-authored by myself and current and founding faculty at Ka Huli Ao Center for Excellence in Native Hawaiian Law, including Melody Kapilialoha MacKenzie, Susan K. Serrano, and D. Kapuaʻala Sproat. With express permission from the author, portions of this article have previously appeared in D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 Marq. L. Rev. 166–185 (2011) and D. Kapuaʻala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and Climate Change Devastation*, 35 Stan. Envtl. L.J. 157, 194–199 (2014), which provide the foundation for the Treatise's contextual framing.

[3] Native Hawaiian, native Hawaiian, Hawaiian, Kānaka Maoli, Maoli, and ʻŌiwi are used interchangeably and without reference to blood quantum. Kānaka Maoli or Maoli is the Indigenous Hawaiian name for the population inhabiting Hawai'i at the time of the first western contact. Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 127 (1986).

[4] Richard Delgado and Jean Stefancic, *Introduction*, in Critical Race Theory: The Cutting Edge 3 (Richard Delgado and Jean Stefancic eds., 3d ed. 2013).

[5] Kuleana can also mean an interest or claim, jurisdiction or justification, or a small

make."[6] This ʻōlelo noʻeau (Hawaiian proverb) highlights the power in our words: they can heal and give life; or, conceal the truth and cause harm.[7]

Part II outlines an intellectual moʻokūʻauhau (genealogy)[8] to lay a foundation for understanding how a Native-centered contextual framework can uniquely illuminate and interrogate the law's operation in Native communities. Part III explores why contextual legal inquiry must start with Native Peoples' unique history and cultural values, explicitly integrating them into a larger analytical framework that accounts for restorative justice and the key dimensions of self-determination. This requires attention to four values: (1) moʻomeheu (cultural integrity); (2) ʻāina (lands and natural resources); (3) mauli ola (social determinants of health and well-being); and (4) ea (self-determination). Section IV then deploys this developing framework to examine the Hawaiʻi Supreme Court's recent decision in *Mauna Kea II* (2018),[9] one of the most consequential and high-profile in recent memory. Indeed, the movement to protect Maunakea against the construction of the Thirty Meter Telescope (TMT) has become the largest mobilization of Kānaka Maoli in generations. This section situates the battle over Maunakea at the intersection of environmental justice, Indigenous rights, and unsettled land claims, which have come into sharp focus for a whole range of communities struggling for justice in recent years.[10]

---

piece of family property, among many other meanings. Pukui & Elbert, Hawaiian Dictionary, *supra* note 3, at 179.

6 Mary Kawena Pukui, ʻŌlelo Noʻeau: Hawaiian Proverbs and Poetical Sayings 129 (1983).

7 Melody Kapilialoha MacKenzie & D. Kapuaʻala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. Haw. L. Rev. 481, 482 (2017).

8 The kuamoʻo (backbone) of Hawaiian culture is moʻokūʻauhau. Though often understood as biological lineage, it also includes intellectual, conceptual, and aesthetic genealogies. *See* Marie Alohalani Brown, Facing the Spears of Change: The Life and Legacy of John Papa ʻĪʻI 27 (2016) (explaining that "in terms of intellectual endeavors, moʻokūʻauhau refers to the worldview we have inherited as ʻŌiwi, which informs how we conceive, reason about, and understand thought and artistic production"). See also Kalei Nuʻuhiwa, *Papakū Makawalu: A Methodology and Pedagogy of Understanding the Hawaiian Universe*, *in* The Past Before Us: Moʻokūʻauhau as Methodology 40 (Nālani Wilson-Hokowhitu ed. 2019) (describing moʻokūʻauhau as a "genealogical map of the origin of all things that are birthed").

9 *In the Matter of Contested Case Hrg. re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve ("Mauna Kea II")*, 143 Hawaiʻi 379, 431 P.3d 752 (as amended Nov. 30, 2018). Note that this article refers to the legal decision using two words "Mauna Kea," but refers to the place as Maunakea using one word. Whereas the name Mauna Kea (white mountain) is simply descriptive, "Maunakea" is a name that is short for "Mauna a Wākea," the mountain of Wākea, one of the progenitors of the Hawaiian people.

10 *See, e.g.*, Danielle Delaney, *Under Coyote's Mask: Environmental Law, Indigenous Identity, and #NODAPL*, 24 Mich. J. Race & L. 299 (2019).

II. Approaches to Law and Legal Process

The goal in deploying this critical framework, or prism, is to reframe questions around Native Hawaiian law in ways that resist the narrow confines of formalism and push us to think more deeply about the lived experiences of Kānaka Maoli and other Indigenous Peoples with law and legal systems. By going beyond the black letter law to examine how it operates on the ground in communities, the hope is that contextual legal analysis can contribute to envisioning and realizing some semblance of justice, particularly for Kānaka Maoli and other Indigenous Peoples who share similar histories. This developing framework starts with the human rights notion of "restorative justice" described below and, in doing so, builds upon three jurisprudential approaches to law and legal process: legal realism, critical legal studies, and critical race theory.[11] I then attempt to ground this contextual framework in Maoli understandings before expanding on four analytical values, rooted in the international human rights norm of self-determination, to guide this critical analysis.[12]

Legal formalism, a jurisprudential approach that evolved in the 1800s, describes the law as a neutral tool that produces "just" results by mechanically applying legal rules to facts.[13] It views the law as "objective, unchanging, extrinsic to the social climate, and above all, different from and superior to politics."[14] Although it was the prevailing view for many years and continues to be used in contemporary times, later critiques revealed that its "narrow lens employs rules (for example, the 'intent of the framers') and methods of reasoning (for example, stare decisis) in ways that treat Native Peoples as inferior to Europeans and, therefore, unworthy of self-governance; it also fails to provide either a balanced perspective or a genuine vehicle to address legal and cultural harms."[15]

Legal realism emerged in the 1920s to "challenge[] the basic understanding of the law as a formula that produces 'correct' or 'just' results

---

[11] For a fuller account of how these various schools of thought developed over time, see Sproat, *Wai Through Kānāwai*, *supra* note 2.

[12] *See* Larry Kauanoe Kimura, "Ke Au Hawai'i." As Kimura puts it: setting up a framework is like re-laying the large stones of the kahua or foundation, which is critical "to have a Kanaka house in which we and our descendants can live." Noenoe Silva, The Power of the Steel-Tipped Pen: Reconstructing Native Hawaiian Intellectual History 7 (2017).

[13] *See generally* Joseph Singer, *Legal Realism Now*, 76 Calif. L. Rev. 465 (1988) (providing an in-depth discussion of legal formalism).

[14] Brian Z. Tamanaha, *Understanding Legal Realism*, 87 Tex. L. Rev. 731, 731 (2009) (internal quotations omitted) (quoting William M. Wiecek, Liberty under Law: The Supreme Court in American Life 187 (1988)). For a more in-depth discussion of legal formalism, see Daniel Farber, *The Ages of American Formalism*, 90 Nw. U. L. Rev. 89 (1995).

[15] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 155–56 (footnote omitted) (citing Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 315–17 (1990); Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lāhui: A History of the Hawaiian Nation to 1887 44–73, 250–60 (2002)).

when mechanically applied to specific cases."[16] Legal realism is an approach to legal decision making that recognizes that history, "[s]ocial context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time."[17] In doing so, it recognized that laws often are not content "neutral" (legal language tends to reflect the interests of those in power at a given time), and that legal analysis must be contextual to genuinely assess the law's impact on "justice." Legal realists inspired a host of other movements, including law and society, critical legal studies, feminist legal theory, law and economics, and critical race theory.[18]

Critical legal studies built on critiques of the supposed neutrality of the law to challenge the very ability of the law to level the playing field, and to suggest even that the legal process was a tool to distract underrepresented groups while continuing to marginalize them.[19] Despite its insights, critical legal studies "failed to resonate completely with people of color and other marginalized groups who recognized the law's ability to subordinate, but who also refused to abandon the legal system wholesale due to its potential to liberate when applied in the right context."[20] It

[16] Isaac Moriwake, Comment, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. Haw. L. Rev. 261, 287 (1998). For an in-depth analysis of legal realism and related theories, see Singer, *supra* note 13, and Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 365 (1992).

[17] Singer, *supra* note 13, at 470. Legal realists contended that the so-called rule of law "created an illusion of certainty that masked the unspoken social and political assumptions guiding much judicial decision making. The exposure of this illusion of certainty led to [r]ealist pronouncements of the indeterminate nature of the law." Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 Cornell L. Rev. 1025, 1055–56 (2003) (citations omitted); *see also* John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 Duke L.J. 84, 88–89 (1995).

[18] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 326–28 (1987) [hereinafter Matsuda, *Looking to the Bottom*]; *see also* Bell, *supra* note 16, at 363–68. For additional information on critical legal studies, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 Yale L.J. 461, 461–62 (1984). For more background on the law and society movement, see Austin Sarat, *Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship*, *in* The Blackwell Companion to Law and Society 1 (Austin Sarat ed., 2004); The Handbook of Law and Society (Austin Sarat & Patricia Ewick eds., 2015). For insight on feminist legal theory, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 586–90 (1990). For a more detailed discussion of law and economics, see generally Richard A. Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757 (1975).

[19] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 162–63.

[20] *Id.* at 163 (citing Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821, 869 (1997) ("[Marginalized groups] understand the limits of 'rights talk' and the ways in which civil rights laws can be used to reinforce the racial status quo. They also, however, perceive potentially transformative value in law and rights assertion for disempowered groups, and they embrace modernist notions of hope and justice through reconceived ideas of law and political struggle."); Kimberlé Williams Crenshaw, *Race, Reform, and*

also failed to bring about real change on the ground in the communities that needed it the most.[21]

Critical race theory emerged in the late 1980s to infuse the voices and experiences of people of color.[22] By foregrounding issues of race, racism, and power dynamics, and challenging intersections of various forms of oppression, critical race theory sought to remedy injustice for a host of marginalized groups.[23] Critical race scholars, like the critical legal scholars before them, viewed the law and legal rules as indeterminate.[24] This novel theory offered a beginning response to the limitations of legal justice for racial communities "by employing critical pragmatic tools to examine racial justice in connection with the interplay of law, race, culture, and social structure."[25] The movement also inspired several theoretical sub-branches, including LatCrit, AsianCrit, QueerCrit, critical race feminism, and TribalCrit.[26]

Critical race theory's insight, particularly its identification of systemic roots of subordination and emphasis on transformative action, provides an apt foundation for contextual inquiry into Indigenous

Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1356 (1988) (critiquing critical legal studies' "failure to analyze the hegemonic role of racism").

[21] Matsuda, *Looking to the Bottom*, *supra* note 18, at 345–49.

[22] Much of critical race theory arose out of concern "over the slow pace of racial reform in the United States" as well as the notion "that the civil rights movement of the 1960s had stalled, and indeed that many of its gains were being rolled back." Critical Race Theory: The Cutting Edge 2 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000). It also developed as a reaction to critical legal studies' "trashing" of civil rights discourse. Yamamoto, *Critical Race Praxis*, *supra* note 20, at 869. For more context, see Critical Race Theory: The Key Writings That Formed the Movement (Kimberlé Crenshaw et al. eds., 1995).

[23] *See, e.g.*, Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 Mich. J. Race & L. 21, 22 (2005). Critical race theory "is a jurisprudence of possibility precisely because it rejects standard liberal frameworks and precisely because it seeks to be inclusive of different groups and different experiences." *Id.*

[24] At the same time, as renowned Law Professor Mari Matsuda observed, "[t]he minority experience of dual consciousness accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy." Matsuda, *Looking to the Bottom*, *supra* note 18, at 341.

[25] Yamamoto, *Critical Race Praxis*, *supra* note 20, at 867.

[26] Kanaka ʻŌiwi Critical Race Theory (ʻŌiwiCrit) is an emerging analytical framework currently being used in the context of Native Hawaiian higher education. Erin Kahunawaikaʻala Wright & Brandi Jean Nālani Balutski, *Ka ʻIkena a ka Hawaiʻi: Toward a Kanaka ʻŌiwi Critical Race Theory*, *in* Kanaka ʻŌiwi Methodologies: Moʻolelo and Metaphor (Katrina-Ann R. Kapāʻanaokalāokeola Nākoa Oliveira & Erin Kahunawaikaʻala Wright eds., 2016); *see also* Nicole Alia Salis Reyes, *A space for survivance: locating Kānaka Maoli through the resonance and dissonance of critical race theory*, 21 Race Ethnicity & Educ. 739 (2018) (weaving together strands of critical race theory with Maoli knowledge toward a KanakaCrit framework); Nik Cristobal, *Kanaka ʻŌiwi Critical Race Theory: Historical and Educational Context*, 7 Contemporaneity 27 (2018) (discussing how critical race theory can and should be adapted to empower Kānaka ʻŌiwi through theory and educational praxis).

Peoples' legal claims by western courts and decision-making bodies.[27] At the same time, just as critical legal studies failed to acknowledge the persistence of racism and significance of civil rights claims for communities of color, critical race theory does not fully illuminate legal controversies for Native Peoples.[28] Although Law Professors Mari Matsuda[29] and Eric Yamamoto[30] opened the critical race theory door to Indigenous Peoples' claims through their groundbreaking works,[31] it is critical to acknowledge that adopting a theoretical framework with roots in another context runs the risk of downgrading or overlooking the key political dimensions of Indigenous struggles, which are tied to the long and complicated history between Indigenous Peoples and colonizing governments.[32] For Native Peoples, the pursuit of justice is less about "equality" and more about self-determination, which includes the right to "freely determine their political status and freely pursue their economic, social and cultural development."[33] Thus, contextual legal inquiry into Native claims must

[27] Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. Colo. L. Rev. 311, 344 (2001); *see also* Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theories for Peoples of Color*, 5 Law & Ineq. 103, 122 (1987) ("Among the perils of [critical legal studies] for peoples of color is its tendency to abandon and marginalize reliance upon what it regards as a false vision. . . . It is far too easy for someone on a law professor's salary to offer open-ended reconstructive projects which may bring immense benefits to a future generation.").

[28] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 166.

[29] Matsuda wrote the seminal article on reparations for Kānaka Maoli. Matsuda, *Looking to the Bottom*, *supra* note 18, at 368–88.

[30] Yamamoto established the need for critical race theorists to modify their analysis to account for the unique interests and values of Native Peoples in *Racializing Environmental Justice*, *supra* note 27. Yamamoto is one of the foremost legal scholars to have linked restorative justice principles, which are usually applied to individuals or discrete communities, to broader Indigenous Peoples' claims for repair of the ravages of western expansion.

[31] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 166–167. *See also* Tsosie, *Engaging the Spirit of Racial Healing*, *supra* note 23, at 41–43 (calling for the development of critical race theory in the realm of Native Peoples' environmental justice claims); Bryan Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 Urb. Rev. 425 (2005).

[32] Gordon Christie, *Indigenous Legal Theory: Some Initial Considerations*, *in* Indigenous Peoples and the Law: Comparative and Critical Perspectives 197, 209 (Benjamin J. Richardson, Shin Imai & Kent McNeil eds., 2009) (arguing that "[i]t is incumbent on Indigenous scholars to articulate visions of the law, as these will reflect experiences and cultural groundings that serve as foundations for Indigenous understandings of the law."); *see also* Jamaica Heolimeleikalani Osorio, (Re)membering ʻUpena of Intimacies: A Kanaka Maoli Moʻolelo Beyond Queer Theory 171–72 (May 2018) (Ph.D. dissertation, University of Hawaiʻi at Mānoa) (on file with author) (suggesting that in order to take useful theories crafted beyond our shores seriously, we must "place them in rigorous conversation with our archive and our ʻŌlelo if they are to take root and become relevant.").

[33] International Covenant on Civil and Political Rights, art. 1, Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, art. 1, Jan. 3, 1976, 993 U.N.T.S. 3; *see also* Julian Aguon, *On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 UCLA Asian Pac. Am. L.J. 47, 51 (2011) ("under international law,

expand on this intellectual moʻokūʻauhau to focus on the impacts of land dispossession, cultural destruction, and the loss of political sovereignty,[34] and in turn, claims to self-determination, including the return and restoration of ancestral land and resources.[35]

III. A Contextual Inquiry Framework for Indigenous Peoples' Claims and Adjudicatory Rulings

To understand how the law operates both generally and for Native Peoples in particular, a contextual approach engages in a sophisticated multi-level analysis and urges us to ask: "Who crafts the laws? Who interprets the laws? Who benefits from the laws? Who is hurt by the laws? What is at stake when the laws are 'blindly' applied? And, what institutional and public constraints limit judges in their decision making?"[36] This approach integrates history into a larger analytic framework that exposes "what is really going on" and "what the decision really means."[37] It starts with the language of rules, but acknowledges that the letter of the law alone does not dictate the formal legal result in complex or controversial cases with political and ideological overtones.[38] Contextual legal analysis interrogates the legal result, the values and interests served by that decision, and the short and long-term consequences.[39] These contex-

self-determination remains a comprehensive, unparsed, and inalienable right of all peoples to freely choose their political status."); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309, 342 (1994) [hereinafter Anaya, *Native Hawaiians and International Human Rights Law*]; Tsosie, *Engaging the Spirit of Racial Healing*, *supra* note 23, at 42–43; Yamamoto & Lyman, *supra* note 27, at 311.

[34] See Joanne Barker, *For Whom Sovereignty Matters*, *in* Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination 1 (Joanne Barker ed., 2005) for a deeper analysis of the various social forces and historical conditions that have shaped the meaning of political sovereignty.

[35] Yamamoto & Lyman, *supra* note 27, at 344; Melody Kapilialoha MacKenzie, Susan K. Serrano & Koalani Laura Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 Nat. Resources & Env't 37, 38 (2007) ("restorative environmental justice is in large part about doing justice through reclamation and restoration of land and culture."); *see also Id.* at 38–42, 79.

[36] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 162; *see also* Juan Perea et al., Race and Races: Cases and Resources for a Diverse America 3–4 (2000) (articulating the questions identified here). For further articulation of this thought, see Sproat, *Wai Through Kānāwai*, *supra* note 2, at 167–68 ("As quantitative studies have demonstrated, however, contextual factors and political perspectives play a significant role in shaping adjudicatory outcomes, even though decisionmakers may feel constrained to follow the rules to appear legitimate.").

[37] *See* Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 Law & Contemp. Probs. 285, 291–92 (2005) (characterizing critical legal inquiry).

[38] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 169.

[39] *Id.* at 171. For a discussion of approaches to contextual analysis in law, *see* Bell, *supra* note 16, 364–68; Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597, 1602–06 (1990) (describing the ways that context matters in decision-making); Eric K. Yamamoto, Carly Minner, & Karen Winter, *Contextual Strict Scrutiny*, 49

tual insights demonstrate how a shifted framework can produce more just results, "not by conceptualizing the legal process as the inevitable march toward justice, but rather by acknowledging that law, as it intersects with politics, can be both subordinating and, at times, an opening toward restoration and self-determination."[40]

For Indigenous Peoples, who are differently situated because of the long-term impacts of colonialism, contextual legal inquiry must start with Native Peoples' unique history and cultural values, explicitly integrating them into a larger analytical framework that accounts for restorative justice and the key dimensions of self-determination.[41] Articulating how Indigenous understandings and conceptualizations underpin these theoretical perspectives is especially important where law has historically been wielded as a tool of oppression and dispossession.[42] Recognizing that the deployment of ʻŌiwi epistemological frames is both a practice of intellectual sovereignty[43] and a necessary first step when engaging in the challenging practice of reframing dominant narratives and legal understandings,[44] the next section describes the Kumulipo to center ʻŌiwi ways of knowing and being.

A. *Kanaka Maoli Worldview as a Paradigm for Contextualizing Legal History and Analysis*

The Kumulipo, a genealogical and cosmological chant, traces the birth of Kānaka Maoli to the beginning of time in Hawaiʻi, explaining that people descend from akua (ancestors, gods or elements) and are physically related to all living things in the Hawaiian archipelago.[45] It

How. L.J. 241 (2006) (advancing contextual analysis for the Equal Protection Clause's strict scrutiny standard of review).

[40] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 136.

[41] *See* Sproat, *Wai Through Kānāwai*, *supra* note 2, at 171–77.

[42] For varying accounts of the colonial impact on law and governance in Hawaiʻi, *see* Noelani Arista, The Kingdom and the Republic: Sovereign Hawaiʻi and the Early United States (2019) (arguing that kānāwai or published law emerged as an extension of the continued exercise of chiefly governance and was not simply a colonial imposition); Kamanamaikalani Beamer, No Mākou Ka Mana: Liberating the Nation (2014) (asserting that our aliʻi (chiefs) selectively appropriated western laws and tools in order to preserve and maintain the lāhui or nation); Sally Engle Merry, Colonizing Hawaiʻi: The Cultural Power of Law (2000) (examining law's colonizing impact as reflected in nineteenth century district court records).

[43] Robert Allen Warrior, Tribal Secrets: Recovering American Indian Intellectual Traditions 87 (1995) (arguing that a "process-centered understanding of sovereignty provides a way of envisioning the work Native scholars do"); *see also* Silva, *supra* note 12, at 8.

[44] Linda Tuhiwai Smith writes that it is crucial to foreground "our concerns and world views and then come to know and understand theory and research from our own perspectives and for our own purposes." Linda Tuhiwai Smith, Decolonizing Methodologies: Research and Indigenous Peoples 39 (1999).

[45] *See* The Kumulipo: A Hawaiian Creation Chant 7, 55–57 (Martha Warren Beckwith trans. & ed., University of Hawaiʻi Press 1972). There are several interpretations of the Kumulipo, including as a description of the origins of the universe, of the birth-life-death cycle of an aliʻi, and of the formation of a new dynasty. *See, e.g., id.* at 44–48.

articulates and reveals the connection between sky and earth, earth and ocean, ocean and land, land and Kānaka, and Kānaka and akua, and describes the way in which this connection establishes the interrelationship of all things in an everlasting continuum.[46] The union of Papahānaumoku (earth-mother) and Wākea (sky-father) resulted in the creation of most of the principal Hawaiian Islands, and also produced a daughter, Hoʻohōkūkalani, whose subsequent joining with Wākea resulted in the birth of Hāloanakalaukapalili.[47] Hāloanaka, a stillborn offspring, was buried in the ground and subsequently the first kalo (taro) plant (the staple food of the Hawaiian diet and today a symbol of the movement for self-determination) grew from that grave. A second offspring, named Hāloa in honor of his elder sibling, became the first human child born in Hawaiʻi, and the progenitor of Kānaka ʻŌiwi.

According to this worldview, rights and responsibilities are inextricably intertwined, which speaks to Native Hawaiians' inherent duty to respect and care for our elder sibling, the kalo plant, and all natural and cultural resources. The politics of land and genealogy are crucial to ʻŌiwi formulations of kuleana, which is integral to social, cultural, and spiritual life and encompasses everything from the depths of Kanaloa's ocean to the expanses of Wākea's sky.[48] The Kumulipo reveals several important lessons, including a history of interrelatedness among all beings and the importance of creating and preserving pono (balance and harmony in the universe), which speaks to the value of restorative justice as a tool for Indigenous communities.[49]

Another interpretation regards the Kumulipo as an account of evolutionary development. Davianna Pōmaikaʻi McGregor, Nā Kuaʻāina: Living Hawaiian Culture 13 (2007).

[46] The Kumulipo explains that in the beginning there was pō or darkness, and from this darkness, came life. Pō gave birth to two children: a son named Kumulipo and a daughter named Pōʻele. Through their union, Kumulipo and Pōʻele created the natural world. The first child born to them was the coral polyp, which created the foundation for all life in the sea. Born in continuing sequential order were all of the plants and animals in Hawaiʻi nei, which became ʻaumakua or guardians that continue to watch over Kānaka Maoli. Pō had many children that comprised all aspects of Hawaiʻi's natural world.

[47] The story of Papa and Wākea is one of the many mele koʻihonua (cosmogonic genealogies) whose genesis originates in the Kumulipo. For a detailed explanation of the varying accounts of the birthing of ka pae ʻāina Hawaiʻi (the Hawaiian archipelago), *see* Katrina-Ann R. Kapāʻanaokalāokeola Nākoa Oliveira, Ancestral Places: Understanding Kanaka Geographies 5–15 (2014).

[48] Kuleana fundamentally implies ancestry and place and is shaped by one's family history and relationships to specific lands and waters. Hōkūlani Aikau, Noelani Goodyear-Kaʻōpua, & Noenoe K. Silva, *The Practice of Kuleana: Reflections on Critical Indigenous Studies Through Trans-Indigenous Exchange*, *in* Critical Indigenous Studies: Engagements in First World Locations 161 (Aileen Moreton-Robinson ed., 2016).

[49] Kapua Sproat & Mahina Tuteur, *The Power and Potential of the Public Trust: Insight from Hawai'i's Water Battles and Triumphs*, *in* ResponsAbility: Law and Governance for Living Well With the Earth (Betsan Martin, Linda Te Aho & Maria Humphries-Kil eds., 2019).

B. *Restorative Justice and Self-Determination*

Restorative justice, as a concept and in practice, has deep Indigenous roots. Traditional cultures required harmony in their relationships with each other, the environment, and the spiritual world to maintain balance and self-sufficiency.[50] Many communities continue to rely on restorative justice concepts to resolve disputes and redress harm.[51] Native healing practices, together with American legal notions of equality and fairness as well as international human rights norms of redress for universal harms, provide common insights about this kind of social healing.[52] Indeed, "[t]he idea of reparation—of amends owed for wrongs and wrongful harms—is ancient, universal, and a basic intuition of justice."[53]

Emerging norms of restorative justice entail repairing the damage wrought by injustice and instituting corrective changes, and may be used to support legal, political, or moral justice claims.[54] Reparative justice for

---

[50] Although these practices vary widely between communities, the dispute resolution process usually involves some narration before victims, offenders, family members, and community members, with outcomes arrived at collectively, which are often accompanied by ceremonies of healing and forgiveness. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 Ann. Rev. L. & Soc. Sci. 161, 167 (2007). For instance, Native Hawaiian communities still practice ho'oponopono, "[t]he specific family conference in which relationships were 'set right' through prayer, discussion, confession, repentance, and mutual restitution and forgiveness." *See* Mary Kawena Pukui, E.W. Haertig & Catherine A. Lee, Nānā I Ke Kumu—Look to the Source 60 (1st ed. 1972).

[51] *Id.*

[52] Eric K. Yamamoto, Sandra Hye Yun Kim, & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 Cal. W. L. Rev. 1, 41 (2007).

[53] Margaret Urban Walker, What is Reparative Justice? 9 (2010). As international instruments, and in some cases international courts and tribunals, implement reparatory justice, new practices and questions have emerged, including:
Which injuries or harms trigger obligations of reparation? What kind of responsibility or relation to wrongs and harms entail obligations to make reparations? Who in relation to a wrong or harm has the standing to receive reparations? What vehicles (acts and goods offered) are capable of convening appropriate and effective reparations? What is the measure of just reparations? What aim or end is sought, and what value or concern is at stake, in doing reparative justice?
Id. at 14. *But see* Chris Cunneen, *Reviving Restorative Justice Traditions?*, *in* The Handbook of Restorative Justice 113 (Gerry Johnstone & Daniel W. Van Ness eds., 2007) (asserting that some restorative justice advocates have a tendency to romanticize or oversimplify Indigenous dispute resolution practices).

[54] Reparative justice norms are codified in the 2005 United Nations Human Rights Commission's "Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law," C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005). *See generally* Universal Declaration of Human Rights, G.A. Res. 271 A (III), at 71, U.N. GAOR, 3rd Sess., art. 4, U.N. Doc A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), at 52, 21 U.N. GAOR Supp. No. 16, art. 2(3), U.N. Doc. A/6316 (Mar. 23, 1976); American Declaration of Rights and Duties of Man, O.A.S. Res. XXX, Ninth International Conference of American States (May 2, 1948); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46/Annex (Dec.

group-based human rights violations can take a variety of forms, including restitution of land and personal property, compensation for specific losses, public apologies, and institutional reforms to guarantee non-repetition of abuses.[55] "Moral repair" examines what it means "in moral and human terms, to respond adequately in the wake of wrongdoing and serious harm" and requires action to put "individuals in right relationship with each other and communities as a whole" in accordance with mutually agreed measures of "what is due to each other."[56]

In recent years, scholars and community advocates have advanced restoration as the appropriate remedial concept, rather than equality of treatment, to redress injustices for Indigenous Peoples and Kānaka Maoli in particular.[57] On paper, the State of Hawai'i appears deeply committed to restorative justice for Kānaka Maoli, most clearly through several landmark amendments to Hawai'i's Constitution passed in 1978. These amendments included the establishment of the Office of Hawaiian Affairs, recognition of and protection for traditional and customary practices, and the adoption of the public trust doctrine.[58] Subsequent state and federal legislation, including measures passed around the centenary

10, 1984); Torture Victim Protection Act of 1991, art. II, § 2, 28 U.S.C. § 1350 (2007). *See also* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 Ariz. J. Int'l & Comp. L. 13 (2004) (setting forth the broad contours and many of the sources of the international human rights regime as it concerns Indigenous Peoples).

[55] *See* Dinah Shelton, *The United Nations Principles and Guidelines on* Reparations*: Context and Contents, in* Out of Ashes: Reparations for Victims of Gross and Systematic Violations of Human Rights 11 (Koen De Feyter et al. eds., 2005).

[56] Margaret Urban Walker, Moral Repair: Reconstructing Moral Relations After Wrongdoing 6 (2006). *See also* Eric K. Yamamoto, Miyoko Pettit-Toledo, & Sarah Sheffield, *Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step*, 15 Seattle J. for Soc. Just. 109 (2016) (suggesting that stalled reconciliation initiatives formalize a fourth step in the process involving assessment, implementation, and oversight).

[57] Yamamoto & Lyman, *supra* note 27, at 335–41; *see also* Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 Asian Am. L.J. 5, 32–33 (2009) (drawing insights from social psychology, theology, political theory, law, economics, and indigenous healing practices to put forth an analytical framework for reparatory initiatives using the "Four Rs": recognition, responsibility, reconstruction, and reparation); Eric K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 Asian Pac. Am. L.J. 71 (2012) (describing four generations of evolving reparations theory and practice); MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 35, at 37–38 (positing a new type of Maoli "restorative environmental justice" that embraces complex issues of Indigenous Peoples' spiritual, social, and cultural connections to the land and natural environment and integrates "cultural values, history, socioeconomic power, and group needs and goals in defining environmental problems and fashioning meaningful remedies").

[58] See Sproat, *An Indigenous People's Right to Environmental Self-Determination*, *supra* note 2, at 183–90.

of the illegal overthrow of the Hawaiian Kingdom, also apologized for past acts and recognized the need for redress for the loss of land and sovereignty.[59] These formalized commitments, however, have not resulted in tangible redress thus far.[60]

There is no "uniform" theory of reparations that fits all cultures, nations, and peoples. For Native Peoples, because reparative justice is a process that is "simultaneously emotional and spiritual, political and social" and requires "discussion of how the past, present and future are co-joined and interdependent," Native normative frameworks of justice are key.[61] Meaningful restorative justice entails repairing the damage suffered by those who have experienced oppression according to their self-shaped notions of reparation, which requires analysis to take account of the particular historical context and cultural framework.[62]

For Indigenous legal scholar Rebecca Tsosie, "Indigenous self-determination provides the baseline requirement for an effective theory of reparative justice."[63] Tsosie recognizes that although some nation-states may disagree, the United Nations Declaration on the Rights of Indigenous Peoples "articulates a basis for recognizing a right of environmental self-determination that preserves the relationship between indigenous peoples and their traditional lands for cultural and moral

---

[59] *Id.* at 184–90. In the 1993 Apology Resolution, the U.S. Congress expressed its "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." S.J. Res. 19, 103d Cong. (1993); *see also* Hawaiian Homes Commission Act, 42 Stat. 108 (1921). In addition, state legislation enacted around or after the Apology Resolution "acknowledged the long-standing harms to the Hawaiian community and the State's commitment to repairing the damage." Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation": Office of* Hawaiian *Affairs v. HCDCH*, 33 U. Haw. L. Rev. 503, 528 (2011). Most recently in 2011, the Hawai'i Legislature seemed to reaffirm this commitment by passing a law acknowledging a special trust relationship between the U.S. and Kānaka Maoli. H.R. 1627, 26th Leg. (Haw. 2011).

[60] *See* Walter R. Echo-Hawk, In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples 275 (2013) ("Native Hawaiians are still waiting on Congress to follow-up on the [A]pology [Act], with an act of atonement for suppressing the inherent sovereignty and depriving the self-determination rights of the Native Hawaiian people, by enacting restorative legislation to recognize and confirm some measure of their indigenous right to self-determination.").

[61] *See* Rebecca Tsosie, *Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations*, *in* Reparations: Interdisciplinary Inquiries 43, 43 (Jon Miller & Rahul Kumar eds., 2007) [hereinafter Tsosie, *Acknowledging the Past*].

[62] Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 Santa Clara J. Int'l L. 203, 245 (2015) [hereinafter Tsosie, *Indigenous Peoples and the Ethics of Remediation*]; Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should Be Taught in Law School*, 21 J. Gender Race & Just. 395, 400 (2018).

[63] Tsosie, *Indigenous Peoples and the Ethics of Remediation*, *supra* note 62, at 253–54.

reasons."[64] Rooted in self-determination rather than sovereignty, this distinctive set of rights arises from Indigenous peoples' unique cultural and political status as dispossessed, colonized people now seeking restorative justice.[65] This set of rights enables Indigenous peoples to invoke a human rights-based set of norms to engage local legal regimes to (1) protect traditional resource-based cultural practices regardless of whether they also possess the sovereign right to govern lands and (2) prevent practices that jeopardize cultural resources.[66]

In light of the lack of guidance on how restorative justice can and should be actualized on the ground in Native communities, this article turns to the restorative justice values for Native Peoples that are embodied in the human rights principle of self-determination.[67] Native American legal scholar and activist Walter Echo-Hawk suggests that the "central purpose of the [United Nations] Declaration [on the Rights of Indigenous Peoples] is restorative justice—to repair the persistent denial of indigenous rights by entrenched forces implanted by the legacy of colonialism."[68] He asks how we can "situate Native [] claims and grasp the distinctive notions of reparative justice that are placed before us by the Declaration?"[69]

The following framework can help us to understand how the law operates in practice, assess whether laws further or hinder restorative justice for Native Peoples, and operationalize otherwise esoteric legal concepts.[70] Like the muliwai (an estuary or coastal body of brackish water fed by springs, rivers, or streams with a free connection to the ocean), it is a place where fresh water meets the sea, and where theory meets practice.[71] It is always shaped by the landscape in which it sits and is a rich and fertile environment for convergence, nourishment, and the emergence of new ideas and approaches.[72]

---

[64] Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. Colo. L. Rev. 1625, 1665 (2007).

[65] *Id.* at 1654–57, 1663–69.

[66] *Id.* at 1625.

[67] *See, e.g.*, Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 33, at 342–60; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[68] Echo-Hawk, *supra* note 62, at 99. He declares that "[r]estorative justice is the best way to respond to human suffering resulting from a historical wrong." *Id.* at 259.

[69] *Id.* at 251.

[70] *See* Anaya, *Native Hawaiians and International Human Rights Law, supra* note 33, at 342–60.

[71] Manulani Aluli Meyer, Ho'oulu Our Time of Becoming: Hawaiian Epistemology and Early Writings viii (2003). In this way, engaging with a contextual framework seeks to avoid the "scholarly penchant for 'theory [that] begets no practice, only more theory.'" Eric K. Yamamoto, Interracial Justice: Conflict & Reconciliation in Post-Civil Rights America 10 (1999).

[72] Aikau, Goodyear-Ka'ōpua & Silva, *supra* note 48, at 161.

C. *Four Indigenous Values for Contextual Legal Analysis*

Tailoring this contextual legal framework for Native Peoples requires attention to four realms (or "values") of restorative justice embodied in the human rights principle of self-determination: (1) moʻomeheu (cultural integrity); (2) ʻĀina (lands and natural resources); (3) mauli ola (social determinants of health and well-being); and (4) ea (self-determination).[73] The forces of colonialism have harmed Indigenous Peoples in each of these four realms, which are both customarily significant and recognized by international human rights principles as significant dimensions of restorative justice.[74]

Each of the four values of restorative justice for Native Peoples are inextricably intertwined.[75] For example, "culture cannot exist in a vacuum and its integrity is linked to land and other natural and cultural resources upon which Indigenous Peoples depend for physical and spiritual survival."[76] In turn, the well-being of Native communities is "defined by cultural veracity and access to, and the health of, natural resources."[77] Lastly, political self-determination ultimately defines who will control Indigenous Peoples' futures, including the land, water, and resources necessary to preserve and maintain cultural practices and well-being.[78] Ultimately, weaving these four values into a cohesive analytical framework

---

[73] *See* Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 33, at 342–60. James Anaya coalesced international human rights principles of self-determination to identify the four analytical categories utilized in this developing framework. *Id.*; *see also* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). To make these values relevant to the Native Hawaiian community and this specific body of law, I use ʻŌlelo Hawaiʻi knowing that these terms are embedded with meanings and significance beyond their mere definitions.

[74] *See* Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 33, at 342–60; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[75] In a similar vein, Political Science Professor Noelani Goodyear-Kaʻōpua encourages Hawaiian Studies practitioners to look at four values or principles that can be seen as ʻaho, single cords, that when braided together form what political scholar and poet Haunani Kay-Trask described as a "rope of resistance": ea (sovereignty and leadership), lāhui (collective identity and self-definition), kuleana (positionality and obligations), and pono (harmonious relationships, justice and healing). Noelani Goodyear-Kaʻōpua, *Reproducing the Ropes of Resistance: Hawaiian Studies Methodologies*, *in* Kanaka ʻŌiwi Methodologies: Moʻolelo and Metaphor 2 (Katrina-Ann R. Kapāʻanaokalāokeola, Nākoa Oliveira & Erin Kahunawaikaʻala Wright eds., 2016).

[76] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 173; *see also* Anaya, *Native Hawaiians and International Human Rights Law, supra* note 33, at 346–47.

[77] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 173; *see also* Anaya, *Native Hawaiians and International Human Rights Law, supra* note 33, at 348–49.

[78] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 173; Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stan. L. & Pol'y Rev. 191, 197 (2001) ("[T]he central challenge of cultural sovereignty is to reach an understanding of sovereignty that is generated from *within* tribal societies and carries a cultural meaning consistent with those traditions.").

has immense potential to begin to heal the wounds of injustice wrought by colonial forces, and in doing so produce some semblance of a new restorative justice. It is important to note that though the following explication is grounded in Maoli cultural precepts and history, application of this framework can extend beyond Hawai'i's shores to other communities grappling with similar justice issues.

1. Mo'omeheu: Cultural Integrity

Ke momole nei no ka mole o 'Ī.
The 'Ī chiefs still adhere to their taproots.
The descendants of 'Ī hold fast.[79]

Indigenous Peoples are in a constant struggle to maintain traditional lifestyles and cultural and spiritual connections to the natural environment in light of colonization's ongoing impacts and other pressures of a quickly changing world.[80] Given culture's central role and its holistic and intergenerational scope—encompassing language, music, art, dance, religion, and sacred sites—weighing cultural impacts is a necessary starting point for any contextual legal inquiry involving Indigenous issues. Analysis of this realm focuses on whether an action or decision appropriately supports and restores "cultural integrity as a partial remedy for past harms, or perpetuate[s] conditions that continue to undermine cultural survival."[81] In the Declaration on the Rights of Indigenous Peoples, the United Nations affirmed that Native Peoples retain the right to "practi[c]e and revitalize their cultural traditions and customs[,] . . . includ[ing] the right to maintain, protect and develop the past, present and future manifestations of their cultures."[82] Moreover, as Indigenous scholar James Anaya has asserted, "the cultural integrity norm has developed to entitle indigenous groups like the Native Hawaiian people to affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard."[83] Indigenous legal scholars Rebecca Tsosie and Wallace Coffey have added that "tradition provides the critical constructive material upon which a community rebuilds itself[,]" encouraging us to look to the future.[84] Exploring im-

---

[79] Pukui, *supra* note 6, at 190.

[80] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 179.

[81] *Id.*

[82] G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). Article 8(2) also prohibits any action "which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities." *See also* Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 Brook. J. Int'l L. 1105, 1120 (2002) (discussing a draft of the declaration).

[83] Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 33, at 345. *See generally* Comm. on the Elimination of Racial Discrimination, Gen. Recommendation on the Rights of Indigenous Peoples on its Fifty-First Session, U.N. Doc. A/52/18, annex V at 122 (1997) (detailing the measures to be taken to protect Indigenous Peoples).

[84] Coffey & Tsosie, *supra* note 78, at 199 (quotations omitted).

pacts to Native culture and tradition are, thus, vital to understanding past harms and shaping meaningful redress because, "only by delving into the inquiry of how our Ancestors saw the world can we truly understand the significance of our communities as they are currently constituted, appreciating both the strengths and continuities that exist, as well as the pathologies that destroy community."[85]

2. ʻĀina: Land and Natural Resources

He aliʻi ka ʻĀina; he kauwĀ ke kanaka.
The land is a chief; man is its servant.
Land has no need for man, but man needs the land and works it for a livelihood.[86]

Here, the term "ʻĀina," which translates to land or "that which feeds," is used to refer to all lands, waters, and resources that sustain Kānaka Maoli in a multitude of ways, and the reciprocal relationship that emerges between people and the natural environment.[87] Noting that Kānaka Maoli of ancestral times did not have a term that directly translates to what we know today as the "environment," Hawaiian language expert Kapā Oliveira suggests that a single term was insufficient because Kānaka had a much deeper and more intimate relationship with their surroundings.[88] The naming of various regions of the environment was not restricted to land but extended vertically and horizontally in every direction, encompassing heavenscapes, landscapes, and oceanscapes, and mapping each part of nĀ mea e hoʻopuni (everything that surrounds or encircles a person).[89] This relationship transcends the idea of land and water as a means of physical survival, but speaks to its necessity for the cultural survival of Indigenous Peoples as distinct communities and nations as well.[90] Like many other Native Peoples, Kānaka Maoli "believed that the cosmos was a unity of familial relations. [Their] culture depended on a careful relationship with the land [and their] ancestor, who nurtured [them] in body and spirit."[91] Kānaka Maoli developed

---

[85] *Id.*

[86] Pukui, *supra* note 6, at 62.

[87] ʻĀina is defined as land, that which feeds. Kanaka Maoli scholar and historian David Malo distinguishes moku, which are "cut off" as they enter the ocean, from ʻāina, which is the reciprocal relationship that emerges when kānaka reside on and care for the land, not simply the land itself. David Malo, Moʻolelo Hawaiʻi 36–37 (Nathaniel B. Emerson, trans., 1898); *see also* George Huʻeu Sanford Kanahele, Ku Kānaka—Stand Tall: A Search for Hawaiian Values 188–94 (1986) (recognizing that the ahupuaʻa system was a land-sea continuum; the ocean was an extension of the land, and the land was an extension of the sea).

[88] Oliveira, *supra* note 47, at 64.

[89] *Id.* at 48, 64; s*ee also* Silva, The Power of the Steel-Tipped Pen, *supra* note 12, at 4 (articulating that "aloha ʻāina is a complex concept that includes recognizing that we are an integral part of the ʻāina and the ʻāina is an integral part of us.").

[90] Coffey & Tsosie, *supra* note 78, at 205. *See also* Anaya, *Native Hawaiians and International Human Rights Law, supra* note 33, at 346.

[91] Preface to Haunani-Kay Trask, Light in the Crevice Never Seen (1994).

an intricate land system that solidified the emotional and spiritual attachment between people and place and sustained "identity, continuity, and well-being as a people."[92] Lands also provided and continues to offer a means of self-determination because a land base allows Indigenous Peoples to live and develop freely in order to pursue their cultural and political sovereignty.[93] The foundational concepts of mĀlama ʻĀina (to care for, protect, preserve)[94] and aloha ʻĀina (profound love of the land)[95] are a piko (umbilicus; convergence) at the very core of Kānaka Maoli identity and spirituality, and have inspired legal and political movements to seek justice for Kānaka and our resources.

Because these ancestral resources and relationships serve as a critical foundation for sustenance, health, spiritual strength, well-being, and ultimately political empowerment, a developing contextual framework for Indigenous Peoples should directly analyze history and current socio-economic considerations to understand whether a particular action "perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way."[96] This is especially important given that "the histories that have been constructed about Native people are often inaccurate and have been used to justify the dispossession of Native peoples from their lands, resources, and even their cultural identity."[97]

3. Mauli Ola: Social Determinants of Health and Well-Being

Ka lā i ka Mauliola.
The sun at the source of life.
Mauli-ola (Breath-of-life) is the god of health.[98]

The term "mauli ola" encompasses a holistic understanding of ʻŌiwi mental, physical, and spiritual health and well-being as the balance

---

[92] Kekuewa Kikiloi, *Rebirth of an Archipelago, in* Hūlili: Multidisciplinary Research on Hawaiian Well-Being 6, 75 (2010).

[93] Angela R. Riley, *Good (Native) Governance*, 107 Colum. L. Rev. 1049, 1063 n.79 (2007) ("[T]erritorial and political sovereignty are inextricably linked with cultural sovereignty[,] and . . . cultural devastation is [a] likely consequence if tribes lose [the] ability to live in separate, self-governing communities.").

[94] Renowned scholar-activist Lilikalā Kameʻeleihiwa described this cultural value as the "first lesson of Wākea." Lilikalā Kameʻeleihiwa, Native Lands and Foreign Desires: Pehea Lā E Pono Ai? 33 (1992).

[95] Political Science Professor Noelani Goodyear-Kaʻōpua suggests thinking about aloha ʻāina as a multiplicity of land-centered literacies, which extends "outmoded understandings of literacy as simply about reading and writing printed text" to "include the ways Kānaka ʻŌiwi developed practices of reading the stars and other celestrial bodies and events; offering chants in our own human language and then observing and finding meaning in the responses of winds, rains, birds, waves, or stones; and writing ourselves into the landscape by drawing water through irrigation ditches to loʻi kalo and then back to streams." Noelani Goodyear-Kaʻōpua, The Seeds We Planted: Portraits of a Native Hawaiian Charter School 34 (2004).

[96] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 181.

[97] Coffey & Tsosie, *supra* note 78, at 200.

[98] Pukui, *supra* note 6, at 154.

between akua, Kānaka, and ʻĀina. With the understanding that the well-being of Native communities is tied first and foremost to a strong sense of cultural identity that links people to their homeland,[99] this value also takes into account various social determinants, which include the complex and interconnected systems, circumstances, environments, and institutions that contribute to or harm the health, economic self-sufficiency, and education of individuals and communities.

Contextual legal analysis here considers "two distinct but related historical phenomena that result in most indigenous communities living in an economically disadvantaged condition."[100] First, the progressive plundering of Indigenous Peoples' lands and resources, which has devastated Kānaka Maoli and other Native economies and subsistence lifestyles; and second, the patterns of discrimination that have excluded Indigenous communities from accessing social benefits available to others. Upon the arrival of foreigners in Hawaiʻi, the Native Hawaiian population was decimated, plummeting from about a million to less than 40,000 within the first century of contact.[101] During the islands' subsequent colonization, many Kānaka Maoli did not obtain western title to their ancestral homelands and became members of the "floating population crowding into the congested tenement districts of the larger towns and cities of the Territory under conditions which many believed would inevitably result in the extermination of the race."[102] Today, Kānaka Maoli continue to live the legacy of this devastation and displacement, and rank last in many wellness indicators.[103]

The third value of contextual inquiry for Indigenous Peoples therefore requires analysis of whether a decision has "the potential to improve health, education, [] living standards," and other social conditions.[104] This type of analysis seeks to explore whether a given action or decision improves social determinants of health and well-being or perpetuates the status quo.

---

[99] Kikiloi, *supra* note 92, at 75.

[100] Anaya, *Native Hawaiians and International Human Rights Law, supra* note 33, at 352–53 (citations omitted); *see also* Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 Harv. L. Rev. 1751, 1760–61 (2003).

[101] *See* O.A. Bushnell, The Gifts of Civilization: Germs and Genocide in Hawaiʻi 132–54 (1993) (detailing the impact of foreign diseases on the Maoli population); *see generally* David E. Stannard, Before the Horror: The Population of Hawaiʻi on the Eve of Western Contact (1989).

[102] Anaya, *Native Hawaiians and International Human Rights Law, supra* note 33, at 315 (quoting Native Hawaiian Rights Handbook 44 (Melody MacKenzie ed., 1991)).

[103] According to a 2018 report based on recent census data, of the five largest racial groups in Hawaiʻi, Native Hawaiians have the highest poverty rates for individuals and families. State of Hawaiʻi Department of Business, Economic Development and Tourism, Demographic, Social, Economic, and Housing Characteristics for Selected Race Groups in Hawaii 13 (2018); see *also* Office of Hawaiian Affairs, KānehŌʻālani: Transforming the Health of Native Hawaiian Men (2017); Office of Hawaiian Affairs, Haumea: Transforming the Health of Native Hawaiian Women and Empowering Wāhine Well-Being (2018).

[104] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 182–83.

4. Ea: Self-Governance

"E mau ke Ea o Hawaii i ka Pono."
The life and sovereignty of Hawai'i must continue in pono—justice, balance, goodness.
Kahalemauna, "Mau Hawaii i ka lanakila" (1895)[105]

The above mele, written after the illegal overthrow of the Hawaiian Kingdom, took King Kamehameha III's 1843 proclamation—"Ua mau ke ea o ka 'Āina i ka pono," or "the sovereignty of the land continues through justice"[106]—and reframed it as a command.[107] Ea refers to political independence and also carries the meanings "life" and "breath."[108] It also describes emergence, such as volcanic islands from the depth of the ocean, extending back to the birth of the land itself.[109] Ea can also be understood as a tool that facilitates guidance and navigation—in the same way that the ea of a boat is the steering blade, the ea of Hawai'i and its Native people is self-governance.[110] Through the dispossession of

[105] Kahalemauna, "Mau Hawaii i ka lanakila," *in* Buke Mele Lāhui 15 (F. J. Testa ed., 1895).

[106] The term ea first became associated with state-based forms of governance or sovereignty when King Kamehameha III made this famous proclamation upon restoration of the Kingdom government after a five-month occupation by the British in 1843. Hawaiian language scholars call attention to the fact that the king did not reaffirm the sovereignty of the government (ke ea o ke aupuni) but rather the sovereignty and life of the land itself. Noelani Goodyear-Ka'Ōpua, *Introduction*, *in* A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty 4 (Goodyear-Ka'Ōpua et al. eds., 2014). This translation disrupts the more popularly known version, adopted as the state government's motto in 1959 ("The life of the land is perpetuated in righteousness"), which does not fully honor the historical context of the Kingdom's independence and the longer lineage of 'Ōiwi autonomy in these islands. For more on the development and use of the term ea in the political context, see *id.* at 3–7.

[107] Subsequent compositions echoed this sentiment, transforming Kauikeaouli's famous saying to the future imperative tense. *See* Alvin Kaleolani Isaacs, "E Mau" (1941) ("Ho'Ōla ka nani o ka 'āina e ho'Ōla; Ho'Ōla a ho'oulu lā a ho'olaha; I mau ka ea o ka 'āina i ka pono" translated as "Restore the goodness of the islands, restore them; Restore, build, and sustain them throughout the world; So that righteousness will fill the land once again"), *available at* www.huapala.org.

[108] "Unlike Euro-American philosophical notions of sovereignty, ea is based on the experiences of people on the land" and is an active state of being that "requires constant action day after day, generation after generation." Goodyear-Ka'Ōpua, *Introduction*, *supra* note 106, at 3–4. The restoration of ea confounds arbitrary distinctions between politics and culture, emerging from the idea that "[w]hen people explicitly assert the ways cultural practice is political, and political movement is cultural, Hawaiian social movements move forward." *Id.* at 12.

[109] *See* Goodyear-Ka'Ōpua, *Introduction*, *supra* note 106, at 4; Leilani Basham, *Ka Lāhui Hawai'i: He Mo'olelo, He 'Āina, He Loina, a He Ea Kākou*, *in* Hūlili: Multidisciplinary Research on Hawaiian Well-Being 6, 37–72 (2010). In examining Hawaiian songs and poetry, Basham highlights that "ea" is foregrounded within a prominent genealogical chant for Hawai'i: "Ea mai Hawaiinuiakea / Ea mai loko mai o ka po." The islands emerge from the depths, from the darkness that precedes their birth. Basham argues that, similarly, political autonomy is a beginning of life.

[110] In 1871, in a public speech celebrating Lā Ho'iho'i Ea (Sovereignty Restoration Day) honoring national independence after a temporary occupation by rogue British

Native lands and resources, the Maoli community has been deprived of its inherent right to cultural and political sovereignty, which are essential to the practice of self-governance.

Throughout what is now considered the United States, the systematic dispossession of Indigenous Peoples from their lands and other resources facilitated the loss of political autonomy, leaving many Native populations dependent upon the federal government. As Anaya put it:

> Because of [Native Peoples'] non-dominant positions within the states where they live, indigenous communities and their members typically have been denied full and equal participation in the political processes that have sought to govern them. Even as indigenous individuals have been granted full rights of citizenship and overtly racially discriminatory policies have diminished, the persistent condition of indigenous groups is typically that of economically disadvantaged numerical minorities. This condition, shared by Native Hawaiians, is one of political vulnerability.[111]

In response, international human rights law recognizes Indigenous Peoples' unique relationship to their lands and resources and has attempted to define rights of self-government and cultural protection.[112] Still, "the nation-states (including the United States) have refused to recognize Indigenous Peoples' rights to self-determination—the realization of a separate autonomous political existence that would limit or constrain the ability of the colonizing nations to control the political existence of Indigenous Peoples."[113] For example, not dissimilar from other places around the world, the history of Hawai'i "is a story of violence,

---

agents, Davida Kahalemaile asked: "Heaha la kea no o ia hopunaolelo, 'Ka la i hoihoiia mai ai ke Ea o ko Hawaii Pae Aina"? ("What is the meaning of this phrase: day the ea of the Hawaiian archipelago was returned?"). He answered this rhetorical question with the following list:

Ke ea o na i-a, he wai.	The ea of fish is water.
Ke ea o ke kanaka, he makani.	The ea of humans is wind.
O ke ea o ka honua, he kanaka.	The ea of the earth is the people.
Ke ea o ka moku, he hoeuli.	The ea of a boat is the steering blade.
Ke ea o ko Hawaii Pae Aina . . .	The ea of the Hawaiian archipelago, it is the government.

Oia no ka noho Aupuni ana.

In this sense, ea refers to the mutual interdependence of all life forms and forces. Kahalemaile emphasizes that ea is necessary for life and that political independence is necessary for the well-being of Kānaka Maoli. Goodyear-Ka'Ōpua, *Introduction*, *supra* note 106, at 5. For a fuller explanation, see Basham, *supra* note 109, at 68.

[111] Anaya, *supra* note 33, at 356.

[112] Coffey & Tsosie, *supra* note 78, at 198.

[113] *Id.* As a driving force of the decolonization movement, self-determination was often understood as a right for colonized peoples to break away from the colonial states and establish their own political entities. Today, there is an increasing movement towards the recognition of self-determination as comprising a right to effective political participation within states' borders or as running parallel to state sovereignty. Echo-Hawk, *supra* note 60, at 44; *see also* Jeremie Gilbert, Indigenous Peoples' Land Rights Under International Law: From Victims to Actors 217 (2d ed. 2016).

in which that colonialism literally and figuratively dismembered the lahui (the people) from their traditions, their lands, and ultimately their government."[114]

Given this painful history, a developing contextual legal framework for Native claims must consider "whether a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance."[115] Time and again, "the law often replicates the same script portrayed in American history."[116] This is especially important because histories written by non-Native "people to justify the colonial conquest and dispossession of Native people continue to provide the truth in cases where Native testimony is perceived as biased and non-Native experts are seen as unbiased purveyors of truth."[117] Indeed, an integral part of restoring self-governance is reclaiming the power to tell our own stories.[118] As scholar Linda Tuhiwai Smith (NgĀti Awa and NgĀti Porou, MĀori) explained in her groundbreaking work *Decolonizing Methodologies*:

> Indigenous peoples want to tell our own stories, write our own versions, in our own ways, for our own purposes. It is not simply about giving an oral account or a genealogical naming of the land and the events which raged over it, but a very powerful need to give testimony to and restore a spirit, to bring back into existence a world fragmented and dying.[119]

Indeed, the recounting of history—"who tells it, how it is told, which stories are shared, the nuances and the complexities, the language

---

[114] Osorio, *supra* note 15, at 3.

[115] Sproat, *Wai Through Kānāwai*, *supra* note 2, at 185.

[116] Coffey & Tsosie, *supra* note 78, at 198.

[117] *Id.*

[118] A growing body of literature by ʻŌiwi scholars is revising Hawaiian history through a Native lens, casting Kānaka Maoli in a central role as shapers of our history, rather than victims of an imposed set of ideas and actions by others. *See, e.g.*, Noenoe K. Silva, Aloha Betrayed: Native Hawaiian Resistance to American Colonialism (2004) (documenting Native resistance to colonialism, particularly the overthrow and annexation); Silva, The Power of the Steel-Tipped Pen, *supra* note 12 (reconstructing ʻŌiwi intellectual history by examining the work of two lesser-known Hawaiian writers); Beamer, *supra* note 42 (discussing the Māhele as a means to secure the land rights of Kānaka Maoli); Arista, *supra* note 42 (reconfiguring a simplistic colonial historiography by exploring Hawaiian deliberations over law and governance); Brown, *supra* note 8 (chronicling the life and contributions of a nineteenth-century statesman); David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016) (tracing how Kānaka Maoli explored the outside world and generated their own understandings in the century after western contact); Kealani Cook, Return to Kahiki: Native Hawaiians in Oceania (2018) (shedding light on Native Hawaiians' efforts to develop relationships with Pacific Islanders).

[119] Smith, *supra* note 44, at 28. *See also* Edward Said, Culture and Imperialism xii-xiii (1993) ("[Stories are] the method colonized people use to assert their own identity and the existence of their own history. The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future—these issues were reflected, contested, and even for a time, decided in narrative.").

used—can enlighten, restore, and inspire healing and reconciliation. Or, incite destruction."[120] Just as moʻolelo (traditional stories) cannot be divested of their cultural, political, and historical context, which breaks epistemological connections and results in the loss of ancestral knowledge, these legal and political narratives must be read and understood in context. This is particularly true when examining controversial cases, such as the Hawaiʻi Supreme Court's 2018 decision allowing construction of the TMT to proceed atop Maunakea ("*Mauna Kea II*"). Prominent legal scholar Eric Yamamoto has noted that "relatively few court cases singularly produce transformations in socio-cultural practices and in consciousness. Those that do tend to occur when the legal dispute is reflective of a larger on-going social-political controversy."[121] *Mauna Kea II* is one of those seminal cases.

IV. The Law and Resistance at Maunakea

Hānau ka Mauna, he keiki mauna na Wākea
Born is the Mauna, a mountain-child of Wākea.[122]

Born of the union between Papa and Wākea, Mauna a Wākea is an elder sibling of Hāloa, the first aliʻi, and is known as wao akua (the realm of the gods).[123] Hawaiʻi's tallest mountain and a place considered sacred to Kānaka Maoli, Maunakea is also considered the piko (umbilicus; convergence) of the island child Hawaiʻi, which ties the earth to the heavens. In recent years it has also become the center of a protracted struggle over contested meanings of land, scientific progress, and meaningful "consultation" with Indigenous communities, becoming what ʻŌiwi philosopher Manulani Meyer calls a "perfect example of clashing cosmologies."[124]

The impending construction of the massive TMT in the conservation district atop Maunakea has become a rallying cry for an emerging generation of Maoli activists. It has galvanized support for Indigenous movements for the protection of land and water both within and beyond

---

[120] MacKenzie & Sproat, *supra* note 7, at 482. *See also* David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 Temp. Pol. & Civ. Rts. L. Rev. 1 (2006) (demonstrating the power of a particular historical narrative in rendering the law as an instrument of colonial domination); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1988) (examining the use of "counterstorytelling" in the struggle for racial reform).

[121] Eric K. Yamamoto et. al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. Haw. L. Rev. 1, 18 (1994).

[122] "He Kanaenae No Ka Hanau Ana o Kauikeaouli," *Ka Naʻi Aupuni* (Feb. 10, 1906). An excerpt from a birth chant written for Kauikeaouli, born in 1813, who would become one of the most important rulers of the 19th century. Infused with multiple layers of meaning, this chant illustrates the direct familial relationship between Kānaka Maoli and Mauna a Wākea.

[123] Leon Noʻeau Peralto, *Mauna a Wākea: Hānau Ka Mauna, the Piko of Our Ea*, *in* A Nation Rising, *supra* note 106, at 234.

[124] *Mauna Kea: Temple Under Siege* (Nā Maka o ka ʻĀina, 2006), https://oiwi.tv/oiwitv/mauna-kea-temple-under-siege.

our shores.[125] If built, the TMT would be the tallest building on Hawai'i Island, eighteen stories high and occupying over five acres of land at the mountain summit, which is significantly larger than anything already built on the mauna (mountain). For many years, community advocates and cultural practitioners had been "working to assert and protect their genealogical connections to elements and deities of the mountain against an expanding footprint of astronomical observatories and telescopes."[126] And in 2015, the disruption of the TMT groundbreaking ceremony and arrest of 31 kia'i (protectors or guardians) brought international attention to the conflict.

With the Hawai'i Supreme Court's 2018 decision allowing construction to proceed and with all legal obstacles cleared, the TMT project was set to begin construction in summer 2019. On July 17, 2019, hundreds watched (thousands through social media) as state police arrested more than thirty revered kūpuna (elders) who formed the front line across Mauna Kea Access Road, blocking heavy equipment from reaching the summit area. Along with the kūpuna, an educated young generation of activists, the products of the cultural and educational resurgence born from the 1970s Hawaiian Renaissance, came to be a driving force of the movement.

The Royal Order of Kamehameha officially designated five acres around Pu'uhuluhulu, which sits directly across from the Mauna Kea Access Road as a pu'uhonua (refuge), which has historically served as a space of protection and protection during contentious times. This pu'uhonua at the base of Maunakea quickly became the piko of a cultural resurgence and the rebuilding of a nation, caring for thousands of Kānaka and their supporters over several months. Ceremonial protocols were practiced three times a day, the first time Kānaka have collectively observed cultural protocol with such discipline in two hundred years, since the end of the 'ai kapu (traditional kapu system governing contact between men and women) in 1819.[127] There was a medical tent, field kitchen feeding those camping and those visiting for the day, recycling bins, portable toilets, even a university that offered classes taught by scholars and practitioners on a range of topics. One Maoli scholar likened the rising of this noncapitalist community grounded in living Hawaiian cultural practices to the kupukupu ferns that grow from cracks in the lava rock and unfurl toward the sun.[128]

All of this was possible through strict adherence to kapu aloha, a disciplined approach to civil disobedience rooted in kuleana and an evolving code of conduct that is culturally informed by Maoli ontologies.

[125] Sproat & Tuteur, *supra* note 49.

[126] Noelani Goodyear-Ka'Ōpua, *Protectors of the Future, not Protestors of the Past: Indigenous Pacific Activism and Mauna a Wākea*, 166 The South Atlantic Quarterly 184, 188 (2017).

[127] For more information see Kame'eleihiwa, *supra* note 94.

[128] Noelani Goodyear-Ka'Ōpua, *Protecting Maunakea is a Mission Grounded in Tradition*, ZORA, Sept. 5, 2019.

It is expressed politically through nonviolent direct action and ceremonially through cultural practice. The term "kapu aloha" comes from the merging of two foundational Hawaiian words: kapu (to set apart; to prohibit; to make sacred or holy) and aloha (to love; show mercy; to have compassion upon). Strictly enforced by respected kupuna, nothing lawless, impulsive, or disrespectful is allowed under kapu aloha: no drugs, no weapons, no violence, no unkindness, not even to the police in riot gear.[129] The message of kapu aloha and the reach of the movement spread far beyond the Maunakea encampment. People marched on every island, cars gathered in convoys, students walked out of classes, and a new generation of activism was born. It also inspired and fueled movements to stop other controversial projects and protect land and resources across ka pae ʻĀina (the archipelago).[130]

A. *Contextual Analysis of the Mauna Kea II Decision*

After several years of contested case hearings and court appeals, in October 2018, the Hawai ʻi Supreme Court issued a split decision upholding the Board of Land and Natural Resources' (BLNR's) issuance of a Conservation District Use Permit allowing construction of the TMT to proceed.[131] The following analysis of this decision, using the contextual legal framework described above, demonstrates that failure to fully consider cultural, social, and historical context, as well as the role of politics, hinders the court's capacity to render just decisions and provide either a balanced perspective or a genuine vehicle to address legal and cultural harms.

1. Moʻomeheu: An Overly Narrow Interpretation of Cultural Practices

The majority opinion undermines established Native Hawaiian rights in two ways that could impact future legal controversies involving Native claims. First, it implicitly suggests that Maoli cultural practices are stuck in the past. Second, it arbitrarily limits a court or agency's required

[129] Still, despite overwhelming evidence of the safety and order present at the Maunakea encampment and other demonstrations, government officials distributed misinformation to undermine the credibility of protectors.

[130] *See* Jennifer Sinco Kelleher, *Telescope protest inspires more Native Hawaiian activism*, ABC News (Nov. 16, 2019), *https://abcnews.go.com/US/wireStory/telescope-protest-inspires-native-hawaiian-activism-67067612*.

[131] *Mauna Kea II*, 143 Hawai ʻi 379 (as amended Nov. 30, 2018). Shortly after the court's decision, Earthjustice, law professor Melody Kapilialoha MacKenzie, and former Hawai ʻi Supreme Court justice Robert Klein, on behalf of cultural practitioner group Kua ʻāina Ulu ʻAuamo and two Office of Hawaiian Affairs trustees, filed an amicus curiae brief urging the court to correct critical errors in the majority opinion that undercut established legal protections for environmental and Native Hawaiian rights. Although the court deleted two problematic footnotes related to Native Hawaiian rights, it did not change its flawed analysis of the public trust doctrine. For more, *see also* Isaac Moriwake, *Hawai ʻi High Court Fixes Flawed Footnotes in Mauna Kea Decision, but Problems Persist*, Earthjustice (Dec. 21, 2018), https://earthjustice.org/from-the-experts/mauna-kea-thirty-meter-telescope-hawaii-supreme-court.

analysis of impacts on Native Hawaiian cultural practices to a specific project site, which disregards any and all impacts beyond a project's physical "footprint."

Though the majority opinion began by describing the cultural significance of the mauna in beautiful, even poetic, terms, the potential ramifications of the final sentence of the following paragraph are troubling:

> The summit of Mauna Kea is thought to touch the sky in an unique and important way, as a piko (navel) by which connections to the ancestors are made known to them, or as the piko ho'okahi (the single navel), which ensures spiritual and genealogical connections, and the rights to the regenerative powers of all that is Hawai'i. The large number of shrines on Mauna Kea indicate that there was a pattern of pilgrimage, "a walk upward and backward in time to cosmological origins," to worship the snow goddess Poli'ahu and other akua such as Kūkahau, Līlīnoe, and Waiau. As discussed later, various Native Hawaiian traditional and customary practices are *derived from* these beliefs, which have also led to *related contemporary cultural practices* [emphases added].[132]

Framing today's "contemporary" practices as "derived" from cultural beliefs about the sanctity of Maunakea suggests a worrying distinction between "traditional" practices and those of today. This characterization is contrary to legal and cultural understandings that Maoli practices must be allowed to evolve in contemporary times in order to support a living culture. Although Hawai'i case law establishes that practitioners must demonstrate that a particular practice existed prior to 1892, this does not mean that traditional and customary rights are frozen in time and cannot take on new forms. Indeed, in the Declaration on the Rights of Indigenous Peoples, the United Nations affirmed that Native Peoples retain the right to "practice and revitalize their cultural traditions and customs[,] . . . includ[ing] the right to maintain, protect and develop the past, present and future manifestations of their cultures."[133] It also shows how painting Indigenous peoples as "relics of the past, . . . mere vestiges of a quickly fading and increasingly irrelevant past" is a strategy used to normalize continued appropriation of ancestral lands and waters.[134]

The second point of analysis under this value considers the court's analysis of whether the BLNR properly discharged its duties under a framework established in the 2000 Hawai'i Supreme Court decision *Ka Pa'akai o ka 'Āina v. Land Use Commission*, designed to effectuate Article XII § 7 of the Hawai'i Constitution and protect rights traditionally and customarily exercised by Native Hawaiians for subsistence, cultural and religious purposes. The *Ka Pa'akai* framework "places an affirmative duty on the State and its agencies to preserve and protect traditional

---

[132] *Mauna Kea II*, 143 Hawai'i at 385 (2018).

[133] G.A. Res. 61/295, U.N. Doc. A/RES/61/295 United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[134] Goodyear-Ka'Ōpua, *Protectors of the Future, not Protestors of the* Past, *supra* note 126, at 184.

and customary native Hawaiian rights, and confers upon the State and its agencies 'the power to protect these rights and to prevent any interference with the exercise of these rights.'"[135]

The three-part test requires a state or county agency to determine: (1) the identity and scope of "valued cultural historical, or natural resources" in the petition area, including the extent to which traditional customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the agency to reasonably protect such practices if they are found to exist.[136] In the *Mauna Kea II* decision, in reviewing the first step of the *Ka Pa'akai* framework, the majority focused on the BLNR's finding that there was "no evidence . . . of Native Hawaiian cultural resources or [traditional and customary] practices, within the TMT Observatory site and the Access Way, which it characterized as the relevant area."[137] After concluding that the TMT would not impact any cultural practices in the summit area because the telescope would not be visible from specific culturally sensitive areas on the summit, the majority reinforced its limited analysis to the project site, stating that "Native Hawaiian rights were not found to have been exercised in the relevant area, so the third [*Ka Pa'akai*] requirement was not required to be addressed."[138] Substantial evidence in this case, however, indicates potentially affected cultural resources, practices, and rights not only at and near the TMT project site, but throughout the summit region. Further, there is no legal authority suggesting that analysis of impacts to cultural practices should be limited to a specific project site.

Although the court acknowledged that the summit is the piko through which spiritual and genealogical connections are sustained, its limited analysis meant that it did not reach the question of whether construction of the TMT would impair practitioners' ability to conduct cultural protocols and other practices. This articulation of the *Ka Pa'akai* analysis—confined only to a specific project footprint as defined by the applicant and approving agency—diverges from settled law and unduly restricts the scope of Native Hawaiian rights and their legal protections. The majority's narrow framing failed to acknowledge the well-known, tragic history of repeated restrictions on Native Hawaiian rights and a legal system that continues to favor private property owners over cultural practitioners.

Justice Michael Wilson wrote a sharp dissent, asserting that the BLNR grounded its analysis on the proposition that the degradation to the summit area was so substantially adverse that the addition of the

---

[135] *Ka Pa'akai o ka 'Āina v. Land Use Commission* (*"Ka Pa'akai"*), 94 Hawai'i 31, 45 (2000).
[136] *Id.* at 1084.
[137] *Mauna Kea II*, 143 Hawai'i 396 (2018).
[138] *Id.* at 397.

TMT would have no substantial adverse effect, calling this the "degradation principle."[139] He warned that the degradation principle "renders inconsequential the failure of the State to meet its constitutional duty to protect natural and cultural resources for future generations."[140] Indeed, although many have framed the Maunakea controversy as a battle between science and culture,[141] what it is really about is the state's continual failure, and in this case refusal, to uphold its duty to respect and protect cultural practices and to follow through on its commitment to restorative justice for Kānaka.

2. ʻĀina: A Refusal to Put Preservation Before Private Use

As to the second value—lands and resources—the majority opinion complicates and confuses Hawai'i's public trust doctrine and ignores that the conservation land at the summit area is considered "public trust lands" or "ceded lands," which the state is mandated to hold in trust specifically for Kānaka Maoli. Both the public trust doctrine and the public lands trust are grounded in cultural values of kuleana and mĀlama (to care for, preserve, protect)[142] and are key tenets of the state's legal commitment to restorative justice for Kānaka Maoli.

Article XI § 1 of the State Constitution articulates the public trust doctrine, which requires government decision-makers to protect "all public natural resources" including "land, water, air, minerals and energy sources." Although the public trust doctrine has been well developed in the context of Hawaiʻi's fresh water resources, it has not been applied and litigated as extensively in other areas. The majority begrudgingly ruled that the doctrine applies to the summit area because it is zoned as "conservation land," but did not fully apply established public trust principles that require preservation of the resource for public benefit above any private use. The court's failure to correct BLNR's erroneous perception of the public trust, which diminished the mandates of protection and conservation in favor of a preference for maximum "public benefits," turns a blind eye to the public trust doctrine's grounding in Maoli perceptions of kuleana and leaves open the possibility for further confusion in this area. In his concurring opinion, Justice Richard Pollack underscored this point, arguing that "neither the text nor the history of article XI, section 1 provides for differing levels of protection for individual natural resources, such as water as compared to land, and this court should not establish artificial distinctions without a compelling basis for doing so."[143]

---

[139] *Id.* at 421–22 (Wilson, J., dissenting).

[140] *Id.* at 423 (Wilson, J., dissenting).

[141] *See, e.g.*, Rosie Alegado, *Worldview: Opponents of the Thirty Meter Telescope fight the process, not science*, 572 Nature 7 (Aug. 2019).

[142] Pukui & Elbert, Hawaiian Dictionary, *supra* note 6, at 232.

[143] *Mauna Kea II*, 143 Hawaiʻi at 410 (2018) (Pollack, J., concurring). It is important to note that Justice Pollack began the PŌhakuloa opinion, another high-profile case concerning Native Hawaiian rights, with the public trust doctrine. See *Ching v. Case*, 145 Hawaiʻi 148, 152 (2019).

Second, the majority in *Mauna Kea II* brushed over the fact that this land is part of the "ceded lands" or "public lands trust" corpus,[144] which includes 1.8 million acres of Hawaiian Kingdom Government and Crown lands confiscated by the Republic of Hawai'i as part of the 1893 illegal overthrow and then "ceded" by the Republic to the U.S. government.[145] In 1959, the U.S. Congress passed the Statehood Admission Act, which transferred about 1.4 million acres of these lands to the State of Hawai'i to be held in a public land trust.[146] The State of Hawai'i accepted the trust and responsibility as a condition of statehood. At the 1978 Constitutional Convention, members of the Hawaiian Affairs Committee looked closely at the Admission Act's trust language as it relates to Kānaka Maoli and pushed for provisions committing the state to fulfill the trust's purposes. Article XII was passed to ensure that the majority of those lands would be held by the state "as a public trust for native Hawaiians and the general public."[147]

Constitutional provisions governing management of these lands, as well as case law and legislative history, makes clear that these specific lands are imbued with a unique history that requires caring for them until they are returned to Kānaka Maoli. The *Mauna Kea II* decision barely acknowledges this kuleana in a footnote, noting that although the petitioners raised arguments based on permissible uses of these lands, they did not allege a specific violation of the constitutional provisions governing them, meaning the court was not required to address the issue.[148] Contextual analysis demonstrates that by dodging the larger issue – the government's duty to properly care for and then eventually return these lands – the court avoided any attempt to redress historical injustices in a significant way.

---

[144] Although commonly referred to as "ceded lands," some refer to them as "seized lands" or "Hawaiian national lands" to highlight the illegal nature of the land transfer and to highlight that Kānaka maintain claims to these lands.

[145] Melody Kapilialoha MacKenzie, *Public Lands Trust*, *in* Native Hawaiian Law: A Treatise 79 (Melody K. MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015).

[146] Section 5(f) of the Admission Act reads: "The lands granted to the State of Hawaii . . . together with the proceeds from the sale or other disposition . . . and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use." Hawai'i Admission Act, Pub. L. No. 86–3, sec. 5(f) (1959).

[147] Haw. Const. art. XII, § 4. It also created the Office of Hawaiian Affairs (OHA), an administrative agency that was to "hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians" and provided that the income and proceeds from a pro rata portion of the trust lands was to go to OHA for these purposes. Haw. Const. art. XII, § 5, 6.

[148] *Mauna Kea II*, 143 Hawai'i 379, 401 n.24 (2018).

3. Mauli Ola: An Exaggeration of the TMT's Contributions to Community Well-Being

Because the majority in *Mauna Kea II* ruled that there are no traditional and customary practices conducted in the "TMT project area," it did not reach the question of whether construction of the TMT would inflict spiritual harm on cultural practitioners and the Hawaiian community. Although the court acknowledged that the summit is the piko through which spiritual and genealogical connections are sustained, it did not ultimately conclude that desecration of the area would result in damage to those relationships.

Instead, it focused on so-called "community benefits" offered up by the University of Hawai'i System (UH) and TMT. In addition to sublease rent to the University and $2.5 million for student grants and scholarships, the court emphasized that the package will also provide "$1 million annually for this program" and will create "a workforce pipeline program that will lead to a pool of local workers trained in science, engineering, and technical positions available for employment in well paid occupations."[149] The court therefore concluded, based on these promises, that use of the land by TMT is "consistent with conservation and in furtherance of the self-sufficiency of the State."[150]

Opponents contend that these community benefits are grossly overstated, and that the vast majority of expenditures will be spent outside Hawai'i. Based on TMT's own reporting, the majority of high-paying jobs would be located in California, with very little money actually staying in Hawai'i.[151] Thus, a more contextual analysis of this value reveals that TMT will not bring enough benefit to Hawai'i and to Kānaka Maoli in particular to "justify" the permanent desecration of a sacred site, as the Hawai'i Supreme Court seems to suggest.

4. Ea: An Extension of Colonial Suppression

This court ruling, coupled with the state and UH's continued refusal to take cultural concerns seriously, is emblematic of a long history of asking Kānaka to accommodate "progress" at the expense of our relationship to 'Āina.[152] The decision reinforced the Maoli community's distrust of state government, with many calling for the removal of UH

---

[149] *Id.* at 431.

[150] *Id.*

[151] Trisha Kehaulani Watson, *It's Time For UH To Walk Away From TMT*, Honolulu Civ. Beat (Mar. 20, 2019), https://www.civilbeat.org/2019/03/trisha-kehaulani-watson-its-time-for-uh-to-walk-away-from-tmt.

[152] At a panel discussion, in response to then Hawai'i County Mayor Harry Kim's suggestion that Hawaiians agreeing to the TMT would be a symbol to the world of peaceful relations, Kanaka Maoli attorney Camille Kalama asked why Kānaka are always asked to bear the burden, and proposed instead that it would be a better symbol if the state government actually listened to its constituents. Panel Discussion on "The Future of Management at Mauna Kea" in Honolulu, Hawai'i (March 8, 2019).

as trustee in light of its longstanding and well-documented mismanagement.[153] In the aftermath of the court decision, Maunakea movement leader Kahoʻokahi Kanuha articulated: "Just because it's 'legal' doesn't make it right," expressing a deeply-held distrust of the judicial system that is common in Hawaiian communities.

It is crucial to note, however, that Kānaka Maoli have never accepted these legal decisions as the final word. Civil disobedience has been a key part of Hawaiian activism since the illegal overthrow of the Kingdom in 1893, and took on a renewed urgency and vitality during the Hawaiian Renaissance of the 1970s.[154] For the past decade or so, most civil disobedience in Hawaiʻi has been focused on blocking the construction of telescopes of the sacred summits of Maunakea and Haleakalā.[155] Since then, the momentum from the mauna has carried over into grassroots movements opposing projects that had received legal approval, but had ignored concerns voiced by the community.[156] At their core, these resistances are not simply about a telescope, a park, or wind turbines, they are about the persisting legacies of colonialism, and the state government's refusal to take Hawaiian perspectives seriously.[157] And they will continue to shape the law in to the future. Law professors Mari Matsuda and Charles Lawrence have characterized the Kānaka on the front lines

---

[153] In 2017, the Office of Hawaiian Affairs sued the state and University of Hawaiʻi over claims of "longstanding and well-documented mismanagement" of Mauna Kea. Chad Blair, *OHA Sues Sate, UH Over 'Longstanding Mismanagement' of Mauna Kea*, Honolulu Civ. Beat (Nov. 8, 2017), https://www.civilbeat.org/2017/11/oha-sues-state-uh-over-longstanding-mismanagement-of-mauna-kea.

[154] There are too many examples to cover, but some of the best known and most impactful instances include the following. In 1971, nearly three dozen Hawaiian activists were arrested in Kalama Valley in east Oʻahu while peacefully protesting the evictions of local pig farmers, considered by many to be the beginning of the Hawaiian cultural renaissance. Haunani-Kay Trask, *Birth of the Modern Hawaiian Movement*, 21 Haw. J. of Hist. 126 (1987). In 1977, more than 200 people blocked traffic and successfully halted evictions in Waiāhole-Waikāne for a huge 7,000-unit planned development. Perhaps the most famous example of ʻŌiwi activism is the fight to regain control over the Navy target island Kahoʻolawe. Mākua Valley, another former military training range, has been the site of numerous arrests over the years. See Goodyear-Kaʻōpua, *supra* note 106, for several chapters on these various struggles.

[155] Anita Hofschneider, *Mauna Kea Is The Latest In Long History Of Native Hawaiian Protests*, Honolulu Civ. Beat (Aug. 30, 2019), *https://www.civilbeat.org/2019/08/mauna-kea-is-the-latest-in-a-long-history-of-native-hawaiian-protests/*.

[156] In September 2019, officers arrested dozens of protectors blocking construction equipment and crews from accessing Waimānalo Bay Beach Park, where a controversial $32 million redevelopment park project was underway. Then in October 2019, along Oʻahu's quiet North Shore, residents resisted the construction of eight massive wind turbines, each taller than downtown Honolulu's tallest skyscraper, in Kahuku.

[157] The months of frustration, first at Mauna Kea, then Kahuku and Waimānalo, coalesced in a passionate rally at the state capitol on opening day of the Legislature. Cassie Ordonio & Dan Nakaso, *Hawaiian protests move to state Capitol on opening day of business*, Honolulu Star-Advertiser (Jan. 16, 2020), *https://www.staradvertiser.com/2020/01/16/hawaii-news/hawaiian-protests-move-to-state-capitol-on-opening-day-of-business/*.

as truly law-makers, not law-breakers, observing that a shift in the legal landscape has always come about as a result of these movements.[158]

In sum, viewing the court's decision through a contextual legal framework tells us that Indigenous and other advocates must ensure that legal rules acknowledge and embody the key values of cultural integrity, lands and resources, social determinants of health and well-being, and self-determination. Absent this important tool, decision-makers will continue to deploy formalist methodologies to subvert Indigenous values and claims. More specifically, this decision and the aftermath of impending construction and resistance against it, reveals that compelling counter-narratives can provide clear legal and moral bases for Maoli justice struggles; specifically, legal claims to former Crown and Government Lands.

B. *Application of Contextual Inquiry Beyond Hawai'i's Shores*

The Maunakea controversy provides a timely example of how several issues around environmental justice and Indigenous rights are playing out in communities and in federal and state courts across the United States. First, it is emblematic of the larger nationwide struggle to refine and extend the public trust doctrine beyond water, specifically in terms of atmospheric trust litigation, with courts considering what should and should not constitute valid public uses of shared resources.[159] Second, Indigenous groups across the United States are arguing for expanded notions of environmental values and calling on courts to think more broadly about the costs of environmental degradation, including harms to community identification and emotional well-being.[160] Outside of the courts, such lawsuits have prompted greater public discourse about what environmental injuries look like for Native communities, and Indigenous groups are "communicating in very specific ways how environmental quality matters in these communities: to survival, to subsistence, to public health, but also in the intimate connection of spiritual practices to place."[161] Legal losses in *Mauna Kea II* and other landmark cases also

---

[158] Charles Lawrence & Mari Matsuda, *Civil Disobedience has changed the law*, Honolulu-Star Advertiser (Aug. 18, 2019), https://www.staradvertiser.com/2019/08/18/editorial/island-voices/civil-disobedience-has-changed-the-law.

[159] *See, e.g.*, Jenna Lewis, *In Atmosphere We Trust: Atmospheric Trust Litigation and the Environmental Advocate's Toolkit*, 30 Colo. Nat. Res., Energy & Env't. L. Rev. 361 (2019).

[160] Nina A. Mendelson, *Tribes, Cities, and Children: Emerging Voices in Environmental Litigation*, 34 J. Land Use & Env't. L. 237, 242 (2019).

[161] *Id.* at 242 (citing Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 Colum. J. Env't. L. 42, 47–48 (2014)). Legal scholar Robert Williams argues: "If the stories and narratives of [Native] peoples are to serve as effective and viable paths of resistance against our currently colonized environmental law, then the environmental racism which has been institutionalized at the deepest levels of our society must also be identified and confronted[.]" Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. Va. L. Rev. 1133, 1136 (1994).

lead many to question whether Kānaka Maoli and other Indigenous groups are without effective domestic legal remedies for conditions that, rooted in historical circumstances, constitute ongoing violations of their human rights.[162] This frustration has led some to look to international law and politics as an avenue to advocate for increased self-determination, improvement of living conditions, and better protection and management of natural resources.

V. Conclusion

For Kānaka, there is an expectation that the law be pono.[163] The ʻŌiwi community's relationship with western law has left this promise largely unfulfilled. Commentary by leading Hawaiian scholar Jon Osorio is particularly fitting here:

> Among all the conversions the Kanaka Maoli accepted from America, the one that proved most unreliable was the implicit promise accompanying the introduction of western laws—that justice is possible. More than 160 years later, our willingness to drape our future onto a legal frame demonstrates profound understandings of law and history. Regardless of the fact that law has changed the Native and may have created a being that is not entirely like our ancestors, law has also been made a part of our being, adopted and adapted to our view of ourselves and the world. Our experience with colonialism makes us wise in our understanding of the limits and promise of law.[164]

Indeed, a critical and more contextual analysis of the *Mauna Kea II* case demonstrates that despite seemingly strong legal protections for natural resources and cultural practices on paper, when politics come into play, the law can still be subverted to maintain destructive policies based on colonialism and capitalism. Still, from Maunakea to Standing Rock, Indigenous peoples around the globe are rising up against the privatization and degradation of vital natural and cultural resources. As Chamorro legal scholar Julian Aguon put it: "We are growing, evolving, and expanding our conceptions of justice. We are learning that the law cannot accommodate our stories, and that, accordingly the matter of our survival at law will depend on our ability to bend, stretch, think, imagine—in short, our ability to reanimate the law to reflect the real."[165]

---

[162] *See* S. James Anaya & Robert A. Williams, Jr., Study on the International Law and Policy Relating to the Situation of the Native Hawaiian People 32 (Indigenous Peoples Law and Policy Program, University of Arizona, James E. Rogers College of Law 2015), *available at https://www.oha.org/wp-content/uploads/OHA-IP-LP-Report-FINAL-09–09–15.pdf*.

[163] Pukui & Elbert, *supra* note 3, at 340 (defining pono and also providing the phrases "ka pono kahiko" for "the old morality or moral system" and "pono i ke kānāwai" for "legal, legality").

[164] Jonathon Kamakawiwo'ole Osorio, *Ku'e and Ku'oko'a (Resistance and Independence): History, Law, and Other Faiths*, 1 Haw. J.L. & Pol. 92, 113 (2004).

[165] Aguon, *supra* note 33, at 65.

Engaging in a more critical analysis of the law's real-life impact is a promising starting point for envisioning and realizing justice, particularly for Kānaka Maoli and other Indigenous peoples who are working to restore culture, communities, and some form of self-governance. By broadening and deepening our legal analysis, this developing framework facilitates reflection and discussion that are more aligned with cultural values and can encourage a more critical interrogation of how the law operates in our communities. The hope is that this contextual legal analysis, grounded in kuleana and a profound love of Hawai'i and her people, can serve as a springboard to spark dialogue about history, the present-day legal reality of Kānaka Maoli and other Indigenous Peoples, and the meaning of justice now and into the future.