

To Raise the Health Status of Native Hawaiians to the Highest Possible Level: An Expansive Reading of the Native Hawaiian Health Care Improvement Act

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ABSTRACT

Compared with other racial and ethnic groups in the United States, Kānaka Maoli (Native Hawaiians) experience a disproportionate number of health inequities, such as a shortened life expectancy and an increased likelihood to live below the poverty line. This injustice is due in part to a loss of land, political autonomy, and cultural sovereignty. The Native Hawaiian Health Care Improvement Act (NHHCIA) attempted to combat these disparities and “raise the health status of Native Hawaiians to the highest possible level.” However, the statute’s near-exclusive focus on clinical care cascades into a narrow implementation that limits impact on population health. Using a restorative justice framework adapted to ‘Ōiwi

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principles and rooted in ideas of self-determination, this Article argues that the NHHCIA should be read more expansively to include more holistic and upstream public health interventions tailored toward land, self-governance, and cultural integrity.

I. INTRODUCTION

The most pressing problem in Indigenous health care is not a lack of empathy but, rather, a lack of funds and resources.¹ The United Nations identified some major reasons for health disparities of Indigenous peoples throughout the world, including: (1) environmental contamination and degradation; (2) high levels of poverty; (3) structural racism and discrimination stemming directly from colonization; (4) loss of property and traditional lands; and (5) remoteness.² Health disparities, particularly for Indigenous groups, are not inherent in the population but are, instead, created by the systems and structures surrounding the population.³

Kānaka Maoli,⁴ or Native Hawaiians, are no exception to this pattern of historical mistreatment. Nearly two and a half centuries of

¹ See generally U.S. COMM’N ON C.R., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEED IN INDIAN COUNTRY (2003) (finding that the Departments of the Interior, Health and Human Services, Housing and Urban Development, Justice, Education, and Agriculture did not adequately fund Native American programs to meet needs). “By most accounts, [Indian Health Services] has done well to work within its resource limitations [. . .] If funded sufficiently, however, it could do more to stem the crisis.” *Id.* at 110.

² U.N. DEP’T. OF ECON. & SOC. AFFAIRS, STATE OF THE WORLD’S INDIGENOUS PEOPLES, at 161-62, U.N. Doc. ST/ESA/328, U.N. Sales No. 09.VI.13 (2009). These categories do not exist in isolation but, rather, overlap and influence one another. For example, all five reasons would be relevant in situations where colonization degrades the environment such that it destroys the land, forces relocation, increases remoteness, and induces poverty.

³ James N. Weinstein et al., NAT’L ACAD. OF SCIS., ENG’G, & MED., COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY 102 (2017). Explicitly naming the root causes of health disparities is crucial to identifying solutions without causing more harm by placing unwarranted blame on individuals. See, e.g., Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. OF THE NAT’L. ACAD. OF SCIS. OF THE U.S. 4296 (2016).

⁴ As noted by the prominent Kanaka scholar Dr. Noelani Goodyear-Ka’ōpua,

Our usage of the term “Kanaka Maoli” is a result of the [Hawaiian Renaissance Movements]. In the late 1980s and 1990s, this way of self-identifying became more and more frequent, as the Native Hawaiian people asserted our distinctive identity in our own language. The reemergence of ancestral ways of describing ourselves also disrupts the racialized, U.S. legal definition of “native Hawaiian,” which uses blood quantum measurements that do not emerge from Hawaiian culture.

NOELANI GOODYEAR-KA’ŌPUA, A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 1-2 (Noelani Goodyear-Ka’ōpua et al., eds., 2014). Similarly, this Article uses the terms “Kanaka Maoli,” “Kanaka ‘Ōiwi,” “Kanaka,” “Maoli,” and

ongoing colonization⁵ reverberate throughout the population, resulting in some of the worst health disparities compared with other minority or Indigenous groups nationally.⁶ For example, in Hawai‘i, Kānaka Maoli have the shortest life expectancy, are the most likely to live below the poverty line, and experience significantly higher rates of unemployment, impoverished conditions, and incarceration.⁷ This is due in part to a loss of land, political autonomy, and cultural sovereignty.

Since 1988, the Native Hawaiian Health Care Improvement Act (NHHCIA)⁸ attempted to combat these disparities by funding interventions like the Native Hawaiian Health Care Systems, the Native Hawaiian Health Scholarship Program, and supportive infrastructure to certify traditional healers.⁹ However, the statute’s near-exclusive focus on clinical care has made its implementation too narrow to have a significant impact on population health. If the purpose of the NHHCIA is to “raise the health status of Native Hawaiians to the highest possible level,” then its scope and resources must be expanded significantly to reach that goal.¹⁰

“‘Ōiwi,” with their respective nuances, “to refer to the autochthonous people of the Hawaiian archipelago – the original people who emerged from this place.” *Id.* at 2.

⁵ Colonization in Hawai‘i continues to manifest through historical trauma, militarization, the tourism industry, and attitudes about how likely these circumstances are to ever change. *See, e.g.,* Mapuana C. K. et al., *(Re)constructing Conceptualizations of Health and Resilience among Native Hawaiians*, GENEALOGY, Jan. 5, 2020, at 1-2 (“Historical trauma is a social determinant of health of indigenous people as a result of colonization.”); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I 49 (1999) (“Tragically for the Native People, Hawai‘i is the most militarized of America’s colonial possessions in the Pacific.”); Erika Nielsen, *Articulated Indigeneity and Tourism in Hawai‘i* 1, 4 (Nov. 21, 2017) (M.A. thesis, University of San Francisco) (“The historical reality of tourism in Hawai‘i is that it often acts as a form of cultural and economic dispossession that stems from a longer saga of colonization by the United States.”); Lorinda Riley, *Native Hawaiians and the New Frontier of the Indian Civil Rights Act*, 26 ASIAN AM. L.J. 168, 200 (2019) (“Colonization has been so effective amongst Native Hawaiians that many Native Hawaiians have given up hope of becoming a nation again, domestic or otherwise.”).

⁶ NOREEN MOKUAU ET AL., CHALLENGES AND PROMISES OF HEALTH EQUITY FOR NATIVE HAWAIIANS 3 (2016) (discussing the numerous social and health disparities of Native Hawaiians including cardiovascular and cerebrovascular disease, cancer, diabetes, substance use, and aging).

⁷ *Id.*

⁸ Native Hawaiian Health Care Act (NHHCA) of 1988, Pub. L. No. 100-579, 102 Stat. 2916 (1988) (amended 1992). The NHHCA was amended in 1992 and renamed the Native Hawaiian Health Care Improvement Act (NHHCIA), 42 U.S.C. §§ 11701-11714. I use NHHCIA when speaking about the statute generally. *See* discussion on the slight differences between the two acts *infra* Part III.

⁹ NHHCIA, 42 U.S.C. §§ 11705, 11709.

¹⁰ *Id.* at § 11702(a).

This Article advocates for an expansive interpretation of the NHHCIA and, in turn, increased funds to support these broader public health initiatives. Section II explains the systemic health inequities caused by the overthrow of a sovereign state, the ongoing effects of a near-cultural genocide, and the resulting governmental duty that results from this historical trauma. Section III examines the NHHCIA in totality, including its foundational study and the practicalities of its governing organization, Papa Ola Lōkahi. Section IV finally proposes upstream health interventions using a restorative justice framework tailored to ‘Ōiwi principles and rooted in ideas of self-determination. Though far from the end goal, expansion of the current structures is a critical step towards imagining a Hawaiian nation that reflects its Indigenous principles.¹¹

II. KULEANA: TRUST AND RESPONSIBILITY

In ‘ōlelo Hawai‘i, or the Hawaiian language, the word “kuleana” can translate to “responsibility.”¹² However, kuleana is “more than simple binary rights and responsibilities” and “extends to relationships with the land and with other people connected to it.”¹³ Kuleana can be interpreted as a collective duty to each other, to the past, to the future, and to the land.¹⁴

The responsibility of a government to its people is a difficult question to answer conclusively. For example, a libertarian may consider government to be a dangerous institution with the ability to restrict individual rights, while a socialist might treat government as a tool to improve economic equity.¹⁵ These ideological differences can be a major source of tension in discussions on long-term support for government-

¹¹ “Imagination enables people to rise above their own circumstances, to dream new visions and to hold on to old ones. It fosters inventions and discoveries, facilitates simple improvements to people’s lives and uplifts our spirits.” LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 158 (1999).

¹² MARY KAWENA PUKUI & SAMUEL H. ELBERT, *HAWAIIAN DICTIONARY* 149 (1986) [hereinafter *HAWAIIAN DICTIONARY*]. “Kuleana” can also translate to “right” or “privilege.” *Id.*

¹³ MEHANA BLAICH VAUGHAN, *KAIĀULU: GATHERING TIDES* 6 (2018); *see also* Noelani Goodyear-Ka‘ōpua, *Kuleana Lāhui: Collective Responsibility for Hawaiian Nationhood in Activists’ Praxis*, 5 *AFFINITIES: J. RADICAL THEORY, CULTURE & ACTION* 131 (2011) (defining kuleana as “authority and obligation based in interdependence and community”).

¹⁴ *See, e.g.*, Goodyear-Ka‘ōpua, *supra* note 13, at 155 (“*Kuleana* should be more fully explored as a principle for building post-imperial futures that carve autonomous spaces outside of the capitalist, private property system by looking at traditional practices of providing food for the people.”).

¹⁵ *See generally* Peter McLaverty, *Socialism and Libertarianism*, 10 *J. POL. IDEOLOGIES* 185, 188-89 (2005); Costas Panayotakis, *Capitalism, Socialism, and Economic Democracy: Reflections on Today’s Crisis and Tomorrow’s Possibilities*, 21 *CAPITALISM NATURE SOCIALISM* 7, 30-32 (2010).

funded benefits.¹⁶ However, there is general agreement that a government ought to be responsible to the people it harms and owes a duty to repair the damage it perpetuates.¹⁷ The following section first touches upon the colonization of Hawai‘i by the United States, explores the resultant negative health effects, and then discusses the kuleana of the U.S. government to Kānaka Maoli.

A. *A Brief History of the Colonization of Hawai‘i*

The first Polynesian settlers are estimated to have arrived in the Hawaiian islands prior to 100 A.D.¹⁸ Throughout hundreds of years of near-isolation, Kānaka Maoli crafted their own unique language, culture, and lifestyle.¹⁹ Native plants and crops sustained a nutritional diet that prevented obesity, cardiovascular disease, and tooth decay.²⁰ Across the archipelago, the Maoli population blossomed to about 300,000 by 1778, and eyewitness accounts from the earliest travelers to Hawai‘i commented on the excellent health of Kānaka Maoli.²¹ Though life was not perfectly peaceful prior to outside contact, the effects of colonization were devastating in previously unimagined ways.²²

¹⁶ Just forty percent of Americans surveyed believe that more government assistance should be provided to people in need. PEW RSCH. CTR., IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS 39 (2019). That number increases six points with younger demographics; fifteen points with family income below the poverty line; and upwards of thirty-two points for liberal respondents. *Id.*

¹⁷ Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J. L. & POL. 183, 183 (2006) (“Holocaust survivors retrieved over \$8 billion in assets frozen in bank accounts or looted by the Nazis; Japanese Americans interned during World War II received compensation from the U.S. government; Chile compensated descendants of Pinochet’s victims; Japan redressed Korean “comfort women”; and Canada paid damages to Aborigines for forced assimilation of their children.”).

¹⁸ Kekuni Blaisdell, *Hawaiian Health Timeline and Events*, PAPA OLA LŌKAHI (2016), <http://papaolalokahi.org/images/pdf-files/hawaiian-health-time-line-and-events.pdf>.

¹⁹ See, e.g., S.M. KAMAKAU, *RULING CHIEFS OF HAWAI‘I* 1-78 (rev. ed. 1992) (retelling the history of certain chiefs before the arrival of Captain Cook).

²⁰ Terry Shintani et al., *The Waianae Diet Program: A Culturally Sensitive, Community-Based Obesity and Clinical Intervention Program for the Native Hawaiian Population*, 53 HAW. MED. J. 136, 137 (1994) (“Historical evidence suggests that prior to western contact and western diets, Native Hawaiians had little cardiovascular disease or obesity”); ALU LIKE, E OLA MAU: THE NATIVE HAWAIIAN HEALTH NEEDS STUDY 15 (2016) [hereinafter E OLA MAU] (“Prior to 1778, there was very little tooth decay in the young Native Hawaiians and it was virtually non-existent in the young child. By 1930, tooth decay was endemic in Hawaii and the majority of Native Hawaiian children had dental decay.”).

²¹ OFF. OF HAWAIIAN AFF., *NATIVE HAWAIIAN POPULATION ENUMERATIONS IN HAWAI‘I* 5 (2017); John Casken, *Improved Health Status for Native Hawaiians: Not Just What the Doctor Ordered*, 16 WICAZO SA REV. 75, 78 (2001).

²² See, e.g., JULIE STEWART WILLIAMS, *KAMEHAMEHA THE GREAT* 43-82 (rev. ed.

Within the first hundred years after European contact in 1778, the Kānaka Maoli population decreased by at least ninety percent as a direct result of new diseases brought to the Islands.²³ Concurrently, American missionaries and businessmen arrived, each with their own agenda.²⁴ When the traditional kapu system of rules and taboos was formally abolished, Christian tenets quickly filled the void.²⁵ As trade increased, cash crops like pineapple, macadamia nuts, sugar cane, and sandalwood began to supplant subsistence-based agricultural practices.²⁶ Storied traditions were abandoned in favor of promises from a new world. As new systems were established, maka‘āinana, or the common citizens of Hawai‘i,²⁷ were left behind.²⁸

The sinking socioeconomic status of Kānaka was not just a tragic accident but the result of assimilative and usurping tactics.²⁹ Wealthy

1993).

²³ Shawn Mali Kana‘iaupuni & Nolan Malone, *This Land Is My Land: The Role of Place in Native Hawaiian Identity*, 3 HŪLILI: MULTIDISC. RSCH. ON HAWAIIAN WELL-BEING 281, 285-86 (2006), <https://kamehamehapublishing.org/hulili-volume-3/>.

²⁴ “This goal of assimilation was the official mission of the missionaries.” E OLA MAU, *supra* note 20, at 19; Ronald Takaki, “An Entering Wedge”: *The Origins of the Sugar Plantation and a Multi-ethnic Working Class in Hawaii*, 23 LAB. HIST. 32, 32-33 (“[William Hooper] was there to remake Hawaii in his own image: to advance American capitalism and civilization to a new Pacific frontier, undermining in the process the feudal society of Hawaii and the people’s traditional relationship with their land.”).

²⁵ Jennifer Fish Kashay, *From Kapus to Christianity: The Disestablishment of the Hawaiian Religion and Chiefly Appropriation of Calvinist Christianity*, 39 W. HIST. Q. 17, 39 (2008) (“The American missionaries and the resident foreign merchants offered them two contrasting Western models to emulate, and the chiefs chose the former as the best means to accomplish their goal.”).

²⁶ Krisnawati Suryanata, *Products from Paradise: The Social Construction of Hawaii Crops*, 17 AGRIC. & HUM. VALUES 181, 181 (2000) (remarking that “traditional sugar and pineapple industries could no longer be sustained”); Takaki, *supra* note 24, at 32 (describing how William Hooper was sent to “establish the first plantation in the Sandwich Islands and to cultivate sugar cane as a cash crop.”).

²⁷ HAWAIIAN DICTIONARY, *supra* note 12, at 224.

²⁸ Between 1778 and 1854 life patterns for the *maka‘ainana* changed from those of affluent subsistence farmers who were self-sufficient in terms of nearly all the essentials of life, albeit in a politically rather unstable world, to those of a class of unskilled and predominantly landless peasants who were dependent on their labour to supply the food and increasing number of goods of foreign origin necessary to sustain life.

Caroline Ralston, *Hawaii 1778–1854: Some Aspects of Maka‘ainana Response to Rapid Cultural Change*, 19 J. PAC. HIST. 21, 22 (1984).

²⁹ For example, annexationists were major proponents of tourism for the explicit purpose of making Hawai‘i “more like a white republic.” JAMES MAK, CREATING “PARADISE OF THE PACIFIC”: HOW TOURISM BEGAN IN HAWAII 23 (2015).

plantation businessmen purposefully created significant economic disparities and racial divides as a ploy to secure political and economic power.³⁰ In 1893, the Kingdom of Hawai‘i was overthrown and illegally annexed by the United States.³¹ By 1920, the Kānaka Maoli population in the islands had plummeted to just under 24,000, representing a tenth of the total population and an estimated eight percent of the pre-contact population.³²

In the immediate aftermath of the overthrow, about 1.8 million acres of land were “ceded” to the U.S. federal government;³³ local governance became driven by White, corporate interests;³⁴ and ‘ōlelo Hawai‘i was banned “to drive Hawaiians away from their culture, spirituality, and practices.”³⁵ It is impossible to fully capture what this meant for Maoli culture, particularly as ‘ōlelo Hawai‘i was an oral tradition whose stories were passed from person to person down generations since time

³⁰ TRASK, *supra* note 5, at 26; *History of Labor in Hawai‘i*, CTR. FOR LAB. EDUC. & RSCH., <https://www.hawaii.edu/uho/clear/home/HawaiiLaborHistory.html> (last visited Oct. 21, 2022).

³¹ Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, NAT’L EDUC. ASS’N (Apr. 2, 2018), <https://www.nea.org/advocating-for-change/new-from-nea/illegal-overthrow-hawaiian-kingdom-government>. Official annexation took three years because, when the Kingdom of Hawai‘i was first overthrown, President Cleveland was patently against supporting the coup of a sovereign state. *Id.* However, Cleveland’s successor, President William McKinley, embodied imperialism by leading the annexation of Hawai‘i, the Philippines, Guam, Puerto Rico, and Sāmoa during his presidency. Kealani Cook, *McKinley’s Wars and Influence on Annexation*, NATIVE STORIES PODCAST (Jul. 26, 2020), <https://nativestories.org/mckinleys-wars-and-influence-on-annexation/>.

³² ROBERT C. SCHMITT, *HISTORICAL STATISTICS OF HAWAII* 8 (1977); Sara Kehaulani Goo, *After 200 years, Native Hawaiians Make a Comeback*, PEW RSCH. CTR. (Apr. 6, 2015), <https://www.pewresearch.org/fact-tank/2015/04/06/native-hawaiian-population/>.

³³ N. Mahina Tuteur, *Militarization, Slow Violence, and the Emerging Threat of Condemnation in Hawai‘i*, 2 J. ENV’T MEDIA 3.1, 3.4 (2021); *see* discussion of ‘āina, land, and natural resources *infra* Section IV.B.

³⁴ *See* Poka Laenui, *One Hundred Years of Colonization in Hawaii*, *FOURTH WORLD BULL.*, July 1993, at 14; John P. Frank, *Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 *COLUMBIA LAW REV.* 639, 644-45 (1944) (“When the Organic Act was passed, it was accepted without question that Hawaii was to be governed by a ‘ruling class’ of approximately 4,000 Americans and other Anglo-Saxon peoples who were to have dominion over the remaining 145,000 residents of the Islands.”); *see* discussion of ea and self-governance *infra* Section IV.C.

³⁵ Troy J.H. Andrade, *E Ola Ka ‘Ōlelo Hawai‘i: Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli*, 6 *INDIG. PEOPLES’ J. L. CULTURAL RESISTANCE* 3, 21 (2020); *see* discussion of mo‘omeheu and cultural integrity *infra* Section IV.D.

immemorial.³⁶ While the written word evolved,³⁷ much of the history, experiences, and existence of Kānaka Maoli were thrust into peril.³⁸

Despite near cultural and physical genocide,³⁹ Kānaka ‘Ōiwi persevered. The Hawaiian Cultural Renaissance of the 1970s instituted language immersion programs, challenged the dominance of the tourism and military industries, and renewed the sovereignty movement.⁴⁰ Though the Kānaka Maoli population has made an incredible comeback, a significant amount of work is required to repair centuries of colonialism.

B. *Health Effects of Colonization*

The material effects of colonization are evident: wealthy business owners backed by U.S. military forces stripped Kānaka Maoli of their land, independence, and culture. A society built over centuries was drastically

³⁶ Jacqueline Ng-Osorio & Brandon C. Ledward, *Aia ke Ola i ka ‘Ōlelo Hawai‘i: Revival of the Hawaiian Language*, KAMEHAMEHA SCH. RSCH. & EVAL. 1. As ‘ōlelo Hawai‘i evolved to include palapala, or written word, Hawaiian literacy became the norm and “[d]espite its displacement by English, ‘ōlelo Hawai‘i was preserved for future generations by a handful of dedicated individuals.” *Id.* at 1-2.

³⁷ Nūpepa ‘ōlelo Hawai‘i, or Hawaiian-language newspapers, began printing in the early 19th century and are a major source of archival history of ‘Ōiwi voices and knowledge, as well as a means of resistance throughout this time. *See generally* NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* 201 (2004) (describing how “newspapers played an important role in sustaining the lāhui as one across the archipelago”).

³⁸ After the overthrow of the Kingdom, ‘ōlelo Hawai‘i was strictly forbidden in schools as an assimilation policy. Kamanaonāpalikūhonua Souza & K. Ka‘ano‘i Walk, *‘Ōlelo Hawai‘i and Native Hawaiian Education*, in *NATIVE HAWAIIAN LAW: A TREATISE* 1271 (Melody Kapilialoha MacKenzie et al. eds., 2015). One proverb states, “I ka ‘ōlelo nō ke ola; i ka ‘ōlelo nō ka make” or there is language in life; there is language in death. MARY KAWENA PUKUI, *‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS* 129 (1983).

³⁹ *See* Thomas W. Simon, *Defining Genocide*, 15 WIS. INT’L L.J. 243, 243 (1996) (citing Rudolph J. Rummel, *The Holocaust in Comparative and Historical Perspective*, a paper delivered to the Conference on The “Other” Threat: Demonization and Anti-Semitism, June 12-15, 1995, at the Hebrew University of Jerusalem) (listing “the denial of ethnic Hawaiian culture by the American run public school system in Hawaii” as an example of genocide); Mililani Trask, *Mililani Trask*, in *AUTOBIOGRAPHY OF PROTEST IN HAWAII* 392 (Robert H. Mast & Anne B. Mast, eds. 1996) (“Hawaiians were evicted from their lands [. . .] That was genocide. Their ability to fish certain waters and cultivate land so that they could eat and live was taken away at the very time that Western diseases were taking a terrible toll.”).

⁴⁰ Davianna Pomaika‘i McGregor, *Statehood: Catalyst of the Twentieth-Century Kanaka ‘Ōiwi Cultural Renaissance and Sovereignty Movement*, 13 J. ASIAN AM. STUD. 311, 316-17 (2010).

altered in a few generations.⁴¹ Despite the strides made to repair these harms, the human body retains trauma over multiple generations.⁴²

Historical trauma is “the collective emotional wounding across generations that results from massive cataclysmic events” that are “held personally and transmitted over generations”.⁴³ Historical trauma can reverberate so loudly that “even family members who have not directly experienced the trauma can feel the effects of the event generations later.”⁴⁴ Regularly cited events causing historical trauma include slavery, the Holocaust, forced migration, and the colonization of Native Americans.⁴⁵ Environmental sensitivity studies suggest that “exposure to trauma or stressors can modify the epigenome which, in turn, can impact gene regulation, expression, and ultimately patterns of biology and health.”⁴⁶ In other words, the psychological effects of trauma are so strong that they can become genetically inherited.

One study on historical trauma by Professor Les B. Whitbeck and others developed a method of conceptualizing and measuring perceptions of loss with symptoms of anxiety, depression, anger, and avoidance in American Indians.⁴⁷ The study found that about a third of participants

⁴¹ See, e.g., Kalamaoka‘aina Niheu et al., *The Impact of the Military Presence in Hawai‘i on the Health of Na Kanaka Maoli*, 14 DEVELOPING HUM. RES. PAC. 199, 200 (2007) (discussing how the construction of a naval base at Pearl Harbor “destroy[ed] 36 traditional Hawaiian fishponds and transform[ed] what was once a rich food source for O‘ahu into a vast naval station.”); Laurie D. McCubbin and Anthony Marsella, *Hawaiians and Psychology: The Cultural and Historical Context of Indigenous Ways of Knowing*, 15 CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCH. 374, 382-84 (2009) (describing how the deficit model of psychology and race science reinforced “negative stereotypes of Hawaiians”).

⁴² See generally BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 3 (2015) (“[Trauma] has ongoing consequences for how the human organism manages to survive in the present. Trauma results in a fundamental reorganization of the way mind and brain manage perceptions. It changes not only how we think and what we think about, but also our very capacity to think.”).

⁴³ University of Washington School of Public Health, *Impact of Unresolved Trauma on American Indian Health Equity - Donald Warne*, YOUTUBE (Apr. 19, 2019), <https://www.youtube.com/watch?v=fS7WKxDtkwY>.

⁴⁴ *Id.*

⁴⁵ ADMIN. FOR CHILD. & FAMS., *Trauma*, <https://www.acf.hhs.gov/trauma-toolkit/trauma-concept> (last visited Oct. 31, 2022, 10:42 PM).

⁴⁶ Andie Kealohi Sato Conching & Zaneta Thayer, *Biological Pathways for Historical Trauma to Affect Health: A Conceptual Model Focusing on Epigenetic Modifications*, 230 SOC. SCI. & MED. 74, 75 (2019) (discussing evidence for epigenetic modification of Holocaust survivors, incarcerated Japanese Americans during World War II, prisoners of the Yom Kippur War, and historically and systematically subjugated populations including Native Americans, Mexican Americans, and African Americans).

⁴⁷ Les B. Whitbeck et al., *Conceptualizing and Measuring Historical Trauma*

thought monthly or more about their loss of land; about a third thought daily about their loss of language, culture, and loss of people due to early death; and almost half thought daily about losses from the effects of alcoholism on their people.⁴⁸ Perceived historical loss was significantly associated with regular instances of shame, loss of sleep, isolation, and rage.⁴⁹ The authors highlight a quote from one of the elders who said, “I feel bad about it. Tears come down. That is how I feel. I feel weak.”⁵⁰

Another review found data that historical trauma negatively affects mental health, physical health, emotional response, risky behaviors, and relationship breakdowns at the individual, family, and community levels.⁵¹ Perhaps more importantly, they found evidence that strong connections to family, community, and culture were protective factors that increased resilience, reduced harm, and healed trauma.⁵² In reference to the African American community, Dr. Elizabeth Burke-Maynard suggests that collective healing from historical trauma can happen by (1) developing specific, culturally-centered interventions; (2) connecting with cultural strengths; (3) integrating traditional rituals and ways of healing; (4) employing culturally-congruent models of service delivery; (5) reducing barriers to resources for well-being; (6) educating culturally competent practitioners; (7) promoting practitioners and practices from the community; and (8) receiving reparations and apologies.⁵³

C. The Trust Relationship

The trust doctrine is a guiding principle of government responsibility to Indigenous peoples. For most Native Americans, the trust relationship stems from the federal government’s obligation to fulfill its treaty commitments and duties under various agreements, executive orders, and statutes.⁵⁴ The U.S. Supreme Court views this relationship as “more

Among American Indian People, 33 AM. J. CMTY. PSYCH. 119, 127 (2004).

⁴⁸ *Id.* at 124. Some of the other questions of loss with a high “Yes” response rate inquired about the loss of traditional spiritual ways, loss of self-respect from poor treatment by government officials, and loss of trust in whites from broken treaties.

⁴⁹ *Id.* at 127.

⁵⁰ *Id.* at 128.

⁵¹ Reakeeta Smallwood et al., *Understanding the Impact of Historical Trauma Due to Colonization on the Health and Well-Being of Indigenous Young Peoples: A Systematic Scoping Review*, 32 J. TRANSCULTURAL NURSING 59, 61-65 (2021).

⁵² *Id.* at 65.

⁵³ Elizabeth Burke-Maynard, *Healing from Historical Trauma for Persons of African Ancestry in the United States: An African Centered Psychology Approach to Wellness* (Dec. 2016) (Ph.D. dissertation, Pepperdine University) (ProQuest).

⁵⁴ *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (first recognition of the trust relationship as “the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be

than mere contracts”⁵⁵ and has stated that the United States has “charged itself with moral obligations of the highest responsibility and trust.”⁵⁶ A Senate report on American Indian policy noted that “the purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people,” including services to protect and enhance tribal lands, resources, and self-government, as well as economic and social programs to raise the standard of living and social well-being.⁵⁷ For example, the “federal government’s obligation to provide health care to [Indigenous peoples] is a significant instance of the larger trust doctrine.”⁵⁸ The same report notes that “there is little reason to restrict the trust doctrine other than administrative convenience.”⁵⁹

Due to the federal government’s reliance on individual treaties, the trust relationship is slightly different for every Indigenous group. However, Kānaka Maoli are particularly distinct.⁶⁰ Here, the federal government created a trust relationship when it illegally annexed Hawai‘i and took ceded lands to be “used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes.”⁶¹ The federal trust relationship was reaffirmed by the 1959 Admission Act, which created the State of Hawai‘i and a separate public trust relationship between the State

extinguished by a voluntary cession to our government.”); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (finding that the United States “has charged itself with moral obligations of the highest responsibility and trust.”); Memorandum from Dep’t of the Interior Solic. Leo M. Krulitz to Assistant Att’y Gen. James W. Moorman, at 2 (Nov. 21, 1978) (“The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.”); *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974) (affirming the constitutionality of federal policy of hiring preferences for Indians for certain jobs as a means of allowing self-governance, furthering “the Government’s trust obligation toward the Indian tribes,” and reducing other negative effects).

⁵⁵ Ian Falefuafua Tapu, *How to Say Sorry: Fulfilling the United States’ Trust Obligation to Native Hawaiians by Using the Canons of Construction to Interpret the Apology Resolution*, 44 N.Y.U. REV. L. & SOC. CHANGE 445, 459 (2020).

⁵⁶ *Seminole Nation*, 316 U.S. at 297.

⁵⁷ AM. INDIAN POL’Y REV. COMM’N, 95TH CONG., FINAL REP. APPENDIXES & INDEX 130 (Comm. Print 1977).

⁵⁸ Ezra Rosser, *Self-Determination, the Trust Doctrine, and Congressional Appropriations: Promise and Pitfalls of Federal Disentanglement from Indian Health Care*, in *FEDERALISM AND ABORIGINAL GOVERNANCE* 179, 184 (Ghislain Otis & Martin Papillon eds., 2013).

⁵⁹ AM. INDIAN POL’Y REV. COMM’N, *supra* note 57.

⁶⁰ S. REP. NO. 112-251, at 1 (2012) (“Native Hawaiians are the only federally-recognized Native people barred from self-determination and self-governance.”).

⁶¹ Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, H.R.J. Res. 55-51, 55th Cong., 30 Stat. 750 (1898).

and Kānaka Maoli.⁶² Other pieces of federal legislation, including the NHHCIA, reflect the trust relationship and theoretically extend “the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities” to Kānaka Maoli.⁶³ Federal courts have also cited the NHHCIA multiple times as confirmation of a trust relationship.⁶⁴

However, the federal government has been hesitant to honor the rights of Kānaka ‘Ōiwi to their fullest extent. For example, the 1993 Apology Resolution recognized Kānaka Maoli as an “indigenous people”⁶⁵ but failed to create any substantive rights that typically accompany this political classification, such as consultation over ceded lands.⁶⁶ The most impactful complication of the trust doctrine is the infamous U.S. Supreme Court case of *Rice v. Cayetano*.⁶⁷ In *Rice*, the Court determined that elections for the Office of Hawaiian Affairs (OHA) are state elections, rather than those of a “separate quasi-sovereignty,” thus any voting restrictions

⁶² Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4. This Public Trust Doctrine between Native Hawaiians and the State of Hawai‘i lists five specific responsibilities for the state to hold lands in trust “for the support of the public schools [. . .], for the betterment of the conditions of native Hawaiians [. . .], for the development of farm and home ownership [. . .] for the making of public improvements, and for the provision of lands for public use.” *Id.* at § 5(f). This responsibility is also embedded in the Hawai‘i Constitution:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect [Hawai‘i’s] natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

HAW. CONST. art. XI, § 1. As the NHHCIA is a federal statute, this paper focuses exclusively on the duty created by the federal trust relationship.

⁶³ NHHCIA, 42 U.S.C. § 11701(19) (1992); *see, e.g.*, Native American Programs Act, 42 U.S.C. § 2991 (1975); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978); National Museum of the American Indian Act, 20 U.S.C. § 80q (1989); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1990).

⁶⁴ *See Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est.*, 470 F.3d 827, 847-48 (9th Cir. 2006) (citing the NHHCIA and the Native Hawaiian Education Act as evidence that “Congress has reaffirmed the unique relationship that the United States has with Hawaii, as a result of the American involvement in the overthrow of the Hawaiian monarchy.”); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1282 (9th Cir. 2004) (recognizing the NHHCIA as one of the statutes that benefit “native Hawaiians only,” along with the Native Hawaiian Education Act and Commission Act).

⁶⁵ Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, S.J. Res. 19, 103rd Cong., 107 Stat. 1510 (1993).

⁶⁶ *See Hawaii v. Off. of Hawaiian Aff.*, 556 U.S. 163, 173 (2009) (holding that the terms used in the Apology Resolution—including Congress’s “commitment to acknowledge the ramifications of the overthrow” and “efforts of reconciliation”—“are not the kind that Congress uses to create substantive rights.”).

⁶⁷ *Rice v. Cayetano*, 528 U.S. 495 (2000).

limiting the election to only “Hawaiians” would violate the Fifteenth Amendment’s requirement of race neutrality.⁶⁸

This opinion has been resoundingly criticized by scholars for erecting a major hurdle to self-determination efforts based in a gross misunderstanding of ‘Ōiwi and OHA history.⁶⁹ The Court refused to “address the history of the special relationship between Native Hawaiians and the federal government”;⁷⁰ the majority ignored that the primary intention of creating OHA was to further “the cause of Hawaiian self-government”;⁷¹ and the opinion did not recognize either “native Hawaiians” or “Hawaiians” as an Indigenous group.⁷²

While the *Rice* decision remains a barrier to Kānaka ‘Ōiwi self-governance, the trust doctrine remains intact. In the two decades since the decision, *Rice v. Cayetano* is generally accepted as “clearly reflect[ive of] the Supreme Court’s indifference and ignorance regarding indigenous rights.”⁷³ While the Court has not made any further decisions on the

⁶⁸ The Court accepts the State’s broad definition of “Hawaiians” as “those persons who are descendants of people inhabiting the Hawaiian Islands in 1778.” *Id.* at 499. Compare *Rice*, 528 U.S. at 522 (“To extend *Mancari* to this context would be to permit a State, by racial classification to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.”) with *Kamehameha Sch./Bernice Pauahi Bishop Est.*, 470 F.3d at 882 (Fletcher, J., concurring) (“Congress has invariably treated ‘Native Hawaiian’ as a political classification for purposes of providing exclusive educational and other benefits.”).

⁶⁹ See generally Lisset M Pino, *Colonizing History: Rice v. Cayetano and the Fight for Native Hawaiian Self-Determination*, 129 YALE L.J. 2574, 2580-85 (2020) (dissecting the doctrinal reasons given by the Court for their ruling and how they are “somewhat perplexing”).

⁷⁰ Kathryn Nalani Setsuko Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of Rice v. Cayetano*, 15 ASIAN AM. LAW J. 9, 29 (2008).

⁷¹ Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 HAW. L. REV. 63, 68 (1985) (quoting COMM. OF THE WHOLE REP. NO. 13, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAWAII OF 1978, at 1019 (1980)).

⁷² *Rice*, 528 U.S. at 509-10 (citing relevant Hawaii statute that refers to both groups as descendant from the “aboriginal peoples” of the Hawaiian Islands but never saying either “aboriginal” nor “Indigenous” within the text of the opinion). In contrast, the dissenting opinions explicitly name the indigeneity of Kānaka Maoli as a key reason the majority erred. See *Rice*, 528 U.S. at 533 (Stevens, J., dissenting) (“Among the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 today expressly include native Hawaiians as part of the class of Native Americans benefited.”); *Id.* at 548 (Ginsburg, J., dissenting) (“Congress’ prerogative to enter into special trust relationships with indigenous peoples, as Justice Stevens cogently explains, is not confined to tribal Indians. In particular, it encompasses native Hawaiians, which Congress has in numerous statutes reasonably treated as qualifying for the special status long recognized for other once-sovereign indigenous peoples.”) (citations omitted).

⁷³ Hong, *supra* note 70, at 29.

political status of Native Hawaiians,⁷⁴ Congress has passed several statutes referencing the Indigeneity of ‘Ōiwi.⁷⁵

The trust obligation to Kānaka Maoli has not been adequately met and has been arguably frustrated by every branch of the federal government.⁷⁶ For the United States government to sufficiently meet its trust responsibilities, government officials must radically shift their approach. A significantly expanded breadth of solutions are necessary to heal from generational trauma and reconcile the deep roots of ongoing harms endured by Indigenous populations.

III. THE NATIVE HAWAIIAN HEALTH CARE IMPROVEMENT ACT

Since 1898, Congress has enacted more than 250 statutes involving Kānaka Maoli by providing separate programs or including Kānaka Maoli in laws and benefit programs assisting other Native peoples.⁷⁷ However, federal involvement with Kānaka Maoli stagnated from the 1990s until recently.⁷⁸ The NHHCIA was passed alongside other key pieces of legislation, all at the helm of the inimitable advocacy efforts of Hawai‘i Senators Daniel Inouye and Daniel Akaka, who both served through the 112th Congress in 2013.⁷⁹

⁷⁴ As a note of interest, the term “Native Hawaiian” appears once in the case of *Lewis v. Clarke*, 137 S. Ct. 1285, 1289 (2017), because Justice Sonia Sotomayor cites the Native Hawaiian Law Treatise for a sentence on federal recognition of Indian tribes.

⁷⁵ See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-10 (grouping “Indian, Native Hawaiian, and Alaska Native Education”); Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289 (grouping “Hawaiian home lands and Indian reservations”); Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act, Pub. L. No. 114-244 (defining a “Native child” as either “an Indian child” or “a Native Hawaiian who is not older than 24 years old”); American Rescue Plan Act of 2021, Pub. L. No. 117-2 (extending funds to both “Urban Indian Health Organizations and Native Hawaiian Health Care Systems”).

⁷⁶ See generally Tapu, *supra* note 55, at 475 (“It is this trust relationship that provides the legal and historical landscape to understand the federal and state governments’ responsibility – and consequently their failure – to fulfill their duties to Native Hawaiians.”); Pino, *supra* note 69, at 2584 (“[Both the Office of Hawaiian Affairs and the Bureau of Indian Affairs] are tasked with administering a trust on behalf of a defined class of beneficiaries. Given this context, the Court plainly erred in distinguishing *Mancari*.”).

⁷⁷ James Kawika Riley, *Ke Kumu O Kānāwai ‘Awa‘awa: The Origins and Expansion of the Native Hawaiian Congressional Policyscape* (Dec. 2022) (Ph.D. dissertation, University of Hawai‘i).

⁷⁸ <http://www.congress.gov> (choose “legislation” from dropdown; type “native hawaiian” into the search box (with quotations); then click the “search” icon). A search for the term “native hawaiian” in federal legislation fetches between 49–112 results for each session from the 101st Congress through the 113th Congress (1989–2014). *Id.* The number of results increases significantly in recent years, with 128 results for the 114th Congress, 129 results for the 115th Congress, 268 results for the 116th Congress, and 336 results for the ongoing 117th Congress as of Oct. 31, 2022. *Id.*

⁷⁹ INOUE, Daniel Ken, HIST., ART & ARCHIVES,

The following section documents the history and present-day details of the NHHCIA. It first looks at E Ola Mau, the study intended to form the basis of the Act, as foundational background to understand what the NHHCIA was meant to achieve in contrast to the text of the statute itself. The second section is a brief overview of the statutory obligations of Papa Ola Lōkahi, the organization in charge of administering the Act. The final section examines E Ola Mau a Mau, the recent follow-up report on Maoli health, and reviews the impact of the NHHCIA as well as recommendations from the report's authors.

A. *E Ola Mau*

Inspired by the Indian Health Care Improvement Act and federally qualified health centers, community advocates envisioned similar statutory assistance for Kānaka Maoli.⁸⁰ Hawai'i Senator Daniel Inouye first introduced legislation addressing this concern in 1981,⁸¹ but legislators needed significantly more information concerning the state of Maoli health before passing anything.⁸² In 1984, the U.S. Senate Appropriations Committee included a directive to conduct the "first comprehensive health assessment of the Native Hawaiian community" that "identified health status, needs, and concerns of Native Hawaiians."⁸³ The project was spearheaded by the Hawaiian Health Research Consortium, who organized

<https://history.house.gov/People/Detail/15647> (last visited Oct. 22, 2022); *AKAKA, Daniel Kahikina*, HIST. & ARCHIVES, <https://history.house.gov/People/Detail/8354> (last visited Oct. 22, 2022).

⁸⁰ Indian Healthcare Improvement Act, 25 U.S.C. § 1601 (1978); Interview with Sheri Daniels, Exec. Dir., Papa Ola Lōkahi, in Honolulu, Haw. (Feb. 23, 2022) (on file with author) [hereinafter POL Interview]; Email from Lorinda Riley, Asst. Prof. of Native Hawaiian and Indigenous Health, University of Hawai'i at Mānoa (Oct. 6, 2022, 3:23 PM HST) (on file with author) [hereinafter Riley Email].

⁸¹ Senator Inouye introduced six bills on Native Hawaiian health care before the NHHCA was finally passed. *See* A bill to specifically include Native Hawaiians within a group of underserved populations for purposes of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, S. 964, 97th Cong. (1981); Native Hawaiian Health Care Needs Act of 1981, S. 965, 97th Cong. (1981); A bill to specifically include Native Hawaiians within a group of underserved populations for the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, S. 168, 98th Cong. (1983); Native Hawaiian and Native American Pacific Islanders Health Care Needs Act of 1983, S. 171, 98th Cong. (1983); A bill to improve the health status of Native Hawaiians, and for other purposes, S. 2243, 99th Cong. (1986); Indian Health Care Amendments of 1987, S. 129, 100th Cong. (1987).

⁸² Too often, policymakers know little to nothing about the people whom their decisions will affect. *See, e.g.,* Libby R. Tronnes, *Mr. Indigenous Goes to Washington: Making Indian Law and Policy in the Twentieth Century*, 64 AM. Q. 153, 154 (2012) ("Blood quantum, reservations, and major court decisions are products of the encounters between Indigenous communities and U.S. colonialism.").

⁸³ E OLA MAU, *supra* note 20, at 2; Mokuau, *supra* note 6, at 5.

themselves into five task forces: (1) Mental Health; (2) Medical; (3) Nutrition and Dental; (4) Historical and Cultural; and (5) Strategic Health Plan.⁸⁴ Each task force had its own respective goals, timelines, strategies, findings, and recommendations, but the entire project was to be completed within just six months.⁸⁵

The Mental Health Task Force gathered data over three months on psychiatric disorder rates and prepared a bibliography of relevant English language and ‘ōlelo Hawai‘i mental health materials.⁸⁶ It found that, compared to the statewide population, Kānaka Maoli have increased instances of “social problems,” disproportionate rates of suicide, and higher levels of stress indexed by markers like poverty, education level, single family households, dwelling density, etc.⁸⁷ The Task Force recommended twelve strategies for improved mental health, some of which included “the renewal and perpetuation of Hawaiian values to assist in the promotion of pride, self-confidence, and personal power”; community-based and Kānaka-controlled mental health services committed to Hawaiian culture, history, and language; the development of political, economic, educational, and social programs to encourage empowerment; and “the development of more programs to increase the availability of land to Native Hawaiians because it is from a relationship with the [‘āina]⁸⁸ that all mental and spiritual health flows.”⁸⁹

The Medical Task Force focused on risk factors for disease, the utilization of health services, and the general health status of Kānaka Maoli.⁹⁰ It found that the “combination of deculturation and low socioeconomic status is reflected in high rates of social problems, a life

⁸⁴ E OLA MAU, *supra* note 20, at 43-59. Each of the task forces had at least some Native Hawaiian membership, though amount varied between twenty and fifty percent. John Casken, *Bringing Culture into health? The Native Hawaiian Health Care Act of 1988* 69-70 (Dec. 1994) (Ph.D. dissertation, University of Hawai‘i) (on file with author).

⁸⁵ E OLA MAU, *supra* note 20, at 2.

⁸⁶ *Id.* at 3.

⁸⁷ *Id.* at 5. The Mental Health Task Force also found disproportionately higher rates of alcohol and narcotics use, school performance impairment, child abuse and neglect, residence in correctional institutions, and academic failure and poor school performance.

⁸⁸ “‘Āina” typically translates to “land” or “environment.” HAWAIIAN DICTIONARY, *supra* note 12, at 10. *See* discussion on ‘āina and its importance to Kānaka ‘Ōiwi *infra* Section IV.B.

⁸⁹ E OLA MAU, *supra* note 20, at 5-6. Crucially, the Mental Health Task Force asserts that these conceptions, rather than the imposition of Western ideals, should provide the basis for assessing Native Hawaiian mental health needs, since it is precisely the imposition of Western values and lifestyles that has been responsible for much of the cultural dislocation and disintegration leading to the current crises in Native Hawaiian mental health. *Id.* at 3.

⁹⁰ *Id.* at 7.

expectancy approximately 6 years lower than the state average, and a high prevalence of numerous health problems.”⁹¹ The Medical Task Force made thirty-one recommendations, stretching from structural solutions to health promotion and education, as well as access to medical care and research. Some of the most interesting recommendations from this task force included the creation of a scholarship for Kānaka Maoli in health professions; programs within the framework of traditional Hawaiian culture; and research on socio-environmental health problems like pesticides, occupational hazards, and social stress.⁹²

The Nutritional and Dental Task Force conducted a broad literature review on the historical and general population and collected records from a maternity and infant care center for data on a more specialized population.⁹³ It found that both nutrition and tooth decay were not issues prior to 1778, the year of first contact with the outside world, but are now problem areas for the Maoli population.⁹⁴ There are ten general recommendation areas, such as increased education in diet and dental hygiene; increased support for maternal and child health; and the promotion of ‘Ōiwi cultural foods through economic feasibility for farming and restoration of farming rights.⁹⁵

The Historical and Cultural Task Force saw only two options before them: (1) Continue ignoring Maoli health problems such that one subset of the population will “assimilate as non-Hawaiians” and another will “continue as the landless, dispossessed, culturally-confused, sick, and [...] persist as ‘the Native Hawaiian problem’” or (2) “Kāko‘o (support) Native Hawaiians in furthering our spiritual and cultural identity, so that through our improved coping skills, self-esteem and support systems for political self-determination and economic self-sufficiency, we may regain our land base for pursuit of more meaningful lives and thus, improved well-being, including health.”⁹⁶ This Task Force had the most extensive recommendations, setting the stage with the first point that there should be a “focus on the historical and cultural basis for the current health plight on Native Hawaiians and not merely a concern with proximate causes.”⁹⁷ Overall, its findings made thirty-six specific suggestions over seven topics

⁹¹ *Id.*

⁹² *Id.* at 11.

⁹³ *Id.* at 13. It is important to note that this task force had the fewest number of Kānaka Maoli in their membership compared to every other task force. This context perhaps sheds some light on why their recommendations were the most Western and medically focused within the report. Casken, *supra* note 84, at 72.

⁹⁴ E OLA MAU, *supra* note 20, at 15.

⁹⁵ *Id.* at 16-17.

⁹⁶ *Id.* at 18-19.

⁹⁷ *Id.* at 39.

ranging from return of land and political self-determination, to housing, transportation, energy, and communication.⁹⁸ Perhaps most striking is that this section was not framed around grim health disparities that other task forces wrote at large about, but rather focused in on the resilience held by Kānaka ‘Ōiwi.⁹⁹

The Strategic Health Plan Task Force compiled all of these reports into nearly seventy-five collective recommendations.¹⁰⁰ Though few task forces wrote it explicitly, the range of recommendations made it evident that, even in 1985, the Hawaiian Health Research Consortium expressed a holistic awareness that “health is but one aspect of well-being.”¹⁰¹ Accompanying the standard clinical suggestions are broader interventions, such as implementing courses in Hawaiian history, language, and culture for all students in Hawai‘i (not just Kānaka students); promoting traditional foods; and returning federal ceded lands to ‘Ōiwi stewardship.¹⁰²

Despite the quick time frame, each task force produced a thorough, comprehensive report with an extensive number of recommendations to create the best possible Native Hawaiian Health Care Act. Yet, just a few years later, Congress drastically departed from the recommendations in E Ola Mau.

B. *The Text of the Act*

Senator Inouye introduced the Native Hawaiian Health Care Act in January 1987 during the first session of the 100th Congress.¹⁰³ After some amendments, such as a new provision allowing Kānaka ‘Ōiwi healers to practice authorized health care services and reorganization of implementation logistics, the bill was reintroduced in September 1987 and became law in 1988.¹⁰⁴ Some amendments and updates have been made

⁹⁸ *Id.* at 19-22. See discussion on the return of land and its potential health effects *infra* Section IV.B; discussion on political self-determination and its potential health effects *infra* Section IV.C.

⁹⁹ *Id.* at 34 (“[Kānaka ‘Ōiwi] concepts have worked for hundreds of years and herein lies their strength.”). Explicitly naming power dynamics can highlight the structural nature of public health problems, while centering vulnerability runs the risk of concealing those systemic issues. Amy S. Katz et al., *Vagueness, Power and Public Health: Use of ‘Vulnerable’ in Public Health Literature*, CRITICAL PUB. HEALTH 1 (2019).

¹⁰⁰ E OLA MAU, *supra* note 20, at 39-54.

¹⁰¹ *Id.* at 39.

¹⁰² *Id.* at 39-54.

¹⁰³ Casken, *supra* note 84, at 76.

¹⁰⁴ *Id.* at 76-77. Additionally, Congress requested a staff paper comparing “the health status of Native Hawaiians to that of the population of the entire United States” rather than just the State of Hawai‘i as E Ola Mau had done. *Id.* at 78. This report played heavily into blood quantum, as “Congress was keenly interested in what projections would be for the continued existence of the Native Hawaiian race, [] especially the 100%

since its enactment, but the Act substantially resembles its original form.¹⁰⁵ Its fourteen sections include congressional findings, a declaration of policy, the roles of Papa Ola Lōkahi and Native Hawaiian Health Care Systems, and funding logistics.¹⁰⁶

The current version of the Act begins with twenty-two congressional findings on the history of the overthrow of the Kingdom of Hawai‘i and the trust responsibility that has emerged as a result.¹⁰⁷ This section explicitly includes “native peoples” of Alaska and Hawai‘i as part of the “[A]boriginal or [I]ndigenous peoples of the United States” for purposes of Congress’ plenary power to create legislation affecting these groups.¹⁰⁸ The next section contains a strong, broad purpose clause, stating that,

. . . it is the policy of the United States in fulfillment of its special responsibilities and legal obligations to the indigenous people of Hawaii resulting from the unique and historical relationship between the United States and the Government of the indigenous people of Hawaii—

(1) to raise the health status of Native Hawaiians to the highest possible health level; and

(2) to provide existing Native Hawaiian health care programs with all resources necessary to effectuate this policy.¹⁰⁹

Yet, the very next section provides that the intent of Congress is to:

(1) Reduce coronary heart disease deaths to no more than 100 per 100,000.

(2) Reduce stroke deaths to no more than 20 per 100,000.

(3) Increase control of high blood pressure to at least 50 percent of people with high blood pressure.

. . .

(40) Reduce significant visual impairment to a prevalence of

Hawaiians.” *Id.*

¹⁰⁵ NHHCA, 42 U.S.C. § 11701. Amendments have been made in 1992, 1998, 2002, 2010, and 2015. The 1992 changes were the most substantial, adding the word “Improvement” to the name of the Act. This was likely to better resemble the Indian Health Care Improvement Act. S. REP. NO. 106-389 (2000).

¹⁰⁶ *Id.* at §§ 11701-11714.

¹⁰⁷ *Id.* at § 11701.

¹⁰⁸ *Id.* at § 11701(a)(17).

¹⁰⁹ *Id.*

no more than 30 per 1,000.¹¹⁰

Almost counter to the broad purpose clause preceding it, this section lists approximately fifty goals that all follow the same basic format: [change] [specific disease] to meet [quantifiable metric].¹¹¹

In contrast to the extensive and thoughtful recommendations laid out in *E Ola Mau*, the goals listed in the intention section reflect how Western concepts of health care domineer over Indigenous ideas. It is likely that congressional drafters disregarded *E Ola Mau* in favor of the updated Surgeon General's *Healthy People Report*, published six years prior to *E Ola Mau* and comprised of specific, quantifiable objectives.¹¹² The three health categories of the NHHCIA mimic the language of the national *Healthy People Report* more so than it resembles the task forces of *E Ola Mau*.¹¹³ When the Act defines these categories further into twenty-five specific points, all fifteen actions named in the *Healthy People Report* appear.¹¹⁴ While the seven items under the "Primary Health Services" category do not appear in the *Healthy People Report*, they do not seem to originate from *E Ola Mau* either.¹¹⁵ In using the broad *Healthy People Report* goals rather than the tailored *E Ola Mau* recommendations, it is worth noting that the implicit belief behind the Act was that the way to raise Native Hawaiian health to the highest standard was to implement the same standard used for every other American.¹¹⁶

There is often dissonance between evidence-based policymaking and more abstract Indigenous ideals. Practically speaking, it is a constant struggle to incorporate Indigenous values when policymakers and funders

¹¹⁰ *Id.* at § 11702(b).

¹¹¹ *Id.*

¹¹² Casken, *supra* note 84, at 84-88. *Healthy People: The Surgeon General's Report on Health Promotion and Disease Prevention* was first published in 1979 and is updated every decade to set new quantitative objectives for the whole U.S. population. Lawrence W. Green & Jonathan Fielding, *The U.S. Healthy People Initiative: Its Genesis and Its Sustainability*, 32 ANN. REV. PUB. HEALTH 451, 452-53, 461 (2011).

¹¹³ *Id.* at 84; *Compare* NHHCIA, 42 U.S.C. § 11705(a) ("Comprehensive health promotion, disease prevention, and primary health services") with U.S. DEP'T OF HEALTH, EDUC., & WELFARE, HEALTHY PEOPLE xii (1979) (listing the main categories of actions for health as "preventive health services, health protection, and health promotion").

¹¹⁴ *Compare* NHHCIA, 42 U.S.C. § 11711 with U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, HEALTHY PEOPLE xii (1979). Included in the Act but not the *Healthy People Report* is diabetes prevention, mental health care, educational programs, and all seven points listed under primary health services. NHHCIA, 42 U.S.C. § 11711.

¹¹⁵ Though listed in the Act, there is no mention of "diagnostic laboratory," "radiologic services," "emergency medical," or "pharmaceutical services" anywhere in the study. *See generally* E OLA MAU, *supra* note 20.

¹¹⁶ Riley Email, *supra* note 80.

are looking for measurable success and the NHHCIA was no exception.¹¹⁷ The ‘Ōiwi approach to health is *ola pono*, or right living; *ola pono* links a person with their community and roots individual health to the troubles of society.¹¹⁸ In contrast, traditional Western perspectives view illness as stemming exclusively from scientific causes that have been or are merely waiting to be discovered.¹¹⁹ It is entirely possible that the only version of the NHHCIA that could be passed by a Western legislature is one whose language and priorities explicitly ignore the voice and recommendations of Kānaka in favor of more familiar metrics. Regardless of what the Act could have been, its current form is what we have to work with.

The remainder of the statute details the implementation of the Act, including the creation of a comprehensive health care master plan, a system of Native Hawaiian health care centers, a Native Hawaiian health scholarship, and the administration of grants.¹²⁰ Perhaps most important is the creation of Papa Ola Lōkahi, the organization responsible for administering the goals of the Act with the most discretion to implement the intentions of Congress.¹²¹

C. *Papa Ola Lōkahi*

The NHHCIA tasked Papa Ola Lōkahi with seven specific responsibilities: (1) coordinate, implement, and update a Native Hawaiian comprehensive master plan; (2) conduct training for Native Hawaiian health care professionals; (3) identify and perform research into diseases that are most prevalent among Native Hawaiians; (4) develop an action plan outlining the contributions from member organizations; (5) serve as a clearinghouse for collecting and maintaining data associated with the health status of Native Hawaiians, identifying and researching diseases affecting Native Hawaiians, and collecting and distributing information about available project funds, research projects and publications; (6) coordinate and assist health care programs and services provided to Native Hawaiians; and (7) administer special projects.¹²²

In practice, Papa Ola Lōkahi achieves an impressive amount with a staff of just over thirty people¹²³ who allocate funds to multiple primary care

¹¹⁷ Riley Email, *supra* note 80.

¹¹⁸ Casken, *supra* note 84, at 75.

¹¹⁹ *Id.* at 75-76.

¹²⁰ NHHCIA, 42 U.S.C. §§ 11703-11710.

¹²¹ *Id.* at § 11704.

¹²² *Id.*; Kuleana, PAPA OLA LŌKAHI, <http://www.papaolalokahi.org/about-papa-ola-lokahi/kuleana.html> (last visited Oct. 22, 2022). Papa Ola Lōkahi also has statutory responsibilities from the State of Hawai‘i, including convening Kupuna Councils of traditional Hawaiian healers and serving as liaison between public and private entities.

¹²³ *Staff Directory*, PAPA OLA LŌKAHI, <http://www.papaolalokahi.org/about-papa->

centers, a health scholarship program, and dozens of community organizations across the country.¹²⁴ Despite administering the funds for all of these programs, Papa Ola Lōkahi receives less than \$3 million in federal awards.¹²⁵ Sheri Daniels, Executive Director of Papa Ola Lōkahi, is all too aware of the incongruities between the NHHCIA and Indigenous understandings of health. She believes that it was necessary for the Act to have tangible, medical metrics more familiar to Western legislators to be viable at all.¹²⁶ However, Papa Ola Lōkahi is still able to “use the Act as kind of a broader stroke opportunity” to work on projects that are more cohesive with Maoli culture.¹²⁷

D. *E Ola Mau A Mau*

In 2019, Papa Ola Lōkahi published *E Ola Mau A Mau – The Next Generation of Native Hawaiian Health*.¹²⁸ This update to the original study kept the original task force model but separated oral health from nutrition and added data governance and workforce development.¹²⁹ The organization also included information on public health policy and community awareness, topics that the initial study was silent on.¹³⁰ This update is welcome “given the advances in health and wellness over the past thirty-two years” as an opportunity for “new benchmarks and a blueprint for health and well-being for Native Hawaiians.”¹³¹

Papa Ola Lōkahi fully embraced that “this new study be holistic, consistent with and enwrapped within Hawaiian culture as defined by traditional values” toward the “true sense of ola pono.”¹³² Each group comments on the increased understanding of their field, effective and promising approaches, remaining gaps, as well as recommendations for continued impact. The Historical and Cultural Perspectives Task Force remarked on the breadth of resources now available. In the thirty years since *E Ola Mau*, about 5,000 publications, recordings, and reports on Kānaka

ola-lokahi/staff-directory.html (last visited Oct. 22, 2022).

¹²⁴ BLAISDELL, *supra* note 18.

¹²⁵ PAPA OLA LŌKAHI, FINANCIAL STATEMENTS WITH OTHER INFORMATION AND SINGLE AUDIT REPORT 13 (2022).

¹²⁶ POL Interview, *supra* note 80.

¹²⁷ *Id.*

¹²⁸ PAPA OLA LOKAHI, *E OLA MAU A MAU – THE NEXT GENERATION OF NATIVE HAWAIIAN HEALTH, COMPENDIUM OF EXECUTIVE SUMMARIES* (2019) [hereinafter *E OLA MAU A MAU*].

¹²⁹ *Id.* at xi.

¹³⁰ *Id.* at 2-3.

¹³¹ *Id.* at 4.

¹³² *Id.* at 4.

Maoli history and culture impacting health, well-being, and healing practices were produced.¹³³ The Mental and Behavioral Health and Wellness Task Force summary comments on existing resiliency factors, “including a strong sense of hope, and positive ‘ohana and community support.”¹³⁴ However, the Nutrition Task Force reveals that “[d]espite the past 30 years of sincere effort, Native Hawaiians continue to experience increasing prevalence of chronic illness and premature death from health conditions that are treatable and preventable.”¹³⁵ Each and every group explicitly named poor funding, insufficient budget, or lack of resources as a barrier to improve health in their area.¹³⁶

Despite the increased presence of ‘Ōiwi voices and scholarship in *E Ola Mau a Mau* compared to its predecessor, the recommendations were somewhat more muted than the generation before. For example, the new study mentioned “place-based and land-based interventions” but failed to address the return of federal ceded lands.¹³⁷ Similarly, the Historical and Cultural Perspectives Task Force mentioned a gap in geriatric systems of health and housing for Kānaka Maoli, but there is nothing about affordable housing despite Pacific Islanders making up half of the unhoused population in Hawai‘i.¹³⁸ Throughout the renewed report, there is little to no acknowledgment of any kind of upstream intervention that would target a social determinant of health.

E Ola Mau A Mau is correct that a new plan for Maoli health is needed for a new generation.¹³⁹ However, the renewed direction should not extend the ongoing Western clinical model but should further the progressive ideas of *E Ola Mau*. The statute certainly has room for a more expansive approach to health care and well-being for Kānaka ‘Ōiwi.

¹³³ *Id.* at 6.

¹³⁴ *Id.* at 10.

¹³⁵ *Id.* at 15.

¹³⁶ *See id.* at 7 (identifying Papa Ola Lōkahi’s statutory authority and budget as “insufficient to direct, coordinate, plan, and successfully execute the [. . .] activities that can transform the present system into a clearly defined, effective Native Hawaiian Health System of Care.”); *id.* at 12 (recommending enhanced “funding and resources for mental health”); *id.* at 14 (naming stressors like “high rates of poverty and homelessness” as strong links to poor health outcomes); *id.* at 15 (recommending the establishment of “food security and economic self-sufficiency”); *id.* at 16 (reporting the “lack of funding for capital expansion [. . .] to enhance access to services”); *id.* at 18 (requesting an increase of coordination, governance, resources, and funding for Native Hawaiian health data); and *id.* at 20 (recommending the improvement of “the quality of life, financial security, and resources necessary for a thriving workforce for Native Hawaiian.”).

¹³⁷ *Id.* at 13.

¹³⁸ *Id.* at 8; PARTNERS IN CARE, 2020 O‘AHU POINT IN TIME COUNT 7, <https://www.honolulu.gov/rep/site/ohou/PIC2020PITCountReportFinal.pdf>.

¹³⁹ *E OLA MAU A MAU*, *supra* note 128, at 4.

IV. LŌKAHI: BALANCE AND HARMONY

Similar to how cold is defined by the absence of heat, Western perceptions of health is simply the absence of illness,¹⁴⁰ as evidenced in the overly clinical objectives listed by the NHHCIA. However, “[f]or Native Hawaiians, as for most indigenous cultures, the cause of sickness” can mean that someone is “out of balance with the rest of creation.”¹⁴¹ Lōkahi recognizes that “all things and all people are connected in [their] aspects” and provides a better framework to achieve the purpose of the NHHCIA.¹⁴²

Typically, the canons of statutory interpretation deal primarily with strict legal formalism. Deciphering statutes can take different approaches such as textualism, which examines the exact language of a statute,¹⁴³ or purposivism, which considers the legislative history of a statute.¹⁴⁴ However, when interpreting Indigenous issues, “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.”¹⁴⁵ Instead, to properly assess Indigenous policy, critical and contextual legal analyses must be applied.

Rather than the limited scope of formalism, applying critical legal analysis reveals that the language of rules “may be manipulated and applied selectively to specific facts.”¹⁴⁶ Most importantly, contextual legal analysis “exposes who truly benefits [. . .] who is harmed by the status quo [. . .] who interprets the status quo [. . .] and what is really at stake if the rules are

¹⁴⁰ Casken, *supra* note 84, at 29 (citing Sander Kelman, *The Social Nature of the Definition of Health*, in *HEALTH AND MEDICAL CARE IN THE U.S.: A CRITICAL ANALYSIS* 3 (V. Navarro ed., 1977) (“In general, the issue [of defining health] is obviated by assuming either implicitly or explicitly, that ‘health’ is the absence of illness.”)).

¹⁴¹ Casken, *supra* note 84, at 54.

¹⁴² *Id.* at 101 (citing THE WAI‘ĀNAE BOOK OF HAWAIIAN HEALTH: THE WAI‘ĀNAE DIET PROGRAM MANUAL (1993)). “Lōkahi” can also be defined as unity, agreement, or harmony. HAWAIIAN DICTIONARY, *supra* note 12, at 240. The word “pono,” defined as goodness, righteous, or balance among other things, can also be seen when talking about Hawaiian health. *See, e.g.*, HAWAIIAN DICTIONARY, *supra* note 12, at 370; Casken, *supra* note 84, at 55.

¹⁴³ *See, e.g.*, *Hawaii v. Off. of Hawaiian Aff.*, 556 U.S. 163, 173 (2009) (“We begin, as always, with the text of the statute.”) (citing *Permanent Mission of India to U.N. v. City of New York*, 551 U.S. 193, 197 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (“In considering [the statutory text in controversy], we begin with the text. We have ‘stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’”) (citing *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-254)).

¹⁴⁴ *See, e.g.*, Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Approach*, 2009 U. ILL. L. REV. 697, 730 (2009).

¹⁴⁵ Dana Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 153-54 (2011).

¹⁴⁶ *Id.* at 206.

‘formalistically applied’.”¹⁴⁷ These more expansive analyses create a framework to properly assess the Act from an Indigenous perspective.

This section utilizes an Indigenous contextual inquiry framework developed by Professor Kapua Sproat to better understand how proposed interventions connect back to the purpose of the NHHCIA. This framework brings together “four values of restorative justice for Native Peoples”¹⁴⁸ that are all inextricably intertwined and firmly rooted in the human rights principle of self-determination: *mauli ola*, or health and well-being; *‘āina*, or land and natural resources; *ea*, or self-governance; and *mo‘omeheu*, or cultural integrity.¹⁴⁹ Focus on one realm, such as *mauli ola*, necessitates the consideration of every realm, how they overlap, and where they interact.

This section is not meant to be fully inclusive of the many public health strategies to which this Act can be expanded. Although not discussed below, robust evidence suggests that creating equitable socio-economic structures, reducing mass incarceration, and humanizing the U.S. immigration system are all means of improving population health, particularly for marginalized and subjugated communities.¹⁵⁰ This section is intended to provide a framework and examples of where the Act can be read more expansively. To even attempt to “raise the health status of Native Hawaiians to the highest possible health level,” the scope of NHHCIA interpretation and implementation must be expanded significantly.¹⁵¹

A. *Mauli Ola: Health and Well-Being*

Mauli ola is the “breath of life” or “power of healing.”¹⁵² The term broadly refers to *‘Ōiwi* health but captures a greater holistic sense than its

¹⁴⁷ See *id.* at 207.

¹⁴⁸ N. Mahina Tuteur, *Reframing Kānāwai: Towards a Restorative Justice Framework for Indigenous Peoples*, 7 INDIG. PEOPLES’ J. L. CULT. RESIST. 59, 73 (2022).

¹⁴⁹ Sproat, *supra* note 145, at 173; see also *id.*; 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); G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

¹⁵⁰ See, e.g., Mary T. Bassett & Sandro Galea, *Reparations as a Public Health Priority—A Strategy for Ending Black–White Health Disparities*, 383 N. ENGL. J. MED. 2101, 2102 (2020) (arguing that reparations could reduce health disparities experienced by Black Americans by expanding resources, reducing stress, and investing in future generations); Jo C. Phelan & Bruce G. Link, *Is Racism a Fundamental Cause of Inequalities in Health?*, 41 ANNU. REV. SOCIOL. 311, 319 (2015) (proposing freedom as a flexible race-related resource to frame imprisonment as an “extreme and prevalent form of unfreedom”); Prashasti Bhatnagar, *Deportable until Essential: How the Neoliberal U.S. Immigration System Furthers Racial Capitalism and Operates as a Negative Social Determinant of Health*, 36 GEO. IMMIGR. L.J. 1017, 1031 (2022) (discussing how the U.S. immigration system sustains a racialized economic hierarchy by using a carceral apparatus).

¹⁵¹ NHHCIA, 42 U.S.C. § 11702(a).

¹⁵² Joseph Keawe Kaholokula, *Mauli ola: Pathways to Optimal Kanaka ‘Ōiwi*

English translation.¹⁵³ Contextual legal analysis within mauli ola considers whether “a decision [has] the potential to improve health, education, and living standards,” among other social determinants of health.¹⁵⁴

One mauli ola framework recognizes the same generally accepted categories touted by social determinants of health: sociopolitical; socio-environmental and economic; cultural; and biological, behavioral, and psychological.¹⁵⁵ However, there are a few key inclusions specific to Kānaka Maoli. For example, the sociopolitical determinants category includes self-determination, and the cultural determinants category lists cultural safety, identity, and revitalization. The most prevalent and Hawai‘i-specific addition within this framework is the inclusion of a historical determinants category, which includes (1) depopulation due to infectious diseases; (2) christianization and dismantling of native practices and institutions; (3) land privatization; (4) illegal overthrow of sovereign and U.S. occupation; and (5) militarization of Hawai‘i.¹⁵⁶

This specific framework also highlights an ‘ōlelo no‘eau, or ‘Ōiwi proverb: mohala i ka wai, ka maka o ka pua (flowers thrive where there is water, as thriving people are found where living conditions are good).¹⁵⁷ This proverb is a reminder that, though the mauli ola framework shares a number of similarities to newer Western models of health, the spirit of mauli ola has existed since time immemorial. Kānaka ‘Ōiwi “concepts have worked for hundreds of years and herein lies their strength.”¹⁵⁸

B. ‘Āina: Land and Natural Resources

In her seminal text, *From A Native Daughter*, ‘Ōiwi scholar and advocate Haunani-Kay Trask writes, “[Our story] rests within the culture, which is inseparable from the land. To know this is to know our history. To write this is to write of the land and the people who are born from her.”¹⁵⁹ Land, community, and culture are deeply intertwined and crucial components of Maoli health and well-being, as recognized in U.S.

Health, 5 MAULI OLA: HAWAI‘INUIĀKEA MONOGRAPH 2, 3 (2017).

¹⁵³ *Id.*

¹⁵⁴ Sproat, *supra* note 145, at 183.

¹⁵⁵ Keawe‘aimoku Kaholokula, *NIMHD Minority Health and Health Disparities Research Framework: Adapted to reflect social and cultural influences of Native Hawaiian health*, NAT’L INST. ON MINORITY HEALTH & HEALTH DISPARITIES, https://www.nimhd.nih.gov/docs/hawaiian-framework_2020.pdf (last visited Oct. 22, 2022).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ E OLA MAU, *supra* note 20, at 34.

¹⁵⁹ TRASK, *supra* note 5, at 121.

legislation¹⁶⁰ and courts.¹⁶¹ Western scientific studies have also found that “recognizing Indigenous Peoples’ rights to land, benefit sharing and institutions is essential to meeting local and global conservation goals.”¹⁶² For Kānaka, the importance of ‘āina dates back to the beginning of time and life itself.

‘Āina is often translated to land or environment, but literally means “that which feeds” and can encompass the earth, the ocean, and all resources that sustain.¹⁶³ The Kumulipo, the ‘Ōiwi story of creation, teaches that “we are all interconnected and genealogically part of the ‘āina” by “blur[ing] the boundaries and break[ing] down hierarchies between humans and nonhumans.”¹⁶⁴ In “an oli of our beginnings,” kalo, or taro, is the first-born son of Wākea (sky father) and Papa (earth mother) and the progenitor of Kānaka is the second-born son.¹⁶⁵ This fraternal relationship is the

¹⁶⁰ S.J. Res. 19, 103rd Cong., 107 Stat. 1510 (1993) (“[T]he health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.”).

¹⁶¹ See, e.g., Off. of Hawaiian Aff. v. Hous. & Cmty. Dev. Corp. of Hawai‘i, 121 Hawai‘i 324, 333, 219 P.3d 1111, 1121 (2009) (amended Nov. 24, 2009).

The health and well-being of the [n]ative [H]awaiian people is intrinsically tied to their deep feelings and attachment to the land.” [Citing in a footnote to the Apology Resolution.] ‘Āina, or land, is of crucial importance to the [n]ative Hawaiian [p]eople—to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. ‘Āina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The ‘āina is part of their ‘ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.

(citing Off. of Hawaiian Aff. v. Hous. & Cmty Dev. Corp. of Hawai‘i (HCDCH), 117 Hawai‘i 174, 214, 177 P.3d 884, 924 (2008) (original emphasis omitted) (format altered) (brackets in original)).

¹⁶² Stephen T. Garnett et al., *A Spatial Overview of the Global Importance of Indigenous Lands for Conservation*, 1 NATURE SUSTAINABILITY 369, 369 (2018).

¹⁶³ Tuteur, *supra* note 133, at 75; see also LeShay Keli‘iholokai et al., *Reclaiming ‘Āina Health in Waimānalo*, 17 INT’L J. ENV’T RSCH. & PUB. HEALTH 5066, 5071 (2020) (researching the relationship between Kānaka Maoli and ‘āina, featuring direct quotes from study participants like, “[‘Āina means] everything. It’s all connected on every level mentally, spiritually, physically... not just land, not just ocean... everything,” and “‘Āina is everything. It holds us. It keeps us. ‘Āina is the keeper, we [are] just part of it.”) (brackets in original).

¹⁶⁴ BRANDY NĀLANI McDougall, FINDING MEANING, KAONA AND CONTEMPORARY LITERATURE 95 (2016).

¹⁶⁵ Terina Kamailelauli‘i Fa‘agau, *Reclaiming the Past for Mauna a Wākea’s Future: The Battle Over Collective Memory and Hawai‘i’s Most Sacred Mountain*, 22

foundation of aloha ‘āina, which translates to love of the land or patriotism.¹⁶⁶

It is no mistake that the major ‘Ōiwi protest movements have focused on land stewardship and environmental conservation. Mauna a Wākea, or Mauna Kea, is where the sky meets the earth and is considered one of the most sacred sites in Hawai‘i.¹⁶⁷ For years now, Kānaka have been living atop the mountain to prevent the development of the fourteenth and largest telescope along with its “substantial, significant, and adverse” cumulative effects. Similarly, Kapūkaki, or Red Hill, is home to both the largest freshwater aquifer on O‘ahu and more than 187 million gallons of fuel just a hundred feet above the water source.¹⁶⁸ Though nearly 200 thousand gallons of fuel have leaked since its inception in 1943, action to start shutting down the facility only began in 2021, emblematic of how militarization in Hawai‘i is directly harming Hawaiian health.¹⁶⁹ These issues are not exclusively about land, but propel environmental conservation, promote cultural sovereignty, and address historical trauma concurrently.¹⁷⁰

Part of this deep need to protect the land stems from the fact that Kānaka Maoli understand that they belong to the ‘āina rather than having “possession of” the land.¹⁷¹ The creation of private property in a process called The Great Māhele is understood by some as the “single most critical dismemberment of Hawaiian society.”¹⁷² Currently on O‘ahu, about half of

ASIAN-PAC. L. & POL’Y J. 1, 17 (2021) (quoting MCDUGALL, *supra* note 164 at 52).

¹⁶⁶ HAWAIIAN DICTIONARY, *supra* note 12, at 21. These translations are imperfect and “critiques warn us to be careful when trying to make meaning of aloha ‘āina, so that we do not perpetuate the very colonial sicknesses that hinder its practice today.” JAMAICA HEOLIMELEIKALANI OSORIO, *Aloha ‘Aina as Pilina*, in REMEMBERING OUR INTIMACIES: MO‘OLELO, ALOHA ‘ĀINA, AND EA 1, 9 (2021). Aloha ‘āina is a “complex concept that includes recognizing that we are an integral part of the ‘āina and the ‘āina is an integral part of us.” NOENOE K. SILVA, THE POWER OF THE STEEL-TIPPED PEN 4 (2017).

¹⁶⁷ See Fa‘agau, *supra* note 165, at 18 (recounting the mele hānau, or birth chant, of “Maunakea’s creation and divine origins”).

¹⁶⁸ Hawaii Dep’t of Health v. U.S. Navy, No. 21-UST-EA-02, 6, 23 (Haw. Dep’t of Health Dec. 27, 2021) (proposed decision).

¹⁶⁹ *Id.* at 5-6.

¹⁷⁰ U. HAW. AT HILO, FINAL ENVIRONMENTAL IMPACT STATEMENT S-8 (2010) <https://dlnr.hawaii.gov/occl/files/2013/08/2010-05-08-HA-FEIS-Thirty-Meter-Telescope-Voll.pdf>; see also Fa‘agau, *supra* note 165, at 7, 16-28 (discussing the “cultural and historical significance of Maunakea to Hawai‘i and Native Hawaiians”); Madelyn McKeague, *A Song of Mauna Kea*, HYPHEN MAG., Sept. 4, 2019, <https://hyphenmagazine.com/blog/2019/09/song-mauna-kea>.

¹⁷¹ Emalani Case, *I ka Piko, To the Summit: Resistance from the Mountain to the Sea*, 54 J. PAC. HIS. 166, 180 (2019).

¹⁷² JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 44 (2002).

the unhoused population fall in the category of “Native Hawaiian and Pacific Islander.” Compared to the population of O‘ahu, Native Hawaiians and Pacific Islanders are more than twice as likely to be unhoused.¹⁷³ Additionally, approximately half of all Kānaka Maoli live outside of Hawai‘i and outmigration from the islands is expected to increase.¹⁷⁴ The primary cause of both homelessness and outmigration of Kānaka Maoli is the lack of affordable housing.¹⁷⁵ In contrast, there are 80,000 “visitor units” in Hawai‘i, including hotels, vacation rentals, and timeshares.¹⁷⁶ As of 2019, “the military controls more than 230,000 acres across Hawai‘i, which house 118 military sites, and commands 24.6 per cent of O‘ahu alone.”¹⁷⁷ One critical way for the NHHCIA to improve health via ‘āina is the creation of more affordable housing and advocating for land back.¹⁷⁸

For example, one framework establishes four pathways in which housing affects health: (1) stability; (2) quality and safety; (3) affordability; and (4) neighborhood.¹⁷⁹ Stability looks solely at the existence and consistency of dependable housing.¹⁸⁰ Quality and safety takes into account

¹⁷³ PARTNERS IN CARE, *supra* note 138, at 7.

¹⁷⁴ U.S. DEP’T OF HOUS. & URB. DEV., HOUS. PROBLEMS AND NEEDS OF NATIVE HAWAIIANS 20 (1996) (naming the loss of “Native Hawaiian population to the mainland” as a significant trend); U.S. DEP’T OF HOUS. & URB. DEV., HOUSING NEEDS OF NATIVE HAWAIIANS 6 (2017) (“By 2010, the Native Hawaiian population was roughly evenly split between those living in Hawaii and those residing on the U.S. mainland”).

¹⁷⁵ Wayne Wagner, *Homeless Property Rights: An Analysis of Homelessness, Honolulu’s “Sidewalk Law,” and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights under the U.S. Constitution*, 35 U. HAW. L. REV. 197, 202 (2013); Jenna T. Caparoso et al., *Island Living, Island Leaving: Who Leaves and Who Stays in Hawai‘i?*, KAMEHAMEHA SCH. STRATEGY & TRANSFORM’N GRP. (Aug. 2019), <https://sites.google.com/ksbe.edu/wellbeing2018/migration>.

¹⁷⁶ HAW. TOURISM AUTH., 2021 VISITOR PLANT INVENTORY 2 (2021), <https://www.hawaiiitourismauthority.org/media/8606/2021-visitor-plant-inventory-report-final.pdf>.

¹⁷⁷ Tuteur, *supra* note 33, at 35. Demilitarization is also a critical avenue to improved well-being as “the military presence in Hawai‘i has played a significant role in the loss of political autonomy, access to land, and therefore healthy food sources for *na Kānaka Maoli*.” Kalamaoka‘aina Niheu et al., *The Impact of the Military Presence in Hawai‘i on the Health of Na Kānaka Maoli*, 14 PAC. HEALTH DIALOG 205, 201 (2007).

¹⁷⁸ “Land Back” is a political, Indigenous-led movement that seeks operational solutions to decolonizing institutions, dismantling white supremacy, and restoring relationships between Native peoples and their ancestral lands. *See, e.g.*, Nikki A. Pieratos, Sarah S. Manning & Nick Tilsen, *Land Back: A Meta Narrative to Help Indigenous People Show Up as Movement Leaders*, 17 LDRSHP. 47, 51 (2021). While land restitution is not the exclusive goal of Land Back, it is an integral part of self-determination and restoring sovereignty. *Id.* at 51-52.

¹⁷⁹ Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFF. (June 7, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/>.

¹⁸⁰ Unsurprisingly, consistently stable housing correlates to overall greater well-

the multitude of environmental factors within the home, such as lead, water leaks, poor ventilation, pest infestation, temperature, and residential crowding.¹⁸¹ Affordability recognizes how the cost of rent or a mortgage can cut into people's finances and deprive them of other necessities.¹⁸² Neighborhood examines everything surrounding the household geographically, such as transportation and access to resources, as well as differences between neighborhoods.¹⁸³

The text of the NHHCIA supports the improvement of housing stability, quality, affordability, and surrounding neighborhoods. One study found that moving to a lower-poverty area led to improved long-term mental and physical health, including reductions in obesity and diabetes.¹⁸⁴ Three of the named Act intentions are to increase moderate daily physical activity, reduce sedentary lifestyles, and reduce the prevalence of overweight people,¹⁸⁵ all of which occurs when housing and neighborhoods are improved. Diabetes is also named four times within the Act: (1) The intent of Congress to reduce diabetes-related deaths; (2) the intent of Congress to reduce severe complications of diabetes; (3) a service provided by the

being in comparison to anything less. For example, people who are chronically homeless face substantially higher morbidity in terms of both physical and mental health and people who face housing instability (e.g., moving frequently, falling behind on rent, couch surfing) are more likely to experience poor health than stably housed peers. David L. Maness & Muneeza Khan, *Care of the Homeless: An Overview*, 89 AM. FAM. PHYSICIAN 634, 635 (2014); Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS e20172199, 1 (2018).

¹⁸¹ Studies have found that poor substandard housing conditions, like residential crowding and exposure to high or low temperatures, have been associated with poor health outcomes, physical illness, and psychological distress. PAULA BRAVEMAN ET AL., HOUSING AND HEALTH 6 (2011), https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2011/rwjf70451; Claudia D. Solari & Robert D. Mare, *Housing Crowding Effects on Children's Wellbeing*, 41 SOC. SCI. RES. 464, 473-74 (2012); Keigo Sacki et al., *Short-term Effects of Instruction in Home Heating on Indoor Temperature and Blood Pressure in Elderly People: A Randomized Controlled Trial*, 33 J. HYPERTENSION 2338, 2342 (2015).

¹⁸² One study found that severely cost-burdened renters, or those who spend more than half of their income on housing, are twenty-three percent more likely than those with less severe burdens to face difficulty purchasing food. JOINT CTR. FOR HOUS. STUD. OF HARV. U., THE STATE OF THE NATION'S HOUS. 44 (2017).

¹⁸³ It is well-documented that neighborhood segregation can widen health disparities in their relative access to schools, jobs, and health care and influence health behaviors through walkability and green spaces. David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 406, 411 (2001); Judy Y. Ou et al., *A Walk in the Park: The Influence of Urban Parks and Community Violence on Physical Activity in Chelsea, MA*, 13 INT. J. ENV'T. RES. PUB. HEALTH 97, 105 (2016).

¹⁸⁴ Taylor, *supra* note 179, at 4 (citing Ludwig et al., *Neighborhoods, Obesity, and Diabetes – A Randomized Social Experiment*, 365 NEW ENGLAND J. MED. 1509, 1509 (2011)).

¹⁸⁵ NHHCIA, 42 U.S.C. §§11702(b)(23)-(25).

Native Hawaiian health care systems to prevent and control diabetes; and (4) part of the enumerated definition of disease prevention.¹⁸⁶ Improving affordability could also “[e]liminate financial barriers to clinical preventative services,”¹⁸⁷ another intent of the Act, by freeing up budget from housing that could go towards medical care.¹⁸⁸

Additionally, the integration of health programs with housing and land were two of the original recommendations made by the *E Ola Mau* Historical and Cultural Task Force,¹⁸⁹ creating historical reason to implement ‘āina-based solutions. While neither housing nor land are explicitly named in the Act, a breadth of public health research connects quantifiable metrics to improved housing conditions, access to neighborhood resources, and the conditions of the greater surrounding environment. These studies could be used as evidence to support ‘āina-based interventions as means to address the explicit language and goals of the Act.

Similarly, land restitution is another solution for the “symptoms of oppression, for example, suicide, poverty, and diabetes” rooted in the loss of land.¹⁹⁰ Professor Mary Wood writes that “[f]ully functioning native nations embody a sovereignty composed of four distinct, yet interwoven, attributes: a secure land base, a functioning economy, self-government, and cultural viability.”¹⁹¹ Large-scale problems require large-scale solutions, and land back “makes decolonization work operational, real, and tangible for all Indigenous peoples.”¹⁹²

¹⁸⁶ *Id.* at §§ 11702(b)(9) & (10), 11705(c)(1)(E), 11711(1)(D).

¹⁸⁷ *Id.* at § 11702(b)(18).

¹⁸⁸ “New York City families with affordable rent payments were found to increase the discretionary income by 77 percent, freeing up funds to spend on health insurance, food, and education or to save for a future down payment on a home.” Taylor, *supra* note 179, at 3 (citing ENTERPRISE COMMUNITY PARTNERS, IMPACT OF AFFORDABLE HOUSING ON FAMILIES AND COMMUNITIES: A REVIEW OF THE EVIDENCE BASE (2014)).

¹⁸⁹ E OLA MAU, *supra* note 20, at 21-22 (listing suggestions to improve Native Hawaiian health through land-based solutions such as (1) “regain and maintain Native Hawaiian land base through federal reparations for U.S. illegal overthrow of the kingdom and violation of Native Hawaiian indigenous people’s rights,” (2) “[r]eturn of federal ceded lands,” (3) the “[p]roper use of Native Hawaiian lands for Native Hawaiians” including homes, and (4) “[p]reference for needs of local native Hawaiians over desires of malihini (newcomer) and greed of developers.”).

¹⁹⁰ Pieratos, *supra* note 178, at 51.

¹⁹¹ Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1473-74 (1994). Interestingly, Wood’s attributes of sovereignty has four pillars similar to the Lōkahi framework implemented by this Article, with the exception of health being replaced by economy.

¹⁹² Pieratos, *supra* note 178, at 51.

“Whether the actual term aloha ‘āina is used or not, nearly every contemporary Kanaka Maoli scholar has necessarily engaged with its ethics and practice.”¹⁹³ Promoting ‘āina health through interventions like improving affordable housing and advocating for land back is needed to “raise the health status of Native Hawaiians to the highest possible health level.”¹⁹⁴

C. *Ea: Self-Governance*

Ea can be translated to “life” or “breath” but is primarily used to mean political independence and sovereignty.¹⁹⁵ “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.”¹⁹⁶ Contextual legal inquiry concerning ea “should address Indigenous groups’ ability to manage their political and cultural sovereignty.”¹⁹⁷

Prior to the overthrow, the Kingdom of Hawai‘i was governed by Kānaka ‘Ōiwi, first as a hereditary monarchy, then as an elective monarchy.¹⁹⁸ However, out of the eight governors, ten congressional representatives, and six senators elected by Hawai‘i since statehood, only one Kanaka ‘Ōiwi occupied each of those positions.¹⁹⁹ The loss of political autonomy has made advocacy for ‘Ōiwi interests particularly difficult. When Native peoples occupy a non-dominant position in their homeland, it is often accompanied by a denial of “full and equal participation in the political process[.]”²⁰⁰ Even when “overtly racially discriminatory policies have diminished,” Indigenous groups tend to remain economically disadvantaged and politically vulnerable.²⁰¹

¹⁹³ OSORIO, *supra* note 166, at 9.

¹⁹⁴ NHHCIA, 42 U.S.C. § 11702(a).

¹⁹⁵ HAWAIIAN DICTIONARY, *supra* note 12, at 36.

¹⁹⁶ Tuteur, *supra* note 148, at 78.

¹⁹⁷ Sproat, *supra* note 145, at 183.

¹⁹⁸ *Chronology of Government in the Hawaiian Islands*, OFF. OF HAWAIIAN AFF., <https://www.ohadatabook.com/T05-EA-13.pdf>.

¹⁹⁹ NATIONAL GOVERNORS ASS’N, Former Governors – Hawaii, <https://www.nga.org/former-governors/hawaii/>; NATIONAL GOVERNORS ASS’N, John Waihee, <https://www.nga.org/governor/john-waihee/>; <https://www.congress.gov/members?q=%7B%22member-state%22%3A%22Hawaii%22%7D%7D>; Associated Press & Caitlin Yoshiko Kandil, *Sen. Kaiuli‘i Kahele Becomes 2nd Native Hawaiian Ever to be Elected to Congress*, TODAY (Nov. 6, 2020).

²⁰⁰ Anaya, *supra* note 149, at 356.

²⁰¹ *Id.*

In recent years, the United States has moved towards a policy era of self-determination and nation-building for its Indigenous people.²⁰² However, Kānaka Maoli find themselves in a liminal space with multiple paths toward self-determination. “Native Hawaiians are the only federally-recognized Native people barred from self-determination and self-governance.”²⁰³ While the *Rice* opinion is still precedent, it has been difficult to organize any form of self-governance.²⁰⁴ In practice, this means Kānaka Maoli suffer from many of the same burdens as other Indigenous communities without the necessary infrastructure to address those burdens.

In 2000, Hawai‘i Senator Daniel Akaka first introduced the Native Hawaiian Reorganization Bill to formally create a Kānaka Maoli governing entity that the U.S. government would recognize in the same way it recognizes other tribal governments.²⁰⁵ A version of the bill was introduced to Congress regularly over the next decade, but never received a sufficient number of votes to pass.²⁰⁶ Disagreements on how to achieve *ea* are not new, but the introduction of federal recognition for Kānaka Maoli on a national stage spurred impassioned debate from all sides. Proponents argued that creation of a nation within a nation could protect existing ‘Ōiwi programs and entitlements, while some voiced that federal recognition “does not extend far enough to address the assault against Native Hawaiians,” and others feared it would “halt any efforts by and for Hawaiians to claim a sovereign state outside of the United States.”²⁰⁷ Though determining the best path toward *ea* remains contentious among ‘Ōiwi,²⁰⁸ a step forward is better than stagnation.

Political self-determination is another recommendation of the *E Ola Mau* Historical and Cultural Task Force.²⁰⁹ This is perhaps the most

²⁰² DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FED. INDIAN LAW vii (“Self-determination has helped to propel Native nations into an era of building modern and successful nations.”).

²⁰³ S. REP. NO. 112-251, at 1 (2012).

²⁰⁴ See discussion on *Rice v. Cayetano* *supra* Section II.C.

²⁰⁵ S. REP. NO. 107-66 at 40. The Native Hawaiian Reorganization Bill is more colloquially known as the Akaka Bill.

²⁰⁶ See, e.g., H.R. 4904, 106th Cong.; S. 2899, 106th Cong.; H.R. 617, 107th Cong.; S. 746 & S. 1783, 107th Cong.; H.R. 665 & 4284, 108th Cong.; S. 344, 108th Cong.; H.R. 309, 109th Cong.; S. 147, 109th Cong.; H.R. 505, 110th Cong.; S. 310, 110th Cong.

²⁰⁷ Linda Zhang, *Re-Building a Native Hawaiian Nation: Base Rolls, Membership, and Land in an Effective Self-Determination Movement*, 22 ASIAN PAC. AM. L.J. 69, 74-75 (2017).

²⁰⁸ See, e.g., PBS Hawai‘i, *What Would It Take to Achieve Hawaiian Sovereignty?* (July 16, 2015), <https://www.youtube.com/watch?v=XbKMs1Ux3kk>.

²⁰⁹ E OLA MAU, *supra* note 20, at 21 (recommending “Locally elected Native Hawaiian councils and governing boards. Representation of po‘e Hawai‘i on all government bodies. Workshops on political organization and effective action on Native

challenging pillar to find textual support for because there are few self-governance case studies that document the quantifiable effects on health. There is one broad enumerated intent of the NHHCIA to “[i]ncrease years of healthy life.”²¹⁰ If an intervention can reasonably improve well-being, it should fall under this provision. There are a number of ways that self-determination can be bolstered. The sovereignty organization Ka Lāhui Hawai‘i outlines four arenas where Kānaka Maoli could exercise political independence: “(1) internal (Native Hawaiian-to-Native Hawaiian); (2) Native-to-Nation State (the U.S.); (3) International (including the UN and other international bodies); and (4) Nation to Nation (international relations between Indigenous nations, whether or not they are recognized by states).”²¹¹ Improvement in any of these arenas would reduce the effects of colonization on health.

Colonial impact on health typically involves “invasive means of behavioral control applied to indigenous populations, as well as the undermining of traditional healing practices.”²¹² In general, Indigenous quality of life would increase with greater expansion of self-governed nations, or increased self-determination.²¹³ One study found that self-government was the greatest protective factor against suicide, and all markers of cultural continuity (including land claims, education, health services, cultural facilities, police and fire services, women in government, and community-run child welfare services) were associated with lower suicide rates.²¹⁴ Native Tribes and Nations in the U.S. that have successfully implemented self-governance in one facet or another have seen reduced reliance on social assistance, reduced unemployment, the emergence of diverse and viable economic enterprises on reservation lands, more effective management of social services and programs (including language and cultural components), and improved management of natural resources.²¹⁵

There are also comparative international examples that create significant evidence to believe that, once colonization is disrupted by

Hawaiian issues. Register every eligible Native Hawaiian to vote; provide transportation to voting booths”).

²¹⁰ NHHCIA, 42 U.S.C. §11702(b)(17).

²¹¹ Noelani Goodyear-Ka‘ōpua, “Now We Know”: *Resurgences of Hawaiian Independence*, 6 POLS., GRPS., & IDENTITIES 453, 456 (2018).

²¹² Gabriela de Carvalho et al., *Trends in Time: Identifying Health Care System Introductions Worldwide 5* (SOCICUM, Working Papers No. 13, 2021).

²¹³ Elizabeth Fast & Delphine Collin-Vézina, HISTORICAL TRAUMA, RACE-BASED TRAUMA AND RESILIENCE OF INDIGENOUS PEOPLES: A LITERATURE REVIEW 5 FIRST PEOPLES CHILD & FAM. REV. 126, 133 (2010).

²¹⁴ *Id.*

²¹⁵ *Id.*

political independence, self-governance “may give way to a process of nation building that led to accelerated action in health.”²¹⁶ For example, when Zimbabwe was still under British rule in the nineteenth and twentieth centuries, health care was highly segregated; the infant mortality rate for White Europeans was fourteen per 1,000 compared to estimated rates of 120 to 220 per 1,000 for Africans in then-Rhodesia.²¹⁷ After winning independence in 1980, the new government quickly set into motion a more equitable health care policy to better reflect the needs of its people.²¹⁸ Within a decade, both infant and maternal mortality was cut in half while life expectancy increased by more than seven years.²¹⁹ These significant health improvements are believed to be a direct result of the changes in policy made by a post-independence Zimbabwe government.²²⁰

While federal recognition by the United States is not mutually exclusive from political independence and nation building, any movement toward increased self-determination deserves robust discussion as to its potential impact on Maoli health and well-being. Efforts toward ea are daunting tasks, but many hands make light work and any step forward is a step better. Though the consequences of colonization may seem inescapable, so once was the divine right of kings.²²¹

D. *Mo‘omeheu: Cultural Integrity*

The term “mo‘o” translates to a lineage or following a course while “meheu” can mean somewhere that has already been walked before.²²² Combined, the terms define culture as walking the same paths that have been walked before us. Critical legal analysis of mo‘omeheu “must explicitly analyze history and socio-economic conditions [. . .] and whether actions or decisions support and restore cultural integrity as a partial remedy

²¹⁶ *Id.* at 5.

²¹⁷ Michele Barry & James E. P. Thomas, HEALTH CARE CHANGES AFTER INDEPENDENCE AND TRANSITION TO MAJORITY RULE, 263 JAMA 638 (1990).

²¹⁸ *Id.* The specific proposals included: “(1) abolition of racially discriminatory laws, (2) restrictions on expansion of private health care facilities, (3) bonding or commitment of health care workers to rural areas in return for subsidized training, (4) incorporation of traditional healers, (5) establishment of a list of essential drugs, and (6) establishment of a national health insurance scheme.” *Id.* at 639.

²¹⁹ *Id.* at 639.

²²⁰ *Id.* at 640.

²²¹ “We live in capitalism, its power seems inescapable – but then, so did the divine right of kings. Any human power can be resisted and changed by human beings.” Ursula K. Le Guin, Acceptance Speech for the Medal for Distinguished Contribution to American Letters (Nov. 19, 2014).

²²² HAWAIIAN DICTIONARY, *supra* note 12, at 245, 253.

for past harms, or perpetuate conditions that continue to undermine cultural survival.”²²³

As research continues to document the importance of social determinants, “[t]here is increasing recognition that the cultures of Indigenous peoples worldwide have an important influence on their health and wellbeing.”²²⁴ While culture is a notoriously amorphous concept, examples of Indigenous cultural domains include caring for country, knowledge and beliefs, language, self-determination, family and kinship, and cultural expression.²²⁵ Strengthening cultural identity can increase sense of belonging, help Indigenous individuals find meaning within their culture, and build resilience, or “an individual’s ability to overcome adversity through protective factors, which in turn leads to better health outcomes.”²²⁶ For Indigenous people and Kānaka Maoli, kinship and cultural ties are major sources of resilience.²²⁷

Connecting cultural practices to improved health and well-being can be simple. For example, the traditional dance of hula. As a form of physical exercise, certain forms of hula can have an aerobic intensity parallel to tennis, swimming, and basketball.²²⁸ Kumu hula, or hula teachers, also advocate for the practice as a means of mental health, emotional health, social support, spiritual health, and renewed cultural integrity.²²⁹ One kumu hula said about their dancers, “They aloha you, you aloha them, you aloha what you doing, you aloha your teacher, you aloha the dance, you know. And then, when you finally get better, you aloha your health. And enjoy the journey, enjoy the journey.”²³⁰

Improving access to cultural activities could particularly improve the health of those furthest from home. Approximately half of all Kānaka ‘Ōiwi live outside of Hawai‘i and outmigration is expected to increase.²³¹ A

²²³ Sproat, *supra* note 145, at 179.

²²⁴ Sarah Bourke et al., *Evidence Review of Indigenous Culture for Health and Wellbeing*, 8 INT. J. HEALTH WELLNESS SOC. 11, 11 (2018).

²²⁵ Laurence J. Kirmayer et al., *Rethinking Resilience from Indigenous Perspectives*, 56 CANADIAN J. PSYCHIATRY, 15 (2011).

²²⁶ Mapuana C. K. Antonio et al., *(Re)constructing Conceptualizations of Health and Resilience among Native Hawaiians*, 4 GENEALOGY 8-9 (2020) (citing Venkat Rao Pulla, *What are Strengths Based Practices All About?* PAPERS IN STRENGTH BASED PRACTICE 51-68 (2012)).

²²⁷ Kirmayer et al., *supra* note 225, at 84.

²²⁸ Tricia Usagawa et al. *Metabolic Equivalent Determination in the Cultural Dance of Hula*. 5 INT. J. SPORTS MED., at 4.

²²⁹ Mele A. Look, et al., *Kumu Hula Perspectives on Health*, 12 HAW. J. MED. & PUB. HEALTH 21, 23-24 (2014).

²³⁰ *Id.* at 23.

²³¹ U.S. Dep’t of Housing and Urban Development, *Housing Problems and Needs of Native Hawaiians* (1996). The increasing emigration of Kānaka Maoli from their

recent survey from Kamehameha Schools found that nearly two-fifths of Kānaka Maoli who still live locally have thought about or are planning to move away from Hawai‘i.²³² Indian Health Services reports that Native Americans who live in urban areas “not only share the same health problems as the general Indian population,” but “their health problems are exacerbated in terms of mental and physical hardships because of the lack of family and traditional cultural environments.”²³³ Native communities often possess a unique relationship and responsibility to their ancestral land,²³⁴ with kinship and cultural ties being major sources of resilience.²³⁵ While this cultural connection to land and community is undoubtedly true for ‘Ōiwi culture, little is known about Kānaka Maoli who live away from Hawai‘i.

As of November 2022, only one study has explicitly investigated the experiences of Kānaka Maoli who live outside of Hawai‘i. Hā Kūpuna, the National Resource Center for Native Hawaiian Elders, used a “talk-story approach” to interview eighteen Maoli kūpuna in thirteen different states who had lived away from Hawai‘i for at least thirty years.²³⁶ Consistent with Kamehameha Schools’ study results on Kānaka outmigration,²³⁷ the primary reasons for leaving were college, work, and to expand their horizons.²³⁸ There were benefits to living away from Hawai‘i, with a majority of participants mentioning greater affordability, increased opportunities for home ownership, and better circumstances for work.²³⁹ However, a significant portion of the interviewees also reported unique cultural challenges associated with living away from Hawai‘i, including

homeland also creates more problems for those who are able to remain. *See* Vaughan, *supra* note 13, at 9 (“What do community members’ tenacious efforts to care for a place where most of their families can no longer live teach us about taking care of the places we love?”).

²³² Caparoso et al., *supra* note 175.

²³³ *Urban Indian Health Program*, INDIAN HEALTH SERV. (2018), <https://www.ihs.gov/newsroom/factsheets/uihp/>.

²³⁴ *See, e.g.,* ‘Umi Perkins, *Pono and the Koru: Toward Indigenous Theory in Pacific Island Literature*, 4 HŪLILI: MULTIDISCIPLINARY RSCH. ON HAWAIIAN WELL-BEING 59, 65 (2007) (“it is through their relationship with *land* that Indigenous peoples are capable of definition [. . .] this relationship with land is linked to the original status of these peoples”).

²³⁵ Kirmayer et al., *supra* note 225, at 84.

²³⁶ HĀ KŪPUNA: NAT’L RES. CTR. FOR NATIVE HAWAIIAN ELDERS, *Kūpuna on the Continent: Migration and Resilience* (2020), <https://manoa.hawaii.edu/hakupuna/wordpress/wp-content/uploads/2020/06/K%C5%ABpuna-on-the-Continent-6.10.20.pdf>.

²³⁷ Caparoso et al., *supra* note 175.

²³⁸ Kathryn L. Braun et al., *Migration and resilience in Native Hawaiian elders*, 30 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 80, 86-87 (2020).

²³⁹ *Id.* at 88.

missing family, Hawaiian food, the land, the music, the aloha spirit, and experiencing disenfranchisement, loss, and racism.²⁴⁰ Yet, few diasporic Kānaka expressed a practical desire to return to Hawai‘i. In fact, ten of the respondents had returned to Hawaii at some point, but eight of them left again. When asked, nearly all participants felt that they would remain on the mainland as they aged, but two-thirds still wanted their ashes scattered in Hawai‘i.²⁴¹ When asked what advice they would give other Kānaka migrating to the U.S. continent, nearly every singly participant said to “create community where you are.”²⁴²

Cultural knowledge is within collective and embodied memory and, in many traditions, is understood to be within the land and within the rocks, with culture being stored in the DNA of the universe.²⁴³ Most evidence-based interventions are developed using Western-centric theories of behavior change and behavioral strategies tested in samples of predominately non-Hispanic White people.²⁴⁴ However, it is the resilience of cultures that acts as a major protective factor in the promotion of individual and community wellness.²⁴⁵ One survey of about 1,500 American Indian Tribal members found that those who were more culturally or spiritually oriented were half as likely to report a history of attempting suicide that those with a low score of cultural spiritual orientation.²⁴⁶ While Kānaka are still on the continent, maintaining cultural connection is crucial to well-being.

The resources and definitions provided by the NHHCIA are naturally concentrated within Hawai‘i. Section 11705(a)(2) restricts the Native Hawaiian Health Care System “to serve the health needs of Native Hawaiian communities on each of the islands of O‘ahu, Moloka‘i, Maui, Hawai‘i, Lana‘i, Kaua‘i, and Ni‘ihau in the State of Hawaii.”²⁴⁷ The Act defines Native Hawaiian Health Centers as those “organized under the laws

²⁴⁰ *Id.* at 88-90.

²⁴¹ *Id.* at 92.

²⁴² *Id.* at 94.

²⁴³ Thomas et al., *supra* note 217, at 124.

²⁴⁴ Joseph Keawe‘aimoku Kaholokula et al., *Culturally Responsive Approaches to Health Promotions for Native Hawaiians and Pacific Islanders*, 45 ANNALS HUM. BIOLOGY 249, 250 (May 29, 2018).

²⁴⁵ Darren Thomas et al., *Re-evaluating Resilience: From Individual Vulnerabilities to the Strength of Cultures and Collectivities Among Indigenous Communities*, 4 RESILIENCE 116, 124 (2016).

²⁴⁶ Fast & Collin-Vézina, *supra* note 213, at 133 (citing Eva Marie Garrouette et al., *Spirituality and Attempted Suicide Among American Indians*, 56 SOC. SCI. & MED. 1571 (2003)).

²⁴⁷ NHHCIA, 42 U.S.C. § 11701(a)(2).

of the State of Hawaii.”²⁴⁸ However, its definition of a Kanaka Maoli is not restricted by location nor blood quantum; a “Native Hawaiian” is defined as any individual who is a citizen of the U.S. and a “descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.”²⁴⁹

The NHHCIA could be interpreted in many ways to fund support for Kānaka Maoli who live outside of Hawai‘i. One possibility would be funding research on the health status and health care needs of all Kānaka Maoli, including those who live on the continent, which is a direct responsibility of Papa Ola Lōkahi.²⁵⁰ Another opportunity would be providing grants to Native Hawaiian organizations on the continent. While both health care systems and health centers are restricted to the State of Hawai‘i, nothing restricts Native Hawaiian organizations so long as they serve the interests of Kānaka ‘Ōiwi, are recognized and certified by Papa Ola Lōkahi, have the significant participation of Native Hawaiian health practitioners, and are a public or non-profit private entity.²⁵¹ Papa Ola Lōkahi has continental relationships with sixteen organizations.²⁵² It could be possible to significantly increase and improve those relationships.

“The trust responsibility extends through the tribe to the American Indian member, whether on or off the reservation;”²⁵³ the same principle should be true for Kānaka. Additionally, the NHHCIA has an expansive definition of Kānaka Maoli.²⁵⁴ This inclusion of Kānaka on the continent is reinforced by Papa Ola Lōkahi, who stated that they will “enable this generation of Native Hawaiians and their families to make great strides toward . . . the true sense of ola pono in this, their island home, *and elsewhere*.”²⁵⁵ Due to the inadequate funding of cultural programs, there is often tension when there is a discussion of assisting Kānaka Maoli who do not live in Hawai‘i.²⁵⁶ However, it is crucial to remember that resentment

²⁴⁸ *Id.* at § 11711(a)(4)(A).

²⁴⁹ *Id.* at § 11711(a)(3).

²⁵⁰ *Id.* at § 11704(b).

²⁵¹ *Id.* at § 11711(a)(5).

²⁵² E-mail from Sarah Kamakawiwo‘ole, Pol’y Alaka‘i, Papa Ola Lōkahi (Mar. 16, 2022, 12:54 HST) (on file with author).

²⁵³ AM. INDIAN POL’Y REV. COMM’N, *supra* note 57, at 6.

²⁵⁴ NHHCIA, 42 U.S.C. § 11711(3). The definition of Native Hawaiian does not refer to blood quantum and is inclusive of anyone who can trace their ancestry back to Hawai‘i before 1778. *See* discussion *supra* Section IV.A.

²⁵⁵ E OLA MAU A MAU, *supra* note 128, at 4 (emphasis added).

²⁵⁶ There is an analogous tension for the topic of federal recognition of Native Hawaiians as “Indians” for the purposes of federal funding and increased resources. POL Interview, *supra* note 80; *cf.* Yellen, Secretary of Treasury v. Confederated Tribes of the Chehalis Reservation, 594 U.S. ___, 141 S. Ct. 2434, 2452 (2021) (finding Alaska Native

should not be held toward the people who also need funds, but rather directed towards those in power who restrict funds.

“Home” is a complex concept, and life in the Native Hawaiian diaspora is proof.²⁵⁷ The kuleana to care for community does not end after Kānaka Maoli have left the land. However, improving care for Kānaka ‘Ōiwi who live outside of Hawai‘i does not have to look exclusively like exporting services. Care for Native Hawaiians in the diaspora could also create ways for people to return home; improving the standard of living so Native Hawaiians can remain on the ‘āina; and implementing policies to decrease the outmigration of Native Hawaiians.²⁵⁸

V. CONCLUSION

The health care benefits conferred by the Native Hawaiian Health Care Improvement Act have not adequately created an environment that can “raise the health status of Native Hawaiians to the highest possible health level.”²⁵⁹ In light of the historical trauma caused by the overthrow of a sovereign nation and the resulting responsibility to right those wrongs, the NHHCIA must be expanded substantially in both scope and available funds. To truly work towards lōkahi, the NHHCIA must not only focus on maui ola, but should also improve ‘āina, ea, and mo‘omeheu. The NHHCIA could have a substantially greater impact by increasing its public health initiatives both home in Hawai‘i and on the continent for Kānaka ‘Ōiwi.

The reinvention and transformation of current systems is important, but it does not yet begin to answer how we might “create a political philosophy to guide our people that is neither derived from the Western model nor a simple reaction against it.”²⁶⁰ While structural reform is a critical component to improving the well-being of Indigenous communities within the confines of our present world, it should never be the end goal. Envisioning an expansion of the ties that bind is simply a first step to a larger, changed reality.

Corporations to be “Indian tribes” eligible for COVID-19 funds under the CARES Act and ruling against the Native American tribes who had challenged the holding).

²⁵⁷ Madelyn McKeague, *Home is where the _____ is: Thoughts on Place, Indigeneity, and Migration*, GEO. IMMIGR. L. J. (2022); see also Vaughan, *supra* note 13, at 4-5 (“Home is a tricky concept in the United States today. People have many places – where they were born, grew up, vacation, have family, lived, and live now.”).

²⁵⁸ See discussion on policies to decrease the outmigration *supra* Section IV.B.

²⁵⁹ NHHCIA, 42 U.S.C. § 11702(a)(1).

²⁶⁰ TAIAIAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO xviii (1999).