

# The Indivisible ‘Ohana: Extending Native Hawaiian Gathering Rights to Non- Hawaiian Family Members

*Ryan Kananiokahome Poiekeala Kanaka ‘ole* \*

INTRODUCTION .....	146
I. THE HAWAIIAN ‘OHANA SYSTEM.....	148
A. <i>The General Concept of ‘Ohana</i> .....	148
B. <i>The Relevance of the Hawaiian ‘Ohana from Pre-Western         Contact Hawai‘i to Present Day</i> .....	149
C. <i>The Inclusive Nature of the Hawaiian ‘Ohana as Illustrated         through the Practice of Hānai</i> .....	154
D. <i>The Role of the Non-Hawaiian in the Hawaiian ‘Ohana</i> .....	156
II. THE LEGAL BASIS OF TRADITIONAL AND CULTURAL RIGHTS .....	158
A. <i>Statutory and Constitutional Sources of Traditional and         Customary Rights</i> .....	158
1. Section 7-1 of the Hawai‘i Revised Statutes .....	158
2. Section 1-1 of the Hawai‘i Revised Statutes .....	159
3. Article XII, Section 7 of the Hawai‘i State Constitution ..	159
B. <i>Judicial Interpretation of Traditional and Customary Rights</i> ..	160
1. <i>Kalipi v. Hawaiian Trust Co.</i> (1982) .....	160
2. <i>Pele Defense Fund v. Paty</i> (1992) .....	161
3. <i>Public Access Shoreline Hawai‘i v. Hawai‘i County             Planning Commission</i> (1995).....	162
4. <i>State of Hawai‘i v. Hanapī</i> (1998).....	163
5. <i>Pele Defense Fund v. The Estate of James Campbell             (2002)</i> .....	164
III. EXTENDING TRADITIONAL AND CUSTOMARY RIGHTS TO NON- HAWAIIAN MEMBERS OF THE ‘OHANA.....	166
A. <i>Extending Traditional and Customary Rights to Non-         Hawaiian Members of an ‘Ohana under the Hawai‘i State         Constitution</i> .....	166
B. <i>Extending Traditional and Customary Rights to Non-         Hawaiian Members of an ‘Ohana under the Hawai‘i Revised         Statutes</i> .....	169
1. Extending HRS Section 7-1 to Non-Hawaiian Members of an ‘Ohana .....	169

---

\* Juris Doctor, William S. Richardson School of Law; B.A., University of Hawai‘i at Hilo. I am deeply indebted to my ‘ohana for everything; Kaipoleimanu Ka‘awaloa for her patience and support; Ke Ali‘i Pauahi for providing the tools to pursue my dreams; my professors for their guidance; and my sources for allowing me to use their knowledge.

2. Extending the Hawaiian Usage Exception to Non-Hawaiian Members of Hawaiian 'Ohana .....	170
CONCLUSION.....	172

## INTRODUCTION

In Hawai'i, the right to access both government and privately owned lands for traditional and customary Native Hawaiian subsistence, cultural, and religious purposes is constitutionally protected.<sup>1</sup> These constitutionally protected traditional and customary rights<sup>2</sup> are essential to preserving the indigenous Native Hawaiian culture and maintaining Native Hawaiian identity. In a seminal gathering rights case, *Public Access Shoreline Hawaii v. Hawaii County Planning Commission* ("PASH"), the Hawai'i Supreme Court ("Court") used Native Hawaiian descent<sup>3</sup> as a threshold factor in determining whether an individual is entitled to assert traditional and customary rights.<sup>4</sup> The Court explicitly stated that Native Hawaiians were entitled to legitimately assert traditional and customary rights,<sup>5</sup> yet refused to decide whether non-Hawaiian members of an 'ohana<sup>6</sup> enjoyed the same rights as their relatives.<sup>7</sup> Although the Court

---

\* Juris Doctor, William S. Richardson School of Law; B.A., University of Hawai'i at Hilo. I am deeply indebted to my 'ohana for everything; Kaipoleimanu Ka'awaloa for her patience and support; Ke Ali'i Pauahi for providing the tools to pursue my dreams; my professors for their guidance; and my sources for allowing me to use their knowledge.

<sup>1</sup> Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246 (1995); see HAW. CONST. art. XII, § 7.

<sup>2</sup> The author uses the terms "traditional and customary rights," "PASH rights," and "gathering rights" synonymously.

<sup>3</sup> Native Hawaiians, for the purposes of constitutional protection under HAW. CONST. art. XII, § 7, are defined as "descendants of native Hawaiians who inhabited the islands prior to 1778." Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246 (1995).

<sup>4</sup> Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246 (1995).

<sup>5</sup> "Furthermore, we expressly reserve comment on the question whether non-Hawaiian members of an 'ohana'. . . may legitimately claim rights protected by article XII, section 7 of the state constitution and HRS § 1-1." Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246, 1270 (1995).

<sup>6</sup> Lit., "Family." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 276 (1986); Hawaiian words are not italicized because Hawaiian and English are the co-official languages of the State of Hawai'i. HAW. CONST. art. XV, § 4 (1978).

<sup>7</sup> Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246 (1995).

made clear that its decision did not foreclose the extension of traditional and customary rights to non-Hawaiians,<sup>8</sup> the issue of whether non-Hawaiian 'ohana members, such as non-Hawaiian spouses or hānai<sup>9</sup> children, can legitimately assert traditional and customary rights remains unresolved.<sup>10</sup>

The 'ohana has served as a cornerstone to the preservation of the Hawaiian identity by carrying on Native Hawaiian traditions and customs.<sup>11</sup> Without the 'ohana, Hawaiian ancestral knowledge would not have been practiced and transmitted to the present, and the Hawaiian sense of identity, rooted in tradition and custom, would have been lost. The preservation and practice of Native Hawaiian culture inherently depends on the 'ohana system to maintain the continuation of subsistence, cultural, and religious practices. Although not genealogically connected, non-Hawaiian members of the 'ohana serve as conduits of tradition and custom that connect generations from the past, the present, and the future; constitutional protections of the practice of Hawaiian customs and traditions should extend to include non-Hawaiian members of the 'ohana. Deprivation of these protectors would divide the 'ohana and restrict the continuation of Hawaiian culture and lifestyle.

This article argues that in determining the legitimacy of traditional and customary rights claims of a non-Hawaiian member of an 'ohana, a court should not be concerned with whether the individual is of Hawaiian ancestry, but whether that individual is acting in fulfillment of kuleana<sup>12</sup> to that individual's 'ohana. Where a non-Hawaiian 'ohana member asserts traditional and customary rights, the determination of whether a claimant is entitled to constitutional protection should depend on whether the actions of that non-Hawaiian 'ohana member are perpetuating Native Hawaiian customs and traditions to ultimately benefit the 'ohana.

Section I of this article will discuss the importance of the 'ohana system and its continuation as the primary social unit in the Native Hawaiian community. It will highlight the integral role of the 'ohana system in the continued practice of Hawaiian tradition and custom and the inclusive nature of the institution of 'ohana with respect to non-Hawaiian

---

<sup>8</sup> Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246, 1270 (1995).

<sup>9</sup> Lit., "Adopted." PUKUI & ELBERT, *supra* note 6, at 56.

<sup>10</sup> At the time of this writing, it has been 15 years since the *PASH* decision. See Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246 (1995).

<sup>11</sup> Shawn M. Kana'iaupuni, *Identity and Diversity in Contemporary Hawaiian Families: Ho'i Hou i ka Iwi Kuamo'o*, 1 HŪLILI: MULTIDISC. RES. ON HAWAIIAN WELL-BEING 53, 61 (2004) [hereinafter Kana'iaupuni, *Hawaiian Families*].

<sup>12</sup> Lit., "Responsibility." PUKUI & ELBERT, *supra* note 6, at 179.

members. Section I will also emphasize that individuals who are non-Hawaiian but have married into or have been adopted into the 'ohana are included and expected to participate in all aspects of 'ohana activity. Section II of this article will discuss the current state of Native Hawaiian traditional and cultural rights, tracing the legal development of traditional and cultural rights from the era of the Kingdom of Hawai'i to present day. Section III will then analyze the judicial and legislative reluctance to foreclose non-Hawaiians from the protections of traditional and customary rights and argue that, in determining whether an individual can legitimately assert these rights, belonging to the 'ohana and the inherent kuleana of carrying on generational knowledge and values are more significant than Native Hawaiian ancestry. This article concludes that based on historical and legal precedent, constitutionally protected traditional and customary rights cannot be strictly limited to individuals of Native Hawaiian ancestry and should be extended to non-Hawaiian members of an 'ohana.

## I. THE HAWAIIAN 'OHANA SYSTEM

### A. *The General Concept of 'Ohana*

A reflection of the Hawaiian agrarian lifestyle, the term 'ohana derives its meaning from the staple food of the Hawaiian people: kalo.<sup>13</sup> The root word for 'ohana is 'ohā,<sup>14</sup> referring to a bud or offshoot from the adult corm of the kalo.<sup>15</sup> 'Ohana literally means "the offshoots" or "that which is composed of offshoots."<sup>16</sup> The image of the kalo aptly illustrates the Hawaiian perspective of family, with 'ohā depending on the parent kalo to nurture the sprouts for future propagation.<sup>17</sup> In this way, all of the 'ohā are linked, generation upon generation, to the same ancestral root.<sup>18</sup> This organic view of the kalo is the prototype for the Hawaiian conception of heredity and relationship, and consequently the term 'ohana refers to the family group related through blood, marriage, and adoption.<sup>19</sup>

---

<sup>13</sup> Lit., "Taro." PUKUI & ELBERT, *supra* note 6, at 123. In Hawai'i, taro has been the staple food from the earliest times of settlement to the present; over the course of Hawaiian history 300 separate cultivars have been developed. *Id.*

<sup>14</sup> MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, NĀNĀ I KE KUMU (LOOK TO THE SOURCE) VOLUME I, 166 (1972) [hereinafter PUKUI, NĀNĀ I KE KUMU].

<sup>15</sup> *Id.*

<sup>16</sup> E. S. CRAIGHILL HANDY, E.G. HANDY & MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAI'I: THEIR LIFE, LORE, AND ENVIRONMENT 76 (1972) [hereinafter HANDY & HANDY, NATIVE PLANTERS].

<sup>17</sup> Kana'iaupuni, *Hawaiian Families*, *supra* note 11, at 58.

<sup>18</sup> "Members of the 'ohana, like taro shoots, are all from the same root." PUKUI, NĀNĀ I KE KUMU, *supra* note 14, at 661.

<sup>19</sup> HANDY & HANDY, NATIVE PLANTERS, *supra* note 16, at 287.

The concept of ‘ohana is two-fold. ‘Ohana refers to both the traditional American paradigm of the nuclear unit (consisting of a mother, a father, and children), as well as the extended family clan.<sup>20</sup> The ‘ohana is an encompassing concept that integrates the past, present, and future through the inclusion of deceased and spiritual ancestors with family members now and to come, all of whom are bound by blood, marriage, and adoption.<sup>21</sup> Although the core of the ‘ohana consists of pili koko or “blood related relatives,”<sup>22</sup> those not born into the blood relationship are also included within the ‘ohana.<sup>23</sup> Sometimes referred to as ‘ōhua<sup>24</sup> to denote the lack of direct genealogical connection to the pili koko, non-related individuals who have been accepted into the ‘ohana participate fully in all familial activity and are expected to carry on the responsibilities and practices of the ‘ohana.<sup>25</sup>

As a physical unit, the ‘ohana can be best characterized as expansive and inclusive while remaining intimate and inseparable; reference to an ‘ohana also alludes to the overarching concepts of commitment, responsibility, and support to all members of the ‘ohana.<sup>26</sup> In sum, the ‘ohana is best described as the expansive interdependent familial support system fundamental to Native Hawaiians. While the ‘ohana has changed and adapted to changes throughout the course of history, it has continued to be the fundamental social institution of Native Hawaiians.

#### B. *The Relevance of the Hawaiian ‘Ohana from Pre-Western Contact Hawai‘i to Present Day*

Most legal scholarship focusing on Native Hawaiian rights begins with a description of pre-modern Hawaiian society as one in which life was shaped by the land tenure system, commonly referred to as the ahupua‘a system.<sup>27</sup> The reason for providing background on pre-modern

<sup>20</sup> PUKUI, NĀNĀ I KE KUMU, *supra* note 14, at 167.

<sup>21</sup> Ivette R. Stern, Sylvia Yuen & Marcia Hartstock, *A Macro Portrait of Hawaiian Families*, 1 HŪLILI: MULTIDISC. RES. ON HAWAIIAN WELL-BEING 73, 74 (2004).

<sup>22</sup> PUKUI, NĀNĀ I KE KUMU, *supra* note 14, at 167.

<sup>23</sup> E. S. CRAIGHILL HANDY & MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA-‘Ū, HAWAI‘I 65 (Tuttle Press 1976) [hereinafter HANDY & PUKUI, POLYNESIAN FAMILY SYSTEM IN KA-‘Ū].

<sup>24</sup> Lit., “Retainers or Members (of a family).” PUKUI & ELBERT, *supra* note 6, at 278.

<sup>25</sup> HANDY & PUKUI, POLYNESIAN FAMILY SYSTEM IN KA-‘Ū, *supra* note 23, at 65; Charles W. Kenn, *Some Hawaiian Relationship Terms Re-Examined*, 5 SOCIAL PROCESS IN HAWAII 46, 47 (1939).

<sup>26</sup> Kana‘iaupuni, *Hawaiian Families*, *supra* note 11, at 61; GEORGE S. KANAHELE, KU KANAKA- STAND TALL 346-47 (1986).

<sup>27</sup> See generally D. Kapua Sproat, *The Backlash Against PASH: Legislative*

Hawai'i is well-founded; the corpus of law regarding Native Hawaiian rights, particularly traditional and cultural rights, is largely developed within the context of the ahupua'a system.<sup>28</sup> For this reason, knowledge of the Hawaiian ahupua'a system is prerequisite to developing an understanding of Native Hawaiian rights.

The traditional Hawaiian land tenure system was subsistence-based, and land was used and treated as collective property.<sup>29</sup> The ahupua'a is best described as the primary land division of the land tenure system, bounded by geographic features such as mountain ridges and typically running from the mountains and extending out into the ocean, in which residents would be able to sustain themselves without the need to leave its boundaries.<sup>30</sup> The ahupua'a was part of a moku<sup>31</sup> or mukupuni<sup>32</sup> ruled over by the ali'i 'ai moku.<sup>33</sup> The ali'i 'ai moku subdivided regulatory power to lesser ali'i<sup>34</sup> who managed the resources and maka'āinana<sup>35</sup> of an ahupua'a.<sup>36</sup> Arguably the oldest and most fundamental socioeconomic institution of pre-modern Hawai'i, legal scholars have given little recognition to the 'ohana's role as the lifeblood of the ahupua'a system.<sup>37</sup>

---

*Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998); Kahikino Noa Dettweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 175 (2005); Sean M. Smith, *The "Hawaiianness" of Same-Sex Adoption*, 30 U. HAW. L. REV. 517 (2008).

<sup>28</sup> See generally D. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998); Kahikino Noa Dettweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 175 (2005); Sean M. Smith, *The "Hawaiianness" of Same-Sex Adoption*, 30 U. HAW. L. REV. 517 (2008).

<sup>29</sup> See DAVIANNA PŌMAIKA'I MCGREGOR, NA KUA'ĀINA: LIVING HAWAIIAN CULTURE 26-27 (University of Hawai'i Press 2007) [hereinafter MCGREGOR, NA KUA'ĀINA]; Dettweiler, *supra* note 27, at 179-81.

<sup>30</sup> See DAVIANNA PŌMAIKA'I MCGREGOR, NA KUA'ĀINA: LIVING HAWAIIAN CULTURE 26-27 (University of Hawai'i Press 2007) [hereinafter MCGREGOR, NA KUA'ĀINA]; Dettweiler, *supra* note 27, at 179-81.

<sup>31</sup> Lit., "District." PUKUI & ELBERT, *supra* note 6, at 252.

<sup>32</sup> Lit., "Island." PUKUI & ELBERT, *supra* note 6, at 252.

<sup>33</sup> Lit., "Chief who rules a moku (district)." PUKUI & ELBERT, *supra* note 6, at 20; see MCGREGOR, NA KUA'ĀINA, *supra* note 29, at 26-27.

<sup>34</sup> Lit., "Chiefs." PUKUI & ELBERT, *supra* note 6, at 20.

<sup>35</sup> Lit., "Commoner." PUKUI & ELBERT, *supra* note 6, at 224.

<sup>36</sup> See MCGREGOR, NA KUA'ĀINA, *supra* note 29, at 26-27.

<sup>37</sup> See generally Sproat, *supra* note 27; Dettweiler, *supra* note 27; Smith, *supra* note 27.

Recent scholarship indicates that the 'ohana system, fully adapted to function within the ahupua'a at the time of Western contact in 1778,<sup>38</sup> actually predates the ahupua'a system.<sup>39</sup> In fact, the ahupua'a system did not develop until many centuries after the first settlement of the Hawaiian Islands, during later wā kahiko.<sup>40</sup> Prior to the ahupua'a system, the social system in Hawai'i was communal and organized around subsistence production to sustain 'ohana.<sup>41</sup> Origin stories varied according to the particular genealogical line from which certain 'ohana descended.<sup>42</sup> During these early eras of Hawaiian history, the kūpuna<sup>43</sup> provided leadership and guidance to the mākuā,<sup>44</sup> who performed most of the daily productive work of fishing, cultivation, and gathering.<sup>45</sup> The 'ohana system was the only social and economic system during this era.

As Hawaiian society changed, the social system became highly stratified, with the ahupua'a land tenure system becoming prevalent in approximately 1400 A.D.<sup>46</sup> The 'ohana adapted to serve as the fundamental operating unit for the entire ahupua'a system. Ahupua'a were further subdivided into parcels of land called 'ili,<sup>47</sup> which were allocated to and cultivated by 'ohana.<sup>48</sup> In the ahupua'a system, the 'ohana's main concern was to cultivate and produce enough to sustain the 'ohana as well as produce an adequate surplus to provide to the ali'i.<sup>49</sup> 'Ohana were not limited to subsisting from the resources of their own 'ili; 'ohana in every 'ili were afforded access to resources within the ahupua'a

---

<sup>38</sup> See RALPH S. KUYKENDALL, *THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION* (1947).

<sup>39</sup> Davianna Pōmaika'i McGregor, *An Introduction to the Hoa'aina and Their Rights*, 30 HAWAIIAN J. OF HIST. 1, 3-4 (1996) [hereinafter McGregor, *Hoa'aina*].

<sup>40</sup> Lit., "Ancient times." PUKUI & ELBERT, *supra* note 6, at 381. The term also refers to historical eras. MCGREGOR, NA KUA'ĀINA, *supra* note 29, at 23. Contemporary scholars identify four distinct wā kahiko prior to Western contact. *Id.*

<sup>41</sup> McGregor, *Hoa'aina*, *supra* note 39, at 3.

<sup>42</sup> MCGREGOR, NA KUA'ĀINA, *supra* note 29, at 24.

<sup>43</sup> Lit., "Grandparents." PUKUI & ELBERT, *supra* note 6, at 186.

<sup>44</sup> Lit., "Parents." PUKUI & ELBERT, *supra* note 6, at 230.

<sup>45</sup> McGregor, *Hoa'aina*, *supra* note 39, at 4.

<sup>46</sup> *Id.* The Hawaiian social stratification system probably developed after 1400 A.D.; Hawaiian society at the time of European contact can be divided into three basic classes: ali'i, the chiefs; kahuna, the priests; and maka'āinana, the commoners. *Id.*

<sup>47</sup> Lit., "Land section, next in importance to ahupua'a and usually a subdivision of an ahupua'a." PUKUI & ELBERT, *supra* note 6, at 97.

<sup>48</sup> JON. J. CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848*, 5 (1974). HANDY & PUKUI, *POLYNESIAN FAMILY SYSTEM IN KA-'Ū*, *supra* note 23, at 2-7.

<sup>49</sup> GEORGE S. KANAHELE, *KU KANAKA- STAND TALL* 344 (1986).

necessary for survival.<sup>50</sup>

Although there is no evidence of a monetary or commodity-based economy, resources and other essential goods were exchanged through a barter system within the framework of the 'ohana.<sup>51</sup> As Mary Kawena Pukui and E.S. Craighill Handy explain:

Between households within the 'ohana there was constant sharing and exchange of foods and of utilitarian articles and also of services, not in barter but as voluntary (though decidedly obligatory) giving. 'Ohana living inland (ko kula uka), raising taro, bananas, wauke (for tapa, or bark cloth making) and olona (for its fibre), and needing gourds, coconuts and marine foods, would take a gift to some 'ohana living near the shore (ko kula kai) and in return would receive fish or whatever was needed. The fisherman needing poi or awa would take fish, squid or lobster upland to a household known to have taro, and would return with his kalo (taro) or paiai (hard poi, the steamed and pounded taro corm) . . . . In other words, it was the 'ohana that constituted the community within which the economic life moved.<sup>52</sup>

The importance of the 'ohana in the ahupua'a is evidenced by the fact that ahupua'a boundaries reflected the pattern of land use that had evolved as the most efficient and beneficial to the 'ohana.<sup>53</sup> Because the ahupua'a grew around the 'ohana, there came to be strong association of particular 'ohana with certain ahupua'a and moku.<sup>54</sup> The ahupua'a boundaries adopted and instituted by the ali'i did not, however, restrict the 'ohana from accessing resources outside their ahupua'a or prohibit 'ohana from other ahupua'a from coming in to access resources.<sup>55</sup> These flexible boundaries were important to 'ohana who did not have certain resources readily available within their own ahupua'a.<sup>56</sup> In some cases, 'ohana would travel between moku or mokupuni to access resources needed for survival.<sup>57</sup> Despite changes throughout pre-modern Hawaiian history, the

---

<sup>50</sup> MCGREGOR, NA KUA'ĀINA, *supra* note 29, at 26.

<sup>51</sup> *Id.*

<sup>52</sup> HANDY & PUKUI, POLYNESIAN FAMILY SYSTEM IN KA-'Ū, *supra* note 23, at 5-6.

<sup>53</sup> *Id.*; McGregor, *Hoa'aina*, *supra* note 39, at 6.

<sup>54</sup> HANDY & HANDY, NATIVE PLANTERS, *supra* note 16, at 287-88; HANDY & PUKUI, POLYNESIAN FAMILY SYSTEM IN KA-'Ū, *supra* note 23, at 4-5.

<sup>55</sup> McGregor, *Hoa'aina*, *supra* note 39, at 6-7.

<sup>56</sup> MCGREGOR, NA KUA'ĀINA, *supra* note 29, at 27.

<sup>57</sup> *Id.*



‘ohana continued to serve as the social and economic foundation of Hawaiian society.

The arrival of Captain James Cook in 1778 introduced Hawai‘i to the Western world and marked the beginning of devastating change for Native Hawaiians.<sup>58</sup> Foreign diseases to which Native Hawaiians had no immunity reduced the native population by an estimated 90% in the century following Western contact.<sup>59</sup> The ahupua‘a system, the system by which the ‘ohana lived and worked, began to erode through the introduction of a Western legal system, government, and religion.<sup>60</sup> The shift from traditional land tenure to a Western private property system between 1845 and 1850 accelerated the displacement of Native Hawaiians from their land and culture, punctuating the gradual and systematic degradation of the Hawaiian way of life.<sup>61</sup>

The dramatic changes following Western contact placed many Native Hawaiian traditions and customs at risk of being extinguished;<sup>62</sup> it was during this period that the survival of the ancient ways depended upon the ‘ohana. Hawaiian spiritual beliefs and customs continued to be honored and passed down through the ‘ohana; the hula, chants, and legends of old Hawai‘i continued to be practiced.<sup>63</sup> Subsistence gathering practices also continued to be passed down from generation to generation within the ‘ohana.<sup>64</sup> Most of the ancient traditions and customs that presently exist withstood extinction because certain ‘ohana persisted in continuing the old ways. As a result, much of our present knowledge of Hawaiian cultural practices is the product of recording the traditions and customs of certain ‘ohana.<sup>65</sup>

---

<sup>58</sup> Paul F. Nahoia Lucas, *No Ke Ola Pono O Ka Lāhui Hawai‘i: The Protection and Perpetuation of Customary and Traditional Rights as a Source of Well-Being for Native Hawaiians*, 1 HŪLILI: MULTIDISC. RES. ON HAWAIIAN WELL-BEING 197, 201-02 (2004); Shawn M. Kana‘iaupuni & Nolan Malone, *This Land is My Land: The Role of Place in Native Hawaiian Identity*, 3 HŪLILI: MULTIDISC. RES. ON HAWAIIAN WELL-BEING 281, 285-86 (2006).

<sup>59</sup> See DAVID E. STANNARD, *BEFORE THE HORROR: THE POPULATION OF HAWAI‘I ON THE EVE OF WESTERN CONTACT* 44-58 (1989).

<sup>60</sup> Shawn M. Kana‘iaupuni & Nolan Malone, *This Land is My Land: The Role of Place in Native Hawaiian Identity*, 3 HŪLILI: MULTIDISC. RES. ON HAWAIIAN WELL-BEING 281, 286 (2006).

<sup>61</sup> JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, *DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887* 44-47 (2002).

<sup>62</sup> See I.C. Cambell, *Culture Contact and Polynesian Identity in the European Age*, 8 J. OF WORLD HIST. 29, 35-41 (1997).

<sup>63</sup> MCGREGOR, NA KUA‘ĀINA, *supra* note 29, at 27.

<sup>64</sup> *Id.*

<sup>65</sup> See ERNEST BEAGLEHOLE, *SOME MODERN HAWAIIANS* 142-9 (1937); *see generally* MCGREGOR, NA KUA‘ĀINA, *supra* note 29, at 27; HANDY & HANDY, *NATIVE*

C. *The Inclusive Nature of the Hawaiian 'Ohana as Illustrated through the Practice of Hānai*

A significant trait of the 'ohana, carried on to present day, is inclusiveness. The best illustration of the inclusive nature of the Hawaiian 'ohana is the long-standing practice of hānai.<sup>66</sup> The term hānai, as a verb, means "to feed;" as a noun, it refers to the provider or to a person for whom one provides food.<sup>67</sup> In the context of adoption, hānai refers to the act of a child being taken into an 'ohana and being reared as one of the 'ohana's own offspring.<sup>68</sup> The mākuā hānai<sup>69</sup> assume complete social rights and obligations in raising their kama hānai.<sup>70</sup> In its most general sense, hānai is the highest form of adoption into a Hawaiian 'ohana because the hānai child is truly part of the 'ohana.<sup>71</sup>

Scholars throughout the past century note the high levels of adoption among Hawaiians in comparison to other ethnic groups in Hawai'i; these observations point to the continuation of Hawaiian adoption practices in modern times.<sup>72</sup> That Hawaiians love children is a common cliché, and it is often noted that Hawaiians believe that a house without children is "lost"<sup>73</sup> or "without life."<sup>74</sup> The Hawaiian affinity to

---

PLANTERS, *supra* note 16, at 76.

<sup>66</sup> Alan Howard, et. al., *Traditional and Modern Adoption Patterns in Hawaii*, in ADOPTION IN EASTERN OCEANIA 29 (Vern Carroll ed., 1970); Benjamin B. C. Young, *The Hawaiians*, in PEOPLE AND CULTURES OF HAWAII 12-13 (John F. McDermott, et. al., eds., 1980).

<sup>67</sup> Alan Howard, et. al., *Traditional and Modern Adoption Patterns in Hawaii*, in ADOPTION IN EASTERN OCEANIA 23 (Vern Carroll ed., 1970).

<sup>68</sup> *Id.* at 24.

<sup>69</sup> Lit., "feeding parents." Charles W. Kenn, *Some Hawaiian Relationship Terms Re-Examined*, 5 SOCIAL PROCESS IN HAWAII 46, 47 (1939).

<sup>70</sup> Lit., "feeding child." *Id.*

<sup>71</sup> Alan Howard, et. al., *Traditional and Modern Adoption Patterns in Hawaii*, in ADOPTION IN EASTERN OCEANIA 22 (Vern Carroll ed., 1970). A lesser form of adoption was known as ho'okama, where the implication is that the adoptive parents took in a child or an adult that they held in special regard. *Id.* The ho'okama relationship is a product of mutual affection and the adoptive parents did not incur full parental responsibilities; rarely did a ho'okama relationship result in a change in residence. *Id.*

<sup>72</sup> See ERNEST BEAGLEHOLE, SOME MODERN HAWAIIANS 61-63 (1937); *Studies in a Hawaiian Community: Na Makamaka o Nanakuli*, 1 PACIFIC ANTHROPOLOGICAL RECORDS 87 (Ronald Gallimore & Alan Howard eds., 1968); Benjamin B. C. Young, *The Hawaiians*, in PEOPLE AND CULTURES OF HAWAII 12 (John F. McDermott, et. al., eds., 1980); Kana'iaupuni, *Hawaiian Families*, *supra* note 11, at 65-66.

<sup>73</sup> *Studies in a Hawaiian Community: Na Makamaka o Nanakuli*, 1 PACIFIC ANTHROPOLOGICAL RECORDS 87 (Ronald Gallimore & Alan Howard eds., 1968).

<sup>74</sup> Benjamin B. C. Young, *The Hawaiians*, in PEOPLE AND CULTURES OF HAWAII 12 (John F. McDermott, et. al., eds., 1980).

love and care for needy children through the practice of hānai is expressed in the saying, “Ka lei hā‘ule ‘ole, he keiki,” which literally means “a child is a garland that is never cast aside.”<sup>75</sup> Because of the ‘ohana’s inclusive nature, orphan children were extremely rare in pre-contact Hawai‘i.<sup>76</sup> Children in need were almost always taken as hānai by their extended ‘ohana, and children had many mākua<sup>77</sup> and kūkū<sup>78</sup> to care for them.<sup>79</sup>

In old Hawai‘i, hānai usually occurred within the ‘ohana,<sup>80</sup> however, to hānai a non-relative was not uncommon.<sup>81</sup> Non-related children<sup>82</sup> who were hānai into an ‘ohana were considered full members of the ‘ohana and included in all aspects of ‘ohana activity.<sup>83</sup> The firm understanding that the hānai child is nothing less than a full member of the ‘ohana is embodied in the saying, “Nau ke keiki, kūkae a na‘au,”<sup>84</sup> which is translated as, “Yours is the child, excreta, intestines and all.”<sup>85</sup> The

<sup>75</sup> GEORGE S. KANAHELE, KU KANAKA-STAND TALL 472 (1986).

<sup>76</sup> E-mail from Taupouri Tangarō to author (Feb. 6, 2010) (on file with author). Taupouri Tangarō, Ph.D. is an assistant professor and department chair of Hawaiian Lifestyles and Humanities at Hawaii Community College. Frances Davis Award Recipients for 2009, <http://www.hawaii.edu/about/awards/davis.php?award=tangaro> (last visited Mar. 4, 2010). Tangarō is a non-Hawaiian member of an ‘ohana. E-mail from Taupouri Tangarō to author (Jan. 25, 2010) (on file with author).

<sup>77</sup> The term makua or “parent” also refers to any relative of the parents’ generation, such as uncles and aunts. PUKUI & ELBERT, *supra* note 6, at 230.

<sup>78</sup> Lit., “grandparent.” PUKUI & ELBERT, *supra* note 6, at 177. The term also refers to any relative of the grandparents’ generation. *Id.*

<sup>79</sup> E-mail from Taupouri Tangarō to author (Feb. 6, 2010) (on file with author).

<sup>80</sup> Alan Howard, et. al., *Traditional and Modern Adoption Patterns in Hawaii*, in ADOPTION IN EASTERN OCEANIA 21, 24 (Vern Carroll ed., 1970).

<sup>81</sup> HANDY & PUKUI, POLYNESIAN FAMILY SYSTEM IN KA-‘Ū, *supra* note 23, at 65-69. The issue of blood relation was always at the forefront in an ‘ohana’s decision to hānai a child; if an ‘ohana did hānai a non-relative, the ‘ohana was usually careful as to the parentage of the hānai child. See Alan Howard, et. al., *Traditional and Modern Adoption Patterns in Hawaii*, in ADOPTION IN EASTERN OCEANIA 21, 24 (Vern Carroll ed., University of Hawai‘i Press, 1970). In some cases, a child would be taken in hānai by a non-related ‘ohana in order to train the child in certain skills that the biological ‘ohana did not possess. *Id.*

<sup>82</sup> The non-related hānai child had no less responsibility than the rest of the ‘ohana, they were required to work with everyone else. Charles W. Kenn, *Some Hawaiian Relationship Terms Re-Examined*, 5 SOCIAL PROCESS IN HAWAII 46, 47 (1939).

<sup>83</sup> HANDY & PUKUI, POLYNESIAN FAMILY SYSTEM IN KA-‘Ū, *supra* note 23, at 66. When a parent says ku‘u keiki, “my child,” the parent may be referring to a true or adopted child. *Id.*

<sup>84</sup> MARY KAWENA PUKUI, OLELO NOEAU, HAWAIIAN PROVERBS AND POETICAL SAYINGS HAWAI‘I 250 (1983). This is a saying used when a child is handed over by the biological family to the hānai family. *Id.*

<sup>85</sup> *Id.*

saying signifies the 'ohana's acceptance of a hānai, taking full familial responsibility for their adoptive child.<sup>86</sup> The assumption of full familial status meant that the hānai were entrusted with the kuleana of the 'ohana: keeping the genealogy and committing it to memory, learning traditions and customs unique to the 'ohana,<sup>87</sup> and providing reciprocal care to the elder 'ohana members.<sup>88</sup> The practice of hānai is still very much alive in today's Hawaiian community, serving as a reminder of the inclusivity of a Hawaiian 'ohana.<sup>89</sup>

#### D. *The Role of the Non-Hawaiian in the Hawaiian 'Ohana*

The steady influx of immigrants after Western contact and subsequent intermarriage between Hawaiians and non-Hawaiians has led to a noticeable change in the 'ohana system and the assumption of roles in the 'ohana. Since Captain Cook's arrival in 1778, the Hawaiian 'ohana has gone from a system serving only ethnic Hawaiians to an institution affecting an increasingly diverse nation of people.<sup>90</sup> Because of the steady increase in ethnic diversity among Hawaiians, the role of the non-Hawaiian in the 'ohana has become increasingly important as Hawaiians continue to marry and hānai non-Hawaiians.<sup>91</sup>

The continued Americanization of Hawai'i makes it increasingly difficult for Native Hawaiians to share the same degree of involvement and connection with their traditional and customary practices as compared to previous generations.<sup>92</sup> Native Hawaiians, cultural practitioners in particular, have become increasingly cognizant of the role of non-Hawaiians in the effort to keep 'ohana tradition and culture alive by embracing all those willing to accept the kuleana.<sup>93</sup> As more Hawaiians assimilate to American society and choose not to carry on their 'ohana's

---

<sup>86</sup> E-mail from Taupouri Tangarō to author (Feb. 6, 2010) (on file with author).

<sup>87</sup> Benjamin B. C. Young, *The Hawaiians*, in PEOPLE AND CULTURES OF HAWAII 12-13 (John F. McDermott, et. al., eds., 1980).

<sup>88</sup> E-mail from Taupouri Tangarō to author (Feb. 6, 2010) (on file with author). Usually, part of the kuleana for hānai children, as with all the younger generations of the 'ohana, would be to one day care for those who hānai (fed) them. *Id.*

<sup>89</sup> Kana'iaupuni, *Hawaiian Families*, *supra* note 11, at 65-66; Alan Howard, et. al., *Traditional and Modern Adoption Patterns in Hawaii*, in ADOPTION IN EASTERN OCEANIA 29 (Vern Carroll ed., 1970).

<sup>90</sup> Kana'iaupuni, *Hawaiian Families*, *supra* note 11, at 55-57.

<sup>91</sup> Shawn M. Kana'iaupuni and Nolan Malone, *This Land is My Land: The Role of Place in Native Hawaiian Identity*, 3 HŪLILI: MULTIDISC. RES. ON HAWAIIAN WELL-BEING 281, 294 (2006).

<sup>92</sup> *Id.* at 297-99.

<sup>93</sup> E-mail from Kekuhi Kealiikanakaoleohaililani to author (Feb. 16, 2010) (on file with author). "Teach everyone, you never know who will carry on the tradition." *Id.* (quoting Edith Kanaka'ole).

traditions and customs, non-Hawaiian 'ohana members become increasingly relevant as a medium to fill the void and carry on the 'ohana's legacy.

In spite of its changing ethnic dynamic, the value of inclusion still holds true in the contemporary Hawaiian 'ohana. A non-Hawaiian who is truly accepted into the 'ohana is treated no differently than his or her Hawaiian relatives.<sup>94</sup> Non-Hawaiian members of the 'ohana share the same kuleana as the Hawaiian family members. The non-Hawaiian 'ohana member is not excluded from the activities of the rest of the 'ohana; a non-Hawaiian member truly accepted into the 'ohana has no other option but to live in the manner of the 'ohana.<sup>95</sup> If the 'ohana gathers from the ocean or from the uplands, the non-Hawaiian member of the 'ohana, short of leaving the 'ohana altogether, has no option but to do the same.<sup>96</sup> The willing non-Hawaiian member of the 'ohana may assume the kuleana of continuing the 'ohana traditions and practicing subsistence gathering to feed the rest of the 'ohana, maintaining the connection of the 'ohana with its Hawaiian ancestral roots.<sup>97</sup> In some cases, it is the non-Hawaiian member of the 'ohana who chooses to carry on the 'ohana traditions and practices.<sup>98</sup> If the 'ohana is truly the cultural connection of contemporary Hawaiians to the past, as some scholars urge,<sup>99</sup> then the non-Hawaiian member of the 'ohana is an equal part of this link to the 'ohana's Hawaiian ancestors and should be able to fully partake in the customs and tradition of the 'ohana.

---

<sup>94</sup> E-mail from Taupouri Tangarō to author (Feb. 2, 2010) (on file with author); see Charles W. Kenn, *Some Hawaiian Relationship Terms Re-Examined*, 5 SOCIAL PROCESS IN HAWAII 46, 46-48 (1939); ERNEST BEAGLEHOLE, SOME MODERN HAWAIIANS 62-63 (1937).

<sup>95</sup> E-mail from Taupouri Tangarō to author (Feb. 2, 2010) (on file with author).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* There will always be a difference between the blood-related and the non-related; however, there are instances in which the kuleana of an 'ohana went to the non-blood related member because no blood-relative was available or conducive to the role of taking on the kuleana. *Id.*

<sup>98</sup> *Id.* Pat Namaka Bacon, the non-Hawaiian hānai child of Mary Kawena Pukui and steward of her 'ohana's legacy, is widely recognized as an authority on hula, Hawaiian language, culture, and history. See generally THROUGH NAMAKA'S EYES: THE LIFE OF PATIENCE BACON (Ka'iwakīloumoku, Hawaiian Cultural Center 2007).

<sup>99</sup> See generally Kana'iaupuni, *Hawaiian Families*, *supra* note 11; McGregor, *Hoa'aina*, *supra* note 39.

## II. THE LEGAL BASIS OF TRADITIONAL AND CULTURAL RIGHTS

A. *Statutory and Constitutional Sources of Traditional and Customary Rights*

## 1. Section 7-1 of the Hawai'i Revised Statutes

The traditional and cultural activities of Hawaiian 'ohana have been adversely affected since the first arrival of foreigners in 1778. The transformation of the traditional land tenure system to a Western system of private property, which insists property is the exclusive domain of the landowner, greatly limited the 'ohana practices of old Hawai'i by restricting 'ohana from accessing lands to gather resources for medicinal, religious, and subsistence purposes.<sup>100</sup> Recognizing the importance of traditional access and gathering to support the livelihood of the common Hawaiian people, termed *hoa'āina*, the legislature of the Kingdom of Hawai'i established a law to ensure that *hoa'āina* were not deprived of gathering certain resources as the lands of the Kingdom converted to fee-simple private property.<sup>101</sup> The law originally required *hoa'āina* to receive permission from the *konohiki*<sup>102</sup> prior to accessing and gathering from the property; the legislature promptly eliminated the consent requirement after hearing accounts of *hoa'āina* experiencing hardship at the hands of *konohiki* who forbade *hoa'āina* from exercising their gathering rights.<sup>103</sup> The law has been in effect since the time of the Hawaiian Kingdom and exists currently as Hawai'i Revised Statutes ("HRS") section 7-1, which reads:

When the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to well and watercourses, which individuals

---

<sup>100</sup> Paul F. Nahoia Lucas, *Gathering Rights, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 224-26 (Melody Kapilialoha MacKenzie ed., 1991).

<sup>101</sup> See JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 44-49 (2008).

<sup>102</sup> The term *konohiki* originally referred to agents appointed by *ali'i* to manage the *ahupua'a*; the term was adopted to refer to the *ali'i* or landlords themselves. PAUL NAHOIA LUCAS, DICTIONARY OF HAWAIIAN LEGAL LAND TERMS 57 (1995).

<sup>103</sup> Lucas, *supra* note 58, at 207.

have made for their own use.<sup>104</sup>

## 2. Section 1-1 of the Hawai'i Revised Statutes

Another statutory source of traditional customary rights is HRS section 1-1, commonly referred to as the "Hawaiian Usage" exception.<sup>105</sup> This statute was originally enacted in November 1892, less than two months before the overthrow of the Hawaiian Kingdom.<sup>106</sup> The law established the sources of common law in the Hawaiian Kingdom and has remained largely unaltered since the overthrow; in its current form, HRS section 1-1 states:

The common law of England as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian Usage.<sup>107</sup>

## 3. Article XII, Section 7 of the Hawai'i State Constitution

Article XII, section 7 of the Hawai'i State Constitution was adopted as a constitutional amendment during the Hawai'i Constitutional Convention of 1978.<sup>108</sup> Article XII, section 7 reads:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the State to regulate such rights.<sup>109</sup>

HRS sections 7-1, 1-1, and article XII, section 7 compose the legal foundation of Native Hawaiian traditional and customary rights. From this foundation of law, the Hawai'i Supreme Court built its interpretation of traditional and customary rights, which includes the articulation of standards to protect traditional and customary rights as well as the imposition of conditions on the exercise of such rights.<sup>110</sup>

---

<sup>104</sup> HAW. REV. STAT. § 7-1 (2008).

<sup>105</sup> See David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. HAW. L. REV. 319, 320 (2008).

<sup>106</sup> Lucas, *supra* note 58, at 207.

<sup>107</sup> HAW. REV. STAT. § 1-1 (2008) (emphasis added).

<sup>108</sup> Lucas, *supra* note 58, at 209.

<sup>109</sup> HAW. CONST. art. XII, § 7 (1978).

<sup>110</sup> Lucas, *supra* note 58, at 211.

B. *Judicial Interpretation of Traditional and Customary Rights*1. *Kalipi v. Hawaiian Trust Co.* (1982)<sup>111</sup>

In 1982, the Court took its first opportunity to apply the collective laws preserving Native Hawaiian traditional and customary rights in *Kalipi v. Hawaiian Trust Co.* (“*Kalipi*”).<sup>112</sup> William Kalipi owned land within the two adjacent ahupua‘a of Manawai and ‘Ōhi‘a while residing in the ahupua‘a of Keawenui.<sup>113</sup> In keeping with his ‘ohana’s traditions, Kalipi regularly gathered resources from the lands surrounding his property in Manawai and ‘Ōhi‘a.<sup>114</sup> When the defendant landowners denied Kalipi access to these surrounding lands,<sup>115</sup> Kalipi filed suit claiming that he had the right to gather because such conduct was protected as traditional and customary practice under HRS section 7-1 and HRS section 1-1.<sup>116</sup>

In an opinion written by Chief Justice William S. Richardson, the Court recognized the inherent conflict between the Western conceptions of private fee-simple property and the Native Hawaiian traditional subsistence lifestyle.<sup>117</sup> The Court also took the opportunity to recognize the recently minted constitutional amendment by acknowledging that article XII, section 7 of the Hawai‘i State Constitution required the Court to consider the State’s obligation to preserve traditional and customary rights.<sup>118</sup>

Reading the plain language of HRS section 7-1, the Court stated that the protection of traditional and customary rights under the statute was limited to gathering the items enumerated in the statute by residents of the ahupua‘a.<sup>119</sup> The Court further limited the protections of HRS section 7-1 to gathering on undeveloped land, because gathering on developed land would lead to conflicts between landowners and those who accessed the land to gather.<sup>120</sup> The resulting conflicts would be inconsistent with the traditional Hawaiian way of life where cooperation and non-interference are integral values.<sup>121</sup> In applying the ahupua‘a residency

---

<sup>111</sup> *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745 (1982).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 747.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 747, 750.

<sup>117</sup> *Id.* at 748.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 750.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*



requirement of section 7-1, the Court concluded that Kalipi was not entitled to access the resources on the lands in question because he was not a resident of the ahupua‘a from which he gathered.<sup>122</sup>

The Court went on to find that Kalipi’s gathering was not protected under HRS section 1-1 since he was not a tenant of the ahupua‘a in which he sought to gather.<sup>123</sup> The Court stated that the retention of Hawaiian tradition and custom under HRS section 1-1 should be determined on a case-by-case basis through “balancing the respective interests and harm,” once it is established that the traditional and customary practices have been continued and did no actual harm.<sup>124</sup>

Although Kalipi’s claims for protection ultimately failed, the Court subsequently expanded traditional and customary rights by rejecting the defendant’s claim that the only protected traditions and customs were those enumerated in HRS section 7-1.<sup>125</sup> The Court explained that HRS section 1-1 served as “a vehicle for continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of the others.”<sup>126</sup> According to the Court, section 1-1 protected other traditional and customary practices that are not expressly enumerated under HRS section 7-1.<sup>127</sup>

## 2. *Pele Defense Fund v. Paty* (1992)<sup>128</sup>

In 1992, a decade after the *Kalipi* case, members of the non-profit Pele Defense Fund (“PDF”) brought suit to review a land exchange between the Board of Land and Natural Resources and the Campbell Estate where the State-owned lands of Wao Kele o Puna were exchanged for Campbell’s lands in nearby Kahauale’a.<sup>129</sup> PDF claimed that the denial of access into the newly privatized Wao Kele o Puna violated article XII, section 7 of the Hawai‘i Constitution because members of PDF were being denied the ability to practice their traditional and customary rights in the area.<sup>130</sup> PDF further argued that the ahupua‘a residency requirement in *Kalipi* did not apply because the forests of Wao Kele o Puna customarily served all of the residents of Puna as a source for subsistence gathering.<sup>131</sup>

---

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 751.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 751-2.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 751.

<sup>128</sup> *Pele Def. Fund v. Paty*, 837 P.2d 1247 (1992).

<sup>129</sup> *Id.* at 1254-55.

<sup>130</sup> *Id.* at 1253.

<sup>131</sup> *Id.* at 1270.

In an opinion written by Associate Justice Robert Klein, the Court agreed with PDF's argument by reasoning that PDF's practices were based on the traditional practices in the Puna region, where access and gathering patterns spanned the entire district as opposed to just the ahupua'a.<sup>132</sup> The Court expanded the scope of traditional and customary rights by holding that such rights "may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."<sup>133</sup> The Court remanded the case for trial to determine the legitimacy of PDF's traditional and customary rights claims.<sup>134</sup> On remand, the trial court ruled in favor of PDF.<sup>135</sup>

3. *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* (1995)<sup>136</sup>

In 1995, the Court issued its arguably most definitive opinion regarding traditional and customary rights in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*.<sup>137</sup> In this case, Public Access Shoreline Hawai'i ("PASH"), a public interest group, challenged the Hawai'i County Planning Commission's ("HPC") issuance of a county-level Special Management Area ("SMA") Use Permit to Nansay Hawai'i, Inc. ("Nansay"), which allowed the development of a resort complex in the ahupua'a of Kohonaiki on the island of Hawai'i.<sup>138</sup> After the HPC denied PASH's request for a contested case hearing on the SMA permit,<sup>139</sup> PASH filed suit challenging the HPC's ruling.<sup>140</sup>

The Court used this case as an opportunity to cement its stance regarding traditional and customary rights after *Kalipi* and to further clarify issues regarding the ability to assert these rights. The Court first reaffirmed its decision in *Pele* by holding that the exception to the *Kalipi* ahupua'a residency requirement was not a departure from the law.<sup>141</sup> In *PASH*, the Court again refused to limit the scope of traditional and

---

<sup>132</sup> *Id.* at 1272.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Pele Def. Fund v. Estate of Campbell*, Civil No. 89-089 (Hilo) (2002) (Findings of Fact, Conclusions of Law, and Order). See discussion *infra* Section II.B.5.

<sup>136</sup> *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246 (1995).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1250; see Sproat, *supra* note 27, at 340.

<sup>139</sup> *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1251 (1995).

<sup>140</sup> *Id.* at 1250.

<sup>141</sup> *Id.* at 1269.

customary rights by reaffirming its position that the nature and scope of such rights are determined by the particular circumstances of each case.<sup>142</sup>

The Court first clarified that for an activity to qualify as a Hawaiian tradition or custom under HRS section 1-1 and article XII, section 7, the practice must have been established prior to 1892, the year in which the Hawaiian Usage exception was enacted.<sup>143</sup> The Court further clarified that a minimum percentage of Hawaiian ancestry, a requirement for some programs benefitting Native Hawaiians, is not a requirement for the purposes of asserting customary and traditional rights.<sup>144</sup> While recognizing that Native Hawaiians can legitimately assert traditional and customary rights under HRS section 1-1 and article XII, section 7, the Court refused to foreclose the extension of traditional and customary rights to non-Hawaiians, reserving that question for a later day.<sup>145</sup> Finally, while the *Kalipi* decision limited the exercise of gathering rights to undeveloped property, the *PASH* Court appeared to expand the scope of traditional gathering rights by holding that an individual legitimately asserting his traditional and customary rights can enter onto undeveloped land *and* “land that is less than fully developed.”<sup>146</sup>

#### 4. *State of Hawai‘i v. Hanapī* (1998)<sup>147</sup>

In 1998, in *State of Hawai‘i v. Hanapī* (“*Hanapī*”),<sup>148</sup> the Court further clarified issues that it had left open in the *PASH* decision. Alapa‘i Hanapī, a native Hawaiian wood carver from the island of Moloka‘i, was convicted of criminal trespass in the second degree for entering on his neighbor’s land to ensure that archaeological and culturally significant sites were not damaged when the neighbor began to develop the land.<sup>149</sup> Hanapī’s defense to the trespassing charge was that he was exercising his rights as a Native Hawaiian to enter into the property.<sup>150</sup> Although the Court upheld Hanapī’s conviction because he could not provide sufficient evidence to show that his conduct was a legitimate traditional or customary practice,<sup>151</sup> the Court took the opportunity to provide guidance

---

<sup>142</sup> *Id.* at 1259.

<sup>143</sup> *Id.* at 1268.

<sup>144</sup> *Id.* at 1270.

<sup>145</sup> *Id.*; see Sproat, *supra* note 27, at 342.

<sup>146</sup> *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm’n*, 903 P.2d 1246, 1271 (1995).

<sup>147</sup> *Hawaii v. Hanapī*, 970 P.2d 485 (1998).

<sup>148</sup> *Id.*

<sup>149</sup> Dettweiler, *supra* note 27, at 204.

<sup>150</sup> *Id.*

<sup>151</sup> *Hawaii v. Hanapī*, 970 P.2d 485, 495 (1998).

on issues regarding traditional and customary rights.

First, the Court found that the exercise of constitutionally protected traditional and customary rights under article XII, section 7 is a legitimate defense to criminal trespass.<sup>152</sup> Second, the Court rearticulated its *PASH* analysis of whether an individual's conduct is a legitimate exercise of traditional and customary rights. The Court boiled down the analysis into a cohesive test, stated as follows:

In order for an [individual] to establish that his or her conduct is constitutionally protected as a native Hawaiian right, he or she must show that . . . [he or she is a] descendant of native Hawaiians who inhabited the islands prior to 1778 and who assert otherwise valid customary and traditional Hawaiian rights; . . . his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice; . . . [and] the exercise of the right occurred on undeveloped or less than fully developed property.<sup>153</sup>

Third, the *Hanapī* Court clarified that an individual's conduct is considered to be traditional or customary if that individual can establish that conduct is traditional or customary through adducing an adequate evidentiary foundation that connects the conduct to a firmly rooted traditional or customary Native Hawaiian practice.<sup>154</sup> *Hanapī* therefore calls for further factual inquiry by a court to determine whether a practice is truly traditional or customary.<sup>155</sup> This further factual inquiry requirement emphasizes that conduct not enumerated in the Hawai'i Constitution or statutes "does not preclude further inquiry concerning other traditional and customary practices that have existed."<sup>156</sup> Finally, the Court clarified its expansion of law in *PASH* by stating that "if property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary Native Hawaiian rights on such property."<sup>157</sup>

##### 5. *Pele Defense Fund v. The Estate of James Campbell* (2002)

On remand for trial on the merits, the Third Circuit Court revisited

---

<sup>152</sup> *Id.* at 492.

<sup>153</sup> *Id.* at 493-94 (quoting *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 900 P.2d 1313 (1993)).

<sup>154</sup> *Id.* at 495.

<sup>155</sup> *Id.* at 494.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 494-95 (emphasis added).

the PDF case<sup>158</sup> in *Pele Defense Fund v. The Estate of James Campbell* (“PDF on Remand”).<sup>159</sup> The trial court was tasked with determining whether defendant Campbell Estate violated article XII, section 7 by preventing PDF’s members from entering into Wao Kele o Puna for subsistence, cultural, and religious practices.<sup>160</sup> Ultimately concluding that PDF’s activities were protected under article XII, section 7,<sup>161</sup> the trial court’s findings of fact and conclusions of law are particularly significant to this paper for two reasons. First, the trial court addressed the issue of whether the benefits of traditional and customary rights were limited to the individual exercising such rights.<sup>162</sup> Second, the trial court examined the unresolved issue expressly reserved in *PASH* and subsequent cases: whether non-Hawaiian members of an ‘ohana may legitimately assert traditional and customary rights.<sup>163</sup>

Previous to *PDF on Remand*, the courts and the public believed that the benefits of access and gathering were limited to the individual who exercises the right.<sup>164</sup> At trial, PDF members showed that their traditional and customary practices continued within the context of the ‘ohana.<sup>165</sup> The benefits from an individual’s hunting and gathering in Wao Kele o Puna were shared with the rest of the ‘ohana.<sup>166</sup> PDF further showed that it was customary for the practitioners who hunted and gathered in Wao Kele o Puna to be accompanied and assisted by ‘ohana.<sup>167</sup> Consequently, the trial court expanded the class of people who possessed traditional and customary rights to include ‘ohana who assist the practitioner in the exercise of his or her rights.<sup>168</sup>

The trial court further examined traditional and customary rights within the context of an ‘ohana in its determination of whether traditional and customary rights should extend to the ‘ohana. Although many members of PDF were of Hawaiian ancestry, PDF members included non-

---

<sup>158</sup> See *supra* Section II.B.2.

<sup>159</sup> *Pele Def. Fund v. Estate of Campbell*, Civil No. 89-089 (Hilo) (2002) (Findings of Fact, Conclusions of Law, and Order).

<sup>160</sup> *Id.* at 3.

<sup>161</sup> *Id.* at 33-34.

<sup>162</sup> Lucas, *supra* note 58, at 209.

<sup>163</sup> *Id.* at 213.

<sup>164</sup> *Id.* at 209.

<sup>165</sup> *Pele Def. Fund v. Estate of Campbell*, Civil No. 89-089 (Hilo) (2002) (Findings of Fact, Conclusions of Law, and Order) at 7-8.

<sup>166</sup> *Id.* at 15.

<sup>167</sup> *Id.* at 19.

<sup>168</sup> *Id.* at 34.

Hawaiian members of Hawaiian ‘ohana.<sup>169</sup> These non-Hawaiian PDF members learned and practiced their ‘ohana’s customary and traditional practices, such as hunting and gathering, in Wao Kele o Puna.<sup>170</sup> PDF members showed that the ‘ohana concept was inclusive and all members of the ‘ohana, including non-Hawaiian members, were expected to participate in the subsistence and cultural activities.<sup>171</sup> Accordingly, the trial court concluded as a matter of law that the non-Hawaiian members of PDF had the same right to claim protection under article XII, section 7 as their ‘ohana.<sup>172</sup> The court finally concluded that the class of persons entitled to exercise customary and traditional rights in this case extended to “[p]ersons related by blood, marriage, or adoption” to Hawaiian ‘ohana.<sup>173</sup>

### III. EXTENDING TRADITIONAL AND CUSTOMARY RIGHTS TO NON-HAWAIIAN MEMBERS OF THE ‘OHANA

#### A. *Extending Traditional and Customary Rights to Non-Hawaiian Members of an ‘Ohana under the Hawai‘i State Constitution*

As noted previously, article XII, section 7 serves as one source of traditional and customary rights under Hawai‘i law.<sup>174</sup> Article XII, section 7 has played a significant role in the protection of traditional and customary rights because it confers a constitutional duty upon the State of Hawai‘i to preserve traditional and customary Hawaiian practices.<sup>175</sup> Beginning with *Kalipi*, this constitutional provision has proved to be decisive in the outcome of cases dealing with traditional and customary rights.<sup>176</sup> The extension of article XII, section 7 protection to non-Hawaiian members of an ‘ohana would surely play a significant role in the preservation of ‘ohana practices and further protect Hawaiian traditions and customs. A plain reading of article XII, section 7, however, seems to indicate that such constitutional protections are limited to only those of Hawaiian ancestry.<sup>177</sup> Because of the provision’s limiting language, one commentator suggests that article XII, section 7 stops short of extending

---

<sup>169</sup> *Id.* at 27-28.

<sup>170</sup> *Id.* at 11.

<sup>171</sup> *Id.* at 18.

<sup>172</sup> *Id.* at 27.

<sup>173</sup> *Id.* at 34.

<sup>174</sup> See *supra* Section II.A. for discussion and full text of article XII, § 7.

<sup>175</sup> HAW. CONST. art. XII, § 7 (1978); see *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 748 (1982).

<sup>176</sup> See *supra* Section II.B.

<sup>177</sup> Paul Lucas, *Gathering Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 216 (Melody Kapilialoha MacKenzie ed., 1991).

constitutional protection to non-Hawaiians, including non-Hawaiian members of a Hawaiian 'ohana.<sup>178</sup> Although legislative intent and compelling policy reasons support the conclusion that traditional and customary rights should extend to non-Hawaiian members of a Hawaiian 'ohana, the facial limitations of article XII, section 7 seem to prevent such rights from being extended under this constitutional provision.

The legislative history of article XII, section 7 suggests the extension of constitutionally protected traditional and customary rights to non-Hawaiian members of Hawaiian 'ohana. In the debates of the Committee of the Whole during the 1978 Constitutional Convention, delegates expressed a desire to include under article XII, section 7 protections for those non-Hawaiian members of 'ohana who were engaged in traditional Hawaiian practices.<sup>179</sup> Delegate Frenchy DeSoto aptly summarized the intent to include protections for non-Hawaiian 'ohana by stating, "If you are fortunate enough to marry a Hawaiian, certainly you may follow her right down to the beach."<sup>180</sup> The comments by the framers of article XII, section 7 imply an understanding of the inclusivity of the 'ohana and the role of the non-Hawaiian 'ohana member in the perpetuation of Hawaiian tradition and custom. Article XII, section 7 was created to allow practitioners to continue following the traditions and customs of their ancestors.<sup>181</sup> Furthermore, the expressed intent to "preserve the small remaining vestiges of a quickly disappearing culture and [perpetuate] a heritage that is unique and an integral part [Hawai'i]"<sup>182</sup> indicates that article XII, section 7 should be interpreted in the broader context as a constitutional mandate to preserve the Hawaiian culture.<sup>183</sup>

True to the intent of the constitutional provision, the Court has interpreted article XII, section 7 to be a mandate on the State to protect traditional and customary practices.<sup>184</sup> Increasing the scope of article XII, section 7 protections to include non-Hawaiian members of an 'ohana is supportive of the State policy to protect the Hawaiian culture, as the perpetuation of Hawaiian culture is deeply dependent on the active continuation of traditional and customary 'ohana practices. Enabling the

---

<sup>178</sup> Smith, *supra* note 27, at 531.

<sup>179</sup> DEBATES, *reprinted in* 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 436-37 (State of Hawai'i 1980).

<sup>180</sup> *Id.* at 436.

<sup>181</sup> STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 639 (State of Hawai'i 1980).

<sup>182</sup> *Id.* at 640.

<sup>183</sup> Smith, *supra* note 27, at 526-28.

<sup>184</sup> See *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 748 (1982); *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1272 (1995); *Ka Pa'akai o ka 'Āina v. Land Use Comm'n*, 7 P.3d 1068, 1076 (2000).

continuation of a *living* Hawaiian culture provides opportunity for Hawaiian traditions and practices to flourish in spite of the increasing urbanization and Americanization of Hawai‘i. Both non-Hawaiian and Hawaiian members are equally obliged to continue the traditions and customs of their ‘ohana’s Hawaiian ancestors.<sup>185</sup> By continuing ‘ohana traditions and customs, the non-Hawaiian member of an ‘ohana embodies the cultural legacy of the ‘ohana’s Hawaiian ancestors.<sup>186</sup>

Significant to the Court’s interpretation of the scope of traditional and customary rights under article XII, section 7 is its repeated refusal to foreclose non-Hawaiians from enjoying such constitutional protections. In both *PASH* and *Hanapī*, the Court explicitly noted that it reserved the question of extending traditional and customary rights under article XII, section 7 to non-Hawaiian members of an ‘ohana.<sup>187</sup> The judicial reluctance to foreclose non-Hawaiian members of an ‘ohana from article XII, section 7 protection seems to stem from the Court’s concern that Equal Protection challenges might arise from such a determination.<sup>188</sup> If the Court were to determine that non-Hawaiians are wholly excluded from the protections of article XII, section 7, the provision could be challenged under the federal and state constitutions as an unconstitutional denial of equal protection to persons of other races.<sup>189</sup> Although the Court has yet to face the decisive issue of whether article XII, section 7 protections extend to non-Hawaiians, the Third Circuit’s opinion in *PDF on Remand* provides substantial guidance on the matter.

Based on evidence produced at trial, the Third Circuit Court concluded as a matter of law that article XII, section 7 does not violate equal protection because non-Hawaiians have the same rights as Hawaiians if they can prove that their rights were based on custom and usage.<sup>190</sup> Although the trial court’s conclusion answers the question of whether article XII, section 7 violates equal protection, the decision does not get around the facial limitations of article XII, section 7. In extending traditional and customary rights to non-Hawaiian members of an ‘ohana, the trial court cites custom and usage as a source of such rights, rather than

---

<sup>185</sup> E-mail from Taupouri Tangarō to author (Feb. 2, 2010) (on file with author).

<sup>186</sup> *Id.*

<sup>187</sup> Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm’n, 903 P.2d 1246, 1270 (1995); Hawaii v. Hanapī, 970 P.2d 485, 494 (1998).

<sup>188</sup> See Sproat, *supra* note 27, at n. 223; Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai‘i*, 20 U. HAW. L. REV. 99, n. 312 (1998).

<sup>189</sup> *Id.*

<sup>190</sup> Pele Def. Fund v. Estate of Campbell, Civil No. 89-089 (Hilo) (2002) (Findings of Fact, Conclusions of Law, and Order) at 32-33.



article XII, section 7.<sup>191</sup> The trial court's decision is sound because article XII, section 7 is merely an affirmation of rights existing under HRS sections 7-1 and 1-1;<sup>192</sup> both of these statutes confer traditional and customary rights regardless of ancestry.<sup>193</sup> In spite of the good intentions of article XII, section 7's framers and supportive State policy, the extension of traditional and customary rights to non-Hawaiian 'ohana under the constitutional provision seems unlikely in its current form. However, the decision in *PDF on Remand* reveals HRS sections 7-1 and 1-1's potential to serve as a source of traditional and customary rights for non-Hawaiian 'ohana members.

B. *Extending Traditional and Customary Rights to Non-Hawaiian Members of an 'Ohana under the Hawai'i Revised Statutes*

Although the extension of constitutional protection under article XII, section 7 to non-Hawaiian members of an 'ohana would be the most advantageous in preserving both 'ohana practices and the 'ohana itself, other mechanisms exist that would extend traditional and customary rights to non-Hawaiian members of the 'ohana. While the plain language of article XII, section 7 may limit constitutional protection to Native Hawaiians,<sup>194</sup> neither HRS section 1-1 nor section 7-1 limit traditional and customary rights to individuals of Native Hawaiian descent.<sup>195</sup> Both statutes provide alternative means to extend traditional and customary rights to non-Hawaiian members of an 'ohana.

1. Extending HRS Section 7-1 to Non-Hawaiian Members of an 'Ohana

While the traditional and customary rights set forth in HRS section 7-1 are specifically limited and enumerated, nothing in the plain language of the statute or the subsequent judicial interpretation of the law limits non-Hawaiian 'ohana members from asserting such rights. Although the statute was originally enacted for the benefit of hoā'āina who continued to live in the ancient way,<sup>196</sup> the plain language of the statute confers rights to "the people" and does not limit these rights to Native Hawaiians.<sup>197</sup> The Court interpreted the traditional and customary rights conveyed under

---

<sup>191</sup> *Id.*

<sup>192</sup> *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1271-72 (1992).

<sup>193</sup> *See infra* Section III.B.

<sup>194</sup> HAW. CONST. art. XII, § 7 (1978).

<sup>195</sup> *See* Paul F. Nahoā Lucas, *Gathering Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 216 (Melody Kapilialoha MacKenzie ed., 1991); Smith, *supra* note 27, at 531.

<sup>196</sup> *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 750 (1982).

<sup>197</sup> HAW. REV. STAT. § 7-1 (2008).

HRS section 7-1 to be preserved for *all* lawful ahupua'a tenants.<sup>198</sup>

In 1858, the Court in *Ha'alelea v. Montgomery* ("*Ha'alelea*")<sup>199</sup> determined that the term "tenant" referred to any person lawfully occupying any part of the ahupua'a.<sup>200</sup> The Court's interpretation of "tenant" ultimately means that anyone, Hawaiian or non-Hawaiian, can be an ahupua'a tenant so long as they are lawfully residing in the ahupua'a. *Ha'alelea* set an early precedent from which it can be interpreted that the exercise of section 7-1 rights are open to all those, regardless of ancestry, who "resid[e] within the ahupua'a in which they seek to exercise their [HRS section 7-1] rights."<sup>201</sup>

Under the current interpretation of the statute, a non-Hawaiian member of an 'ohana would surely enjoy the rights enumerated in HRS section 7-1. This statute, however, would merely provide a non-Hawaiian 'ohana member with the ability to gather "firewood, house timber, aho cord, thatch, and ki leaf."<sup>202</sup> The limited rights conferred in section 7-1 do not come close to providing adequate protection for a non-Hawaiian 'ohana member who seeks to continue the practices of his or her 'ohana. The traditional and customary rights provided through section 7-1 are essentially limited to the gathering of materials associated with the building and operation of a traditional Hawaiian hale.<sup>203</sup> The statute wholly overlooks one the most common and practical aspects of 'ohana activity: traditional subsistence practice.<sup>204</sup> Even if the protections of HRS section 7-1 are applicable to a non-Hawaiian 'ohana member, he or she would be limited in fulfilling his or her kuleana to the 'ohana.

## 2. Extending the Hawaiian Usage Exception to Non-Hawaiian Members of Hawaiian 'Ohana

Of all options available to extend traditional and customary rights to non-Hawaiian members of Hawaiian 'ohana, HRS section 1-1 seems to be the most viable. As previously noted, article XII, section 7 was intended to serve as a constitutional reaffirmation of the customary and traditional rights that already existed under Hawai'i law under HRS sections 7-1 and 1-1.<sup>205</sup> Because of the limited nature of section 7-1,<sup>206</sup>

<sup>198</sup> *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 749-50 (1982).

<sup>199</sup> *Ha'alelea v. Montgomery*, 2 Hawai'i 62 (1858).

<sup>200</sup> *Id.* at 71-72.

<sup>201</sup> *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 749-50 (1982).

<sup>202</sup> HAW. REV. STAT. § 7-1 (2008).

<sup>203</sup> Lit., "House." PUKUI & ELBERT, *supra* note 6, at 52.

<sup>204</sup> See Lucas, *supra* note 58, at 203.

<sup>205</sup> *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1271-72 (1992).

<sup>206</sup> See *supra* Section III.B.1.

the broad spectrum of traditional and customary rights protected under article XII, section 7 originates from HRS section 1-1, the Hawaiian Usage exception. Unlike article XII, section 7, the Hawaiian Usage exception does not limit traditional and customary rights to individuals of Native Hawaiian descent. In its discussion of the Hawaiian Usage exception, the *Kalipi* Court explained that the exception was intended to protect “native understandings and practice;”<sup>207</sup> that is to say, the Hawaiian Usage exception protects the traditional or customary practice rather than the practitioner. As one legal scholar suggests, the Hawaiian Usage exception “protects Hawaiian tradition without limits according to person or class.”<sup>208</sup> If the Hawaiian Usage exception is applied to extend traditional and customary rights, there may be concern about potential abuses of these rights by individuals seeking only to exploit resources or the Hawaiian culture.

Even if traditional and customary rights under the Hawaiian Usage exception were interpreted to be potentially assertable by *anyone* regardless of ancestry, Court imposed conditions would limit the extension of protections to individuals who are truly knowledgeable of Hawaiian traditional and customary practices. In order to be afforded traditional and customary rights, the individual asserting such rights must provide an adequate foundation connecting the claimed right to a firmly rooted traditional or customary Hawaiian practice.<sup>209</sup> The Court has historically rejected claims after concluding that the claimant had not shown that the asserted right was firmly established in Hawaiian practice or custom.<sup>210</sup> Because an adequate evidentiary foundation must be established,<sup>211</sup> the individual asserting his or her traditional and customary rights must adhere to proper protocols, norms, and values of traditional Hawaiian culture.

The evidentiary requirement set forth in *Hanapī* limits protections to those who are truly ma‘a<sup>212</sup> to Hawaiian traditional and customary practices. This limitation prevents potential attempts to undermine the true intent of traditional and customary rights, which is to preserve traditional Hawaiian culture and lifestyle.<sup>213</sup> Additionally, the limitation of gathering for subsistence use prevents individuals from exploiting

---

<sup>207</sup> *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 751 (1982).

<sup>208</sup> Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture Values for the Debate About Homogamy*, 8 YALE J. L. & HUMAN. 105, 139 (1996).

<sup>209</sup> *Hawaii v. Hanapī*, 970 P.2d 485, 495 (1998).

<sup>210</sup> *See Oni v. Meek*, 2 Hawai‘i 87 (1858); *Haiku Plantations Ass’n v. Lono*, 529 P.2d 1 (1974); *Hawaii v. Hanapī*, 970 P.2d 485 (1998).

<sup>211</sup> *Hawaii v. Hanapī*, 970 P.2d 485, 495 (1998).

<sup>212</sup> Lit., “Knowing thoroughly.” PUKUI & ELBERT, *supra* note 6, at 217.

<sup>213</sup> *See Lucas*, *supra* note 58, at 217.

resources by asserting traditional and customary rights for commercial purposes.<sup>214</sup> Therefore, traditional and customary rights under the Hawaiian Usage exception would not extend to *anyone* who merely wishes to assert such rights.

Extending the Hawaiian Usage exception to the non-Hawaiian member of the 'ohana would be advantageous because the exception provides protection to the broadest spectrum of traditional and customary practices, thereby allowing the 'ohana member to carry out his or her kuleana. More likely than not, a non-Hawaiian 'ohana member continuing the traditional and customary practices of his or her 'ohana would be afforded protections under the Hawaiian Usage exception. As noted in *Kalipi* and reaffirmed in subsequent cases,<sup>215</sup> traditional and customary practices are protected under HRS section 1-1 if those customary practices are (1) established prior to November 25, 1892,<sup>216</sup> (2) continue to be practiced, and (3) cause no harm.<sup>217</sup> Insofar as there is no actual harm, non-Hawaiian 'ohana members carrying out kuleana to the 'ohana falls squarely within HRS section 1-1 protections. A key characteristic of the traditional and customary practices of an 'ohana is that the practices have been continued and passed intergenerationally from past to present while maintaining the inherent values and customs of the previous generations—customs which have existed prior to 1892 and in many cases prior to Western Contact.<sup>218</sup> Because article XII, section 7 creates no new or different rights, HRS section 1-1 essentially grants the same traditional and customary rights to non-Hawaiian members of Hawaiian 'ohana, placing them on equal ground with their Hawaiian relatives.

#### CONCLUSION

The 'ohana continues to serve as the primary social unit for Native Hawaiians. Members of an 'ohana include anyone related through blood, marriage, and adoption. All members of an 'ohana are considered to be full family members. Most importantly, the 'ohana plays a central role in the preservation of Native Hawaiian culture through the continuation of 'ohana traditions and customs. As more non-Hawaiians are included

---

<sup>214</sup> *Id.* at 214-15.

<sup>215</sup> See *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 751-752 (1982); *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1275 (1992); *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1261-63 (1995).

<sup>216</sup> *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1268 (1995).

<sup>217</sup> *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 751-752 (1982).

<sup>218</sup> McGregor, *Hoa'aina*, *supra* note 39, at 14-18; Kana'iaupuni, *Hawaiian Families*, *supra* note 11, at 61; see *Pele Def. Fund v. Estate of Campbell*, Civil No. 89-089, Finding of Fact 47 (Hilo) (2002).

within the Hawaiian 'ohana, their role in the continuation of 'ohana traditions and customs will become more pronounced. Although the issue of extending traditional and customary rights to non-Hawaiian members of Hawaiian 'ohana remains unsettled, the Hawai'i Supreme Court will eventually have to make such a determination as more non-Hawaiian 'ohana members choose to carry on the traditions and customs of their Hawaiian ancestors.

The laws that recognize traditional and customary rights do not prohibit non-Hawaiian 'ohana members from asserting such rights. Furthermore, both the legislative intent and judicial interpretation of the laws protecting traditional and customary rights suggest the extension of these protections to non-Hawaiian members of Hawaiian 'ohana. To ensure a thriving Hawaiian culture, the constitutional protections for traditional and customary practices, implemented to preserve Hawaiian culture, should be extended to non-Hawaiian members of the 'ohana.