The Duty to Aloha ʻĀina: *Indigenous Values as a Legal Foundation for Hawai'i's Public Trust*

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I. Introduction

Hawaiian language newspapers (nūpepa) were a vital forum for public discourse and cultural expression, especially in the wake of the illegal overthrow of the sovereign Kingdom of Hawai'i in 1893.[1] As the social media of their era, nūpepa now provide invaluable insight into Native Hawaiian[2] life, culture, values, and more.[3] An 1895 article deconstructed the cultural tenet of aloha ʻāina, describing it as the "magnetic pull within the hearts of a people, compelling them to live sovereignly in their own homeland."[4] Another article highlighted the power of aloha ʻāina, detailing how, in the same way that objects can become magnetized, people "imbued with aloha for their land can pass on their aloha" to others.[5] They "can introduce people,

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[1] *See* M. Puakea Nogelmeier, Mai Pa'a i ka Leo: Historical Voice in Hawaiian Primary Materials, Looking Forward and Listening Back 102–26 (Dec. 2003) (Ph.D. thesis, University of Hawai'i Mānoa) (on file with author). From 1843 to 1948, over 100 Hawaiian language newspapers were printed. *Id.* The independent press elevated native voices, scholarship, and culture, and epitomized the decentralization and sharing of Indigenous knowledge. *Id.* These newspapers represent one of the greatest repositories of traditional language. *Id.*; *see also* Kamanamaikalani B. Beamer, *Ali'i Selective Appropriation of Modernity: Examining Colonial Assumptions in Hawai'i Prior to 1893*, 5 AlterNative 139, 151 (2009) [hereinafter Beamer, *Selective Appropriation*].

[2] This Article uses Native Hawaiian, native Hawaiian, Hawaiian, Kānaka ʻŌiwi, ʻŌiwi, Kānaka Maoli, and Kānaka interchangeably and without reference to blood quantum. Kānaka ʻŌiwi and Kānaka Maoli are the Indigenous Hawaiian names for the population inhabiting Hawai'i at the time of the first western contact. Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 127 (1986) [hereinafter Hawaiian Dictionary] (noting that Kānaka Maoli historically referred to a full-blooded "Hawaiian person").

[3] *See generally* Nogelmeier, *supra* note 1, at 102–26.

[4] *Ke Aloha Aina; Heaha Ia'*, Ke Aloha Aina, May 25, 1895, at 7 ("'O ke Aloha ʻāina, 'o ia ka 'Ume Māgēneti i loko o ka pu'uwai o ka Lāhui, e kāohi ana i ka noho Kū'okoa Lanakila 'ana o kona one hānau pono'ī.") (translation by Devin Kamealoha Forrest, diacriticals added).

[5] *Ka Mana o Ka Mageneti*, Ke Aloha Aina, May 25, 1895, at 7 ("Ua hiki i nā mākua i piha i ke aloha i ka ʻāina e ʻānai aku i ka 'ume e aloha i ka ʻāina i loko o kā lākou mau keiki a lilo kēlā mau keiki i mau keiki kaulana no ko lākou ʻāina makuahine.") (translation by Devin Kamealoha Forrest, diacriticals added).

their children, and their families until they too are imbued with the Magnetism of Aloha ʻāina."[6]

Over the intervening century, aloha ʻāina has maintained its cultural significance, and, indeed, interest in it has increased as aloha ʻāina has evolved from a cultural value into a legal requirement.[7] This Article explores the Hawaiʻi Supreme Court's articulation of the legal duty to aloha ʻāina in *Ching v. Case*. That decision embraced and uplifted this cultural precept, and Native Hawaiian values more broadly, acknowledging them as foundational for Hawaiʻi law and the Public Trust Doctrine in particular.[8] This Article situates *Ching* within the caselaw's and the state constitution's embrace of restorative justice. Despite the pathbreaking nature of the opinion and favorable Hawaiʻi law, the limitations of legal formalism—particularly when attempting to heal the harms that flow from colonization—and the court's failure to deploy an analytic framework to operationalize the duty to aloha ʻāina threaten to limit the impact of that decision. This Article then argues that these limitations are best addressed by deploying contextual legal inquiry—the Four Values of Restorative Justice—to make the decision's groundbreaking promise real.

Today, many within and beyond Hawaiʻi's shores fail to appreciate the full meaning of "aloha ʻāina." Literally translated, aloha can mean love, grace, or affection, and it is often used as a greeting or farewell.[9] Yet it also denotes mercy, respect, and more.[10] ʻĀina is that which feeds, including land and natural and cultural resources. But ʻāina is also an ancestor, an extension of the family, and the physical embodiment of different akua (gods or ancestors).[11] It is sacred and revered. Because of the deep and profound meanings associated with each component word, the phrase aloha ʻāina is difficult to translate into English; it is a philosophy, relationship, and cultural obligation that is visceral for Kānaka. It is a piko, or umbilical cord that tethers us as Indigenous People to Hawaiʻi and defines our place in this universe. Aloha ʻāina invokes kuleana: the right and corresponding responsibility to care for Hawaiʻi's natural and cultural resources for present and future generations.[12]

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[6] *Id.* ("Pēlā nō nā kānaka i piha i ke aloha no ko lākou ʻāina hānau ponoʻī. Ua hiki iā lākou ke hoʻolauna mai i nā kānaka a me nā keiki a me nā ʻohana o lākou a [liloʻ] mai iā lākou i loko o ka ʻume Māgēneti o ke Aloha ʻāina.") (diacriticals added).

[7] *See* Noelani Goodyear-Kaʻōpua, The Seeds We Planted: Portraits of a Native Hawaiian Charter School 31–34 (2013); Kamanamaikalani Beamer, *Tūtū's Aloha ʻāina Grace*, *in* The Value of Hawaiʻi 2 (Aiko Yamashiro & Noelani Goodyear-Kaʻōpua eds., 2014) [hereinafter Beamer, *Tūtū's Aloha ʻāina Grace*]; Ching v. Case, 449 P.3d 1146, 1160 (Haw. 2019).

[8] Both the lower court and the Hawaiʻi Supreme Court recognized a "duty to ʻmalama ʻaina,' which the court translated as 'to care for the land.'" *Ching*, 449 P.3d at 1160. The term "mālama ʻāina" is relatively new and is likely a product of the 1960s or 1970s. Because Kānaka articulated and perpetuated this practice as aloha ʻāina, this Article will also use that.

[9] *See* Hawaiian Dictionary, *supra* note 2, at 21.

[10] *See id.*; *see also* Goodyear-Kaʻōpua, *supra* note 7, at 31–33.

[11] *See* Hawaiian Dictionary, *supra* note 2, at 15; *see also infra* Part II.

[12] *See* Hawaiian Dictionary, *supra* note 2, at 179; *see also* Beamer, *Tūtū's Aloha ʻāina Grace*, *supra* note 7, at 2, 15 ("Aloha requires one to speak and act out in the face of injustice.

And now, because of the *Ching* decision, aloha ʻāina is also a legal duty imposed on state and local decisionmakers as fiduciaries of the Public Trust and Public Land Trust that is available for enforcement by beneficiaries of those trusts, including Native Hawaiians.[13] Yet this legal victory raises an important question: how, if at all, will aloha ʻāina as legal duty impact the larger struggle of Native Hawaiians and other historically underrepresented communities—who have been a training ground for the U.S. military—to combat resource dispossession?

All of this comes together at Pōhakuloa, a vast plain of lava fields and native dryland forest on the Island of Hawaiʻi that is home to archaeological sites, high concentrations of native plants and animals, and the largest military installation in the archipelago. On this windswept upland plateau, military training with live ammunition and explosives has persisted for over half a century, utilizing nearly 23,000 acres held in trust by the State of Hawaiʻi's Department of Land and Natural Resources ("DLNR") for five purposes, including bettering the conditions of Native Hawaiians.[14] In 1964, DLNR charged the U. S. military one dollar for a 65-year lease of this sacred ʻāina.[15]

In 2014, two Native Hawaiian cultural practitioners with ancestral ties to the area—Clarence Kū Ching and Mary Maxine Kahāʻulelio—sued DLNR for its failure to adequately care for trust resources at Pōkahuloa under lease to the military.[16] The plaintiffs contended that Hawaiʻi's Constitution requires DLNR to diligently protect trust lands from degradation and that, by neglecting to investigate whether the military is following the terms of the lease, DLNR violated its trustee duties, which include a kuleana—a duty—to aloha ʻāina.[17]

The trial court's 2018 decision, which the Hawaiʻi Supreme Court upheld, highlighted new dimensions of Hawaiʻi's Public Trust and Public Land Trust, including their grounding in Indigenous culture and values. Uncle Kū and Aunty Maxine's aloha ʻāina compelled them to take action to ensure that

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Aloha is active and something that needs to be put into practice, not something that is a state of being.").

[13] *See Ching*, 449 P.3d 1146.

[14] *Id.* at 1150; *see* Admission Act of March 18, 1959, § 5(f), Pub. L. No. 86-3, 73 Stat 4.

[15] Robert H. Horwitz, Judith B. Finn, Louis A. Vargha & James W. Ceaser, Legis. Reference Bureau, Rep. No. 5, Public Land Policy in Hawaii: An Historical Analysis 76 tbl.9(B) (1969); *Ching*, 449 P.3d at 1150.

[16] First Amended Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 1, 56–62, Ching v. Case, No. 14-1-1085-04 GWBC, 2018 WL 11225507 (Haw. Cir. Ct. Apr. 3, 2018) [hereinafter First Amended Complaint]. Uncle Kū and Aunty Maxine named three defendants in this case: Suzanne Case in her capacity as the Chair of the Board of Land and Natural Resources and State Historic Preservation Officer; the Board of Land and Natural Resources; and the Department of Land and Natural Resources. *Id.* ¶¶ 3–5. This Article will collectively refer to these defendants as "DLNR."

[17] *Id.* ¶¶ 1, 56–62.

ancestral land was better stewarded.[18] This deep commitment to place and practice magnetized others, and the court then imbued DLNR with the duty to aloha ʻāina. This Article delves into this incipient legal duty and its potential to further magnetize Hawaiʻi law and the Public Trust Doctrine in particular.

Part II provides the cultural and historical context for the duty to aloha ʻāina as a foundation for Native Hawaiian culture and society. It also highlights the role of Indigenous custom and tradition, including aloha ʻāina, as a background principle of property law in Hawaiʻi.

Part III uplifts the vital role of restorative justice as a vehicle for transformative change, especially for Indigenous People still living with the vestiges of colonization, including cultural destruction, resource dispossession, and the loss of self-governance. It underscores the significance of Hawaiʻi's unique legal regime, grounded in Native Hawaiian values, customs, and traditions and its commitment to restoring that which was taken or destroyed. It also distills Hawaiʻi's Public Trust and Public Land Trust, including emergent understandings of these legal doctrines, with a focus on the role of Indigenous culture and values.

Part IV elucidates the duty to aloha ʻāina as a basic tenet of Hawaiʻi's Public Trust by deconstructing *Ching v. Case* and, in particular, the vital role of restorative justice in beginning to repair the harms of colonization. Hawaiʻi's embrace of restorative justice principles in its dealings with Native Hawaiians opens the door to international human rights norms of self-determination for Indigenous Peoples, offering a powerful example of how they can be infused into local laws to provide meaningful remedies for environmental and cultural damage.

Yet as Part V explores, *Ching v. Case* and its court-ordered Management Plan are not without limitations. The legal process still struggles to deliver restorative justice for Native communities, especially in complex cases with cultural and environmental components. This Part offers insight into how the law actually operates for Native Peoples, and how legal formalism shrouds the dynamics of decisionmaking. It also highlights how contextual legal analysis, a jurisprudential approach grounded in the new legal realism, is key to actualizing restorative justice in a broad array of Indigenous Peoples' claims. It proffers the Four Values of Restorative Justice as an analytic framework to meaningfully engage restorative justice claims and operationalize the duty to aloha ʻāina.

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[18] Zoom Interview with Clarence Kū Ching, Named Plaintiff, Ching v. Case (July 10, 2021) [hereinafter Ching Interview]. Consistent with Native Hawaiian custom and tradition, this Article refers to revered elders as "Uncle" or "Aunty."

II. Cultural and Historical Context for the Duty to Aloha ʻĀina

A. Understanding and Embracing Aloha ʻĀina

In the wake of *Ching v. Case*'s imposition of a duty to aloha ʻāina, we ponder: ke aloha ʻāina; he aha ia' Aloha ʻāina, what is it, really?[19] For Kānaka, aloha ʻāina "escapes translation"[20] because it is something that we are born with and that is encoded in our genes. It can be described, albeit insufficiently, as a worldview and familial relationship with Hawai'i's islands and all of their resources.[21] Contemporary scholars also describe aloha ʻāina as a lolo noʻonoʻo or "guiding philosophy"[22] that is "grounded in an ancestral worldview that considers the environment as kin," and as "a system of values perpetuated over generations."[23]

After the illegal U.S.-backed overthrow of the Hawaiian Kingdom in 1893, aloha ʻāina became the "cornerstone of resistance" to settler colonialism, expressing Kānaka's shared desire "for self-rule as opposed to rule by the colonial oligarchy of settlers or the military rule of the United States."[24] One 1895 nūpepa article illustrated the "direct connection between aloha ʻāina and one's desire and struggle for independence"[25] by describing aloha ʻāina as "the magnetic pull within the hearts of a people, compelling them to live sovereignly in their own homeland."[26] Dr. Jamaica Heolimeleikalani Osorio's analysis of that article reveals another facet of aloha ʻāina as a mag-

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[19] *See Ke Aloha Aina; Heaha Ia*ʻ, *supra* note 4, at 7.

[20] Jamaica Heolimeleikalani Osorio, Remembering Our Intimacies: Moʻolelo, Aloha ʻāina, and Ea 12 (2021).

[21] *See, e.g.*, Goodyear-Kaʻōpua, *supra* note 7, at 32 ("Kānaka ʻŌiwi, like many Indigenous peoples throughout the world recognize all beings—birds, rocks, insects, plants, winds, waters—as familial relations. All are part of interrelated, living systems."); *see also* Candace Fujikane, Mapping Abundance for a Planetary Future: Kanaka Maoli and Critical Settler Cartographies in Hawaiʻi 28 (2021) ("Kanahele uses the word 'attunement' to describe the intimate relationship between Kānaka and ʻāina, similar to conceptions of a kupuna [elder] vibration and an alignment with akua. It is the pilina (connectedness) of all life-forms that governs these ecological systems.").

[22] Bruce Kaʻimi Watson, "Mahikihiki mai ka Opae Oehaa a Hihia i ka Wai" Pua Does Not Always Mean Flower and this Paper is Not About Shrimp 16 (2021) (unpublished manuscript) (on file with Harvard Civil Rights-Civil Liberties Law Review).

[23] Kamanamaikalani Beamer, Axel Tuma, Andrea Thorenz, Sandra Boldoczki, Keliʻiahonui Kotubety, Kaneoka Kuke-Shultz & Kawena Elkington, *Reflections on Sustainability Concepts: Aloha ʻāina and the Circular Economy*, Sustainability, Mar. 9, 2021, at 2 [hereinafter Beamer et al., *Reflections on Sustainability Concepts*].

[24] Noenoe K. Silva, Aloha Betrayed: Native Hawaiian Resistance to American Colonialism 11 (2004). Aloha ʻāina was also synonymous with an independence movement and political parties opposing the U.S. occupation of Hawaiʻi during the late 1800s and into the 1900s, although it "encompasses more than nationalism and is not an exact fit with the English word 'patriotism,' the usual translation." *Id.*; *see also* Osorio, *supra* note 20, at 9–14 (problematizing the association of aloha ʻāina and western patriotism or nationalism); Goodyear-Kaʻōpua, *supra* note 7, at 32–39 (same).

[25] Osorio, *supra* note 20, at 13.

[26] *Ke Aloha Aina; Heaha Ia*ʻ, *supra* note 4, at 7. For a full translation, *see supra* note 4.

netic force: it creates pilina (intimacy or connection) between place and community.[27] Another nūpepa article explained that "aloha ʻāina also results in a pilina between Kānaka," as poʻe "aloha ʻāina [aloha ʻāina actors] are able to recognize the aloha ʻāina in each other and are bound in intimacy together because of our shared intimacy and connection to our land."[28] Dr. Osorio's research illustrates that "aloha ʻāina is an internal love for place and community so strong that it cannot be overcome" and is "a natural and imbedded Kanaka Maoli practice of relation to one's home."[29] Aloha ʻāina, then, "is that pull to place, that internal compass orienting Kānaka Maoli toward intimacy and self-governance simultaneously."[30]

Aloha ʻāina was and continues to be actively practiced in the same way that some might observe other religious or cultural protocols. Dr. Noelani Goodyear-Kaʻōpua underscores that, as a "political philosophy and praxis," the "*aloha* part of this phrase is an active verb, not just a sentiment," so "it is important to think of aloha ʻāina as a practice rather than merely a feeling or belief."[31] Building on those insights, Dr. Osorio opines that "[t]he effective practice of aloha ʻāina" requires the "creat[ion] and maint[enance]" of "two relationships: to the land itself, to that which feeds; and, through that 'upena [fishing net] of pilina, to one's community. These relationships themselves are inseparable, relying upon each other for survival."[32] Thus, from this Indigenous perspective, aloha ʻāina "mean[s] not only a love for the land, but a real deep and personal sense of connection to place, an unswerving commitment to the health of our natural world"[33] and the human communities reliant upon it.[34]

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[27] Osorio, *supra* note 20, at 12–13 (explaining that the article articulates aloha ʻāina as "a magnetic force that not only draws the individual Kanaka to our ʻāina but also creates and maintains pilina between all Kānaka and ʻāina.").

[28] *Id.* at 13. Dr. Candace Fujikane elaborates on this intimacy, noting that

> [t]he range of our intimate relationships with land shifts across time and place. Sometimes the love is for a mother or grandmother, for Papa, the earth, and yet at other times aloha ʻāina is a lover's passion for a place, as Poliʻahu's cinder cones are embraced by Kūkahuʻula's pink glow at sunrise and sunset on Mauna a Wākea, or it is the tender love for a child, as the love that Protect Kahoʻolawe ʻOhana activists felt for Kahoʻolawe, an island bombed for decades by the US military for target practice . . . . This entanglement in desire for land is rooted in the kilo (observations) of one who has lived in a place until deeply well-versed in the expressions of the land.

Fujikane, *supra* note 21, at 24–25.

[29] Osorio, *supra* note 20, at 13; *see also* Fujikane, *supra* note 21, at 117 (sharing Dr. Kahikina de Silva's characterization that "land is not simply a locale; it is our connection to each other, to ancestors gone and descendants to come.").

[30] Osorio, *supra* note 20, at 13.

[31] Goodyear-Kaʻōpua, *supra* note 7, at 32 (emphasis in original).

[32] Osorio, *supra* note 20, at 13.

[33] Noelani Goodyear-Kaʻōpua, *The Enduring Power of Aloha ʻāina: Noelani Goodyear Kaopua at TEDxManoa*, YouTube (Oct. 29, 2013), https://www.youtube.com/watchʻv=KUd4KzRekoI&list=PLZOlg9OnZtjfb3ubKEOMAeSWqhr0bFkWG, *archived at* https://perma.cc/3GU4-GC3C.

[34] *See* Osorio, *supra* note 20, at 9–14.

This commitment is rooted in the reciprocal relationship between Kānaka and the Hawaiian archipelago that arises from Native Hawaiians' shared moʻokūʻauhau (genealogy) with our ʻāina. The Kumulipo—a cosmogonic chant—and other historical works[35] trace the birth of Native Hawaiians to the beginning of time in Hawaiʻi.[36] In this genealogy, the "relationship between ʻāina (land, or literally, that which feeds us) and kānaka (humanity) is defined as one of reciprocity between an elder and younger sibling; the kuleana (responsibility) of the elder sibling is to sustain, love, and protect the younger, who in turn loves, serves, and honors the elder."[37] For Kānaka, our biocultural resources are our ancestors, part of the extended family, and the physical embodiment of different akua (gods or ancestors). Understanding the genealogical connection between people, natural systems, and resources "enabled the development of philosophies such as aloha ʻāina, which focused on the relationships humans must maintain to live in balance with the natural world."[38] "At its root, Aloha ʻāina has a tenet that the land is the religion and the culture."[39] Dr. Kamanamaikalani Beamer explains that "'ʻāina" describes land that is cultivated—absent a relationship with humans, land has a different name.[40] Aloha ʻāina, therefore, shapes both resources and their caretakers. Dr. Noa Emmett Aluli expands on this pilina (relationship): "[i]n our daily activities, we develop a partnership with the land so as to know when to plant, fish, or heal our minds and bodies according to the ever changing weather, seasons and moons."[41] This intimacy is "[s]o close . . . that we acknowledge the ʻaumakua and akua, the ancestral spirits and gods of special areas."[42] In this way, "[w]e learn the many personalities of the land, their form, character and resources; and we love the land personally[.]"[43]

Historically, aloha ʻāina took many forms and was implicit in all aspects of a functioning Native Hawaiian society. Aloha ʻāina was the foundation for society as a whole and the individual kānaka interactions with natural and cultural resources. For example, at the individual level, aloha ʻāina

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[35] *See, e.g.*, *Mele Hānau nō Kau-i-ke-ao-uli*, *in* The Echo of Our Song: Chants and Poems of the Hawaiians 17 (Mary Kawena Pukui & Alfons L. Korn trans. & eds., 1973).

[36] *See, e.g.*, Silva, *supra* note 24, at 11 ("The islands were said to have been conceived and born like human beings, of the same parents, Papahānaumoku 'Papa who gives birth to islands' and Wākea, the sky father, and Hoʻohōkūkalani, 'she who creates the stars in the heavens.'").

[37] Beamer et al., *Reflections on Sustainability Concepts*, *supra* note 23, at 4.

[38] *Id.* at 2.

[39] Noa Emmett Aluli, *Land Issues are Integral Part of Life: Aloha Aina is More Than Popular Slogan*, Honolulu Star Bulletin The Year of the Hawaiian 1887-1987, at 25.

[40] Beamer, *Tūtū's Aloha ʻāina Grace*, *supra* note 7, at 13 ("The renowned Hawaiian scholar David Malo notes that 'ma ka noho ana a kanaka, ua kapa ia he aina ka inoa.' [it is because people live and interact with a place that it is called 'āina.]") (citation omitted).

[41] Aluli, *supra* note 39, at 25.

[42] *Id.*

[43] *Id.* at 25.

> takes familial relationships with akua, [nature's] elemental forms, as a premise, and cultural practices are grounded in chants and practices that ask the akua for their consent. There are protocols in place for asking permission to enter into a place and to gather. The elemental forms respond to these requests and recognize us through hōʻailona (signs). Sometimes the signs are elemental: a sudden rush of wind, the flick of a fish tail, a flock of nçnç flying overhead, or the mists that kolo (creep) in to hide a place from our eyes. At other times, kūpuna [elders] explain that they feel in their naʼau (seat of knowledge or visceral core) whether their actions are pono (morally right, just, balanced).[ ] But even to know how to ask for permission or to read hōʻailona, it is important to trace kilo practices of observation back to genealogical relationships.[44]

Dr. Goodyear-Kaʻōpua further reveals that "many ʻŌiwi assert that we are not only related to the land but also a part of what is referenced when one talks about ʻāina. It is through action, through practicing aloha ʻāina, that we produce ourselves in relation to and as part of ʻāina."[45]

This fundamental connection between Kānaka and nature was infused into norms and protocols from the earliest governance by individual aliʻi (chiefs) and ʼaha aliʻi (councils of chiefs) to the evolution of the institution of mōʻī (the sovereign or single supreme leader) and other "indigenous Hawaiian 'statecraft,' including a system of bounding lands and resources under chiefly authority."[46] An example of this iteration of aloha ʻāina through law is Māʼilikūkahi's establishment of land divisions and management systems for Oʻahu's resources and people in the fifteenth century.[47] Prior to Māʼilikūkahi's reign, "the land was in a state of confusion. It was not clearly understood what was an ahupuaʻa [similar to a watershed] and what was an ʼili kū ʻāina" (a smaller land division) and who was responsible for what.[48] Māʼilikūkahi established a network of nested land districts across the entire island as well as resource managers at each level to direct the cultivation of ocean- and land-based resources.[49] He also distributed ʻāina to various classes of people, including makaʻāinana (people of the land), and issued edicts focused on the wellbeing of the land and its people.[50] Māʼilikūkahi's reforms were maintained for hundreds of years, and the land divisions were ulti-

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[44] Fujikane, *supra* note 21, at 23 (footnote omitted).

[45] Goodyear-Kaʻōpua, *supra* note 7, at 33 (citation omitted.

[46] *See* Kamanamaikalani Beamer, No Mākou Ka Mana: Liberating the Nation 19, 19–21 (2014) [hereinafter Beamer, No Mākou Ka Mana].

[47] *See id.* at 34–36. Māʻilikūkahi's efforts to aloha ʻāina ushered in an era of peace and prosperity. *Id.*

[48] *See id.* at 34.

[49] *Ka Moolelo o Hawaii Nei*, Ka Nupepa Kuokoa, Sept. 2, 1895, at 1 (translation by Devin Kamealoha Forrest).

[50] *Id.* (advising Aliʻi not to take from others, especially makaʻāinana, or face the penalty of death).

mately mapped during the 1800s.[51] Other leaders embraced aloha ʻāina by, for example, prohibiting overfishing, requiring the rotation of harvests, and limiting the collection of marine life during spawning seasons.[52] In this way, aloha ʻāina guided Native Hawaiian life at every level from the individual to the larger community.

B. Aloha ʻāina's Legal Evolution and Inscription

In addition to being an Indigenous value or guiding philosophy, aloha ʻāina is also a legal precept. Long before the Hawaiʻi Supreme Court's decision in *Ching v. Case*, aliʻi (Native Hawaiian leaders) including Māʼilikūkahi imbedded aloha ʻāina into law.[53] In the face of expanding western influence and colonization across the Pacific in the 1800s, aliʻi transformed their Indigenous governance system into a constitutional monarchy.[54] To do so, they codified the "existing indigenous structure" and combined it with "selective[ly] appropriat[ed]" European and American laws.[55] As part of this effort, "Indigenous Hawaiian leaders developed a complex system of resource management as well as a social system rooted in aloha ʻāina that was hybridized during the period of the Hawaiian Kingdom when Hawaiʻi became recognized as an independent and sovereign state in 1843."[56] Aliʻi embraced the western legal system as part of a deliberate strategy of giving Indigenous governance structures a white veneer to appear familiar to foreigners and, thus—the hope was—be more likely to be honored.[57] Although Native Hawaiian leaders had long-issued oral decrees, they added written laws and proclamations in the 1800s that regulated both Natives and foreigners. "As the aliʻi learned and mastered [ ] European and American law, they implemented certain structures as a method for controlling Europeans within the kingdom and, to a lesser extent, for restricting foreign influence in the islands."[58] For Hawaiʻi, as "a nation unequally matched in infantry, naval vessels and steel, law was a significant tool—one that could be manipulated non-violently to maintain control domestically and decrease the likelihood of external intervention."[59]

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[51] *See* Beamer, No Mākou Ka Mana, *supra* note 46, at 35–36.

[52] *See, e.g.*, Moke Manu & Others, Hawaiian Fishing Traditions xii–xiii (1992).

[53] *See, e.g.*, Beamer, No Mākou Ka Mana, *supra* note 46, at 34–35.

[54] *See* Melody Kapilialoha MacKenzie, *Historical Background*, *in* Native Hawaiian Law: A Treatise 2, 10–12 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter MacKenzie, *Historical Background*].

[55] Beamer, *Selective Appropriation*, *supra* note 1, at 151.

[56] Beamer et al., *Reflections on Sustainability Concepts*, *supra* note 23, at 5.

[57] *See, e.g.*, Beamer, No Mākou Ka Mana, *supra* note 46, at 104.

[58] *Id.* ("Law was understood by the Aliʻi and appropriated selectively to further their own ends.").

[59] Beamer, *Selective Appropriation*, *supra* note 1, at 151.

Hawai'i's 1839 Kānāwai and 1840 Constitution exemplify how ali'i inscribed Kānaka values and praxes, including aloha 'āina, into law.[60] In 1839, Kauikeaouli promulgated the Hawaiian Kingdom's "first formal body of written laws."[61] The 1839 Kānāwai has two parts: "Kumu Kānāwai (Source of Law, or Constitution) and Ke Kānāwai Ho'oponopono Waiwai (Law Regulating Taxation, Property, and the Rights of Classes).[62] The first is often called the Declaration of Rights, given the translation of Kumu Kānāwai as "source of law."[63] Laws under the second heading include thirteen sections and seven subsections that outline a range of rights, duties, and taxes that largely sought to protect maka'āinana "from abuses of power[,]" especially from ali'i who might overburden them.[64]

The 1839 Kānāwai "began the process of codifying ancient relationships" between the three principal classes within Native Hawaiian society—the mō'ī (king), ali'i (chiefs), and maka'āinana (people of the land)—that had been respected for centuries but never reduced to writing.[65] Under the 1839 Kānāwai, and consistent with Native Hawaiian custom and practice including aloha 'āina, land and marine resources were jointly held by the three classes, rather than vesting all rights in the mō'ī (king).[66]

The 1839 Kānāwai embodied aloha 'āina by acknowledging the genealogical connection and intimacy between all Kānaka and 'āina—as part of the same 'ohana, maka'āinana, ali'i, and the mō'ī share kuleana to care for extended family, including natural resources and each other. Section eight articulates the mō'ī's desire to "use law to restore the state of pono (secured harmony)" and "to place people back on the land to farm and cultivate it."[67] This is the sacred "pilina" that Dr. Osorio highlighted, both between Kān-

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[60] *See, e.g.*, BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 116. Although the 1839 laws have two headings—Kumu Kānāwai (Source of Law, or Constitution) and Ke Kānāwai Ho'oponopono Waiwai (Law Regulating Taxation, Property, and the Rights of Classes)—this Article collectively refers to both as the "1839 Kānāwai." *Id.* In addition to the 1839 Kānāwai, the Hawai'i Supreme Court also looked to the Māhele process (beginning around 1845) as a basis for Hawai'i's Public Trust. *See In re* Waiāhole Ditch Combined Contested Case Hearing (*Waiāhole*), 9 P.3d 409, 440–41, 443, 449 (Haw. 2000).

[61] Beamer, *Selective Appropriation*, *supra* note 1, at 142. Kauikeaouli is also known as Kamehameha III. *Id.* Prior to 1839, Kingdom laws were both oral and written, but they had not been comprehensively compiled. BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 106, 116. Written laws prior to 1839 "largely regulated taxation, trade, and engagements with foreigners." Beamer, *Selective Appropriation*, *supra* note 1, at 143. In fact, "it appears that many of these laws regulated the behavior of foreigners" to a greater extent than maka'āinana. BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 106. For example, early laws "prohibited murder and theft, abolished rum, restricted nonmonagamous sexual relations, and established numerous regulations for foreign vessels and sailors." *Id.*

[62] BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 116; *see also* HE KUMU KAWAWAI, A ME KE KANAWAI HOOPONOPONO WAIWAI, NO KO HAWAII NEI PAE AINA NĀ KAMEHAMEHA III, at 1–4 [hereinafter 1839 KUMU KĀNĀWAI].

[63] BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 116.

[64] *Id.* at 122.

[65] Beamer, *Selective Appropriation*, *supra* note 1, at 146, 143.

[66] BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 124.

[67] Beamer, *Selective Appropriation*, *supra* note 1, at 149.

aka, and between people and place.[68] Kauikeaouli's acknowledgement that all Kānaka have an interest in the ʻāina reflected the "reciprocal recognition" that a functional and healthy Native Hawaiian society required all classes of people and the ʻāina to live and work in balance.[69] Such recognition "locates Indigenous peoples in broader governing systems based on laws of the natural world that transcend human laws."[70]

Other portions of the 1839 Kānāwai also manifest aloha ʻāina precepts. For example, section thirteen relating to fresh water specifies that the resource must be shared equitably and mandates restoration of areas that have been depleted.[71] Subsection V relating to prohibited items from the mountains, prescribed a more equitable sharing of resources across all classes of people, acknowledged limited use of scarce items, and barred certain practices altogether, such as burning.[72] These and other sections reflect pono or best practices that temper use to preserve resources for future generations.

The 1840 Constitution formalized the Kingdom's governmental structure to include a bicameral, elected legislature, a judicial system that included a supreme court, and more.[73] Despite these and other western trappings, the 1840 Constitution went even further in embracing aloha ʻāina. It declared that the ʻāina was not owned in a western sense, but was instead held in trust for all Kānaka:

> Eia ke ano o ka noho ana o na'lii a me ka hooponopono ana i ka aina. O Kamehameha I, oia ke poo o keia aupuni, a nona no na aina a pau mai Hawaii a Niihau, aole nae nona ponoi, no na kanaka no, a me na'lii, a o Kamehameha no ko lakou poo nana e olelo i ka aina.
>
> The origin of the present government, and system of polity, is as follows. Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had management of the landed property.[74]

This acknowledgement epitomizes aloha ʻāina by emphasizing shared genealogy and reciprocity between Kānaka and ʻāina. If land is an ancestor and the physical manifestation of a god, it can never be possessed in a western sense; instead, it is cherished as part of the extended family and held in trust

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[68] Osorio, *supra* note 20, at 12–13.
[69] Fujikane, *supra* note 21, at 23.
[70] *Id.*
[71] 1839 Kumu Kānāwai, *supra* note 62, at 120 ("E hāʻawi like i ka wai no nā ʻāina a pau oia wahi i hoʻonele'ia mamua i ka wai") (translation by Devin Forrest, diacriticals added).
[72] *Id.* at 121.
[73] *See generally* MacKenzie, *Historical Background*, *supra* note 54, at 11–12.
[74] Beamer, No Mākou Ka Mana, *supra* note 46, at 124 (translation by Dr. Beamer).

for generations yet unborn.[75] In this way, Hawai'i's first constitution reflects Native Hawaiian cultural approaches to resource management, which must inform both the interpretation of Hawai'i's Public Trust and the kuleana or cultural duty associated with resource management and protection.

The 1839 Kānāwai and 1840 Constitution, therefore, embody Kānaka precepts, including the relationship of maka'āinana, ali'i, and mō'ī to each other and their ancestor, the 'āina, which provides the foundation for the hybridized system of Indigenous and western property that endures in Hawai'i today.[76] In doing so, Kauikeaouli "reaffirm[ed] in the relatively new governmental system that which was held traditionally in practice."[77] This "appropriation and adaptation of Anglo-American law to reflect earlier relationships to land demonstrates ali'i agency in using law for their own purposes."[78] To protect Kānaka sovereignty, the "po'e aloha 'āina adapted their concept of aloha 'āina to the Euro-American concepts and structures of nationhood and nationalism as resistance to colonialism, although they knew that it was those very structures that were overtaking them."[79]

Although the ali'i's ultimate goal of continued independence was not realized, their values and laws, including aloha 'āina, are embedded in Hawai'i's constitution,[80] statutes,[81] and common law[82] today. Aloha 'āina was and remains a central foundation for Native Hawaiian society, fundamental basis for Indigenous knowledge and governance systems, and personification of Native Hawaiian custom and usage. Not relegated to the past, aloha 'āina also holds a key to a more just future: it brings together "culture and the environment to achieve social, cultural, and ecological justice in Hawai'i in an effort to integrate the knowledge and practices of traditional systems into the contemporary management of land and people."[83]

So what does a duty to aloha 'āina mean for State and County decisionmakers managing Public Trust resources and the Public Land Trust? At bottom, "Aloha 'āina links social, cultural, and ecological justice."[84] From that perspective, "[p]racticing aloha 'āina means to be active in mind, spirit, and policy to achieve a deep love for, and be committed to act as protector of land." It also "considers the relationship between humans and land as one

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[75] GOODYEAR-KA'ŌPUA, *supra* note 7, at 31–33.

[76] *See, e.g.*, Beamer, *Selective Appropriation*, *supra* note 1, at 150 ("Clearly, the Ali'i were truly creating law—cautiously determining the appropriate content, designing the laws to reflect their own considerations and account for their reservations, and ultimately, to produce a pono state for society.").

[77] BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 129.

[78] *Id.*

[79] SILVA, *supra* note 24, at 11.

[80] *See infra* Part III.A–B and note 342.

[81] *See, e.g.*, HAW. REV. STAT. § 7-1 (2009) (formerly section 7 of the Kuleana Act of 1850, *reprinted in* PENAL CODE OF THE HAWAIIAN ISLANDS 202–04 (1850)); *see also infra* note 344.

[82] 82 *See infra* note 343.

[83] Beamer et al., *Reflections on Sustainability Concepts*, *supra* note 23, at 5.

[84] Beamer, *Tūtū's Aloha 'āina Grace*, *supra* note 7, at 13.

of kinship and as something that must be seen as inseparable and integral for our existence."[85] Hawai'i's decisionmakers thus must respect the "diverse and vibrant collection of multibodied relationships between Kānaka Maoli, our ancestors, peers, descendants, and the environment[.]"[86] Without Kānaka, our culture, and our self-determination, the ʻāina that delights and inspires so many will cease to exist.[87]

III. Hawai'i's Unique Legal Regime Is Grounded in Restorative Justice and Native Hawaiian Custom and Tradition

Hawai'i's unique history, including the United States' role in the illegal overthrow of the sovereign Hawaiian Kingdom and colonialism's lasting harms, has also inspired a focus and emphasis on restorative justice principles in addressing issues continuing to face Kānaka Maoli.[88] In part to further restorative justice goals, Hawai'i established a comprehensive legal regime for the Public Trust and Public Land Trust that was grounded in Indigenous precepts.[89] Framed generally and with the potential to yield just results, much of the legal language appears favorable to both Hawai'i's Indigenous people and the larger community.[90] Establishing this regime was both its own struggle and a direct response to years of repressive colonial interests that imposed cultural harms on Kānaka, such as seizing Native lands for a range of purposes, including military training at Pōhakuloa. Yet as detailed herein, contextual legal analysis is vital to actualize restorative justice and the duty to aloha ʻāina.

A. Exploring Hawai'i's Constitutional Public Trust and Public Land Trust

Hawai'i's 1978 Constitutional Convention ("ConCon") proved critical in grounding Hawai'i's legal regime in both restorative justice and Native Hawaiian values. Dubbed the "People's ConCon," it differed from previous conventions because there were more and younger delegates, including more

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[85] Beamer et al., *Reflections on Sustainability Concepts*, *supra* note 23, at 4.

[86] Osorio, *supra* note 20, at 13.

[87] *See* Beamer, *Tūtū's Aloha 'āina Grace*, *supra* note 7, at 11 (explaining that Kānaka make land ʻāina).

[88] *See* D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 Stan. Env't L.J. 157, 181–94 (2016) [hereinafter Sproat, *Environmental Self-Determination*].

[89] *Id.* at 183–94.

[90] *Compare* Haw. Const. art. XI, § 1 ("For the benefit of present and future generations" state and county decisionmakers "shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote" their development and utilization "in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State") *with id.* art. XII, § 7 ("reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778").

women, fewer established politicians, and participants who better reflected Hawai'i's racial and ethnic diversity.[91] These younger Kānaka and environmentally- and socially-conscious delegates and staff acknowledged the threats to natural resources, Native Hawaiian cultural practices, and the harm imposed by the seizure of 'āina.[92] After significant debate, committee reports reflected delegates' concern that "past and present actions by private landowners, large corporations, ranches, large estates, hotels and government entities . . . preclude native Hawaiians from following subsistence practices traditionally used by their ancestors."[93] Constitutional amendments were seen as a restorative tool "in preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State."[94] Delegates sought to safeguard Indigenous culture and resources through "the recognition and reaffirmation of native Hawaiian rights by constitutional amendment."[95] Moreover, they aimed to "balance [ ] the use of our natural resources, which is necessary, and their preservation[,]" while being mindful that "our obligations include the welfare of future generations[.]"[96] Delegates acknowledged the important role of aloha 'āina in preserving Native culture and resources: "historically and presently, native Hawaiians have a deep love and respect for the land, called aloha aina, [and] reasonable regulation is necessary to prevent possible abuse as well as interference with" Native rights and interests.[97]

ConCon delegates crafted amendments that were later ratified by Hawai'i's voters to enshrine resource protection, Native Hawaiian practices, and the Public Land Trust as constitutional mandates.[98] The Public Trust and Public Land Trust are spotlighted here, given their potential to begin to repair the harms of colonization and their relevance to *Ching v. Case*.[99]

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[91] *See* Richard H. Kosaki, *Constitutions and Constitutional Conventions of Hawaii*, 12 HAWAIIAN J. HIST. 120, 129–31 (1978); Amy K. Trask, *A History of Revision: The Constitutional Convention Question in Hawai'i, 1950–2008*, 31 U. HAW. L. REV. 291, 309 (2008).

[92] *See, e.g.*, Debates in the Committee of the Whole on Hawaiian Affairs, *in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE HAWAII OF 1978, at 432–37 (1980) (statements by Delegates De Soto, Shon, and Hoe) [hereinafter 2 CONVENTION PRO.]; Debates in the Committee of the Whole on Conservation, Control and Development of Resources, *in* 2 CONVENTION PRO., *supra*, at 857–60 (1980) (statements by Delegates Hoe, Chong, and Fukunaga).

[93] Stand. Comm. Rep. No. 57, *in* 1 CONVENTION PRO., *supra* note 92, at 639.

[94] Comm. Whole Rep. No. 12, *in* 1 CONVENTION PRO., *supra* note 92, at 1016.

[95] Debates in Committee of the Whole on Hawaiian Affairs, *in* 2 CONVENTION PRO., *supra* note 92, at 426 (statement by Delegate De Soto).

[96] Debates in the Committee of the Whole on Conservation, Control and Development of Resources, *in* 2 CONVENTION PRO., *supra* note 92, at 857 (statement by Delegate Hoe).

[97] Stand. Comm. Rep. No. 57, *in* 1 CONVENTION PRO., *supra* note 92, at 639.

[98] *See* Sproat, *Environmental Self-Determination*, *supra* note 88, at 183–90. ConCon delegates crafted over one hundred changes to Hawai'i's Constitution, which resulted in thirty four amendments that voters ratified at the November 1978 General Election. *See* Trask, *supra* note 91, at 312.

[99] Other constitutional provisions, legislation, and state and federal actions similarly reflect a commitment to restorative justice for Native Hawaiians. *See, e.g.*, Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of

1. Hawai‘i's Public Trust Reflects Native Hawaiian Precepts, Including Aloha ʻāina

Article XI, section 1 of Hawai‘i's Constitution outlines Hawai‘i's Public Trust principles, as well as the State's and Counties' responsibilities under that trust:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii'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.[100]

Article XI, section 7 makes specific reference to water and affirms the "obligation to protect, control and regulate the use of Hawai‘i's water resources for the benefit of its people."[101] The Hawai‘i Supreme Court confirmed that these two provisions, "article XI, section 1 and article XI, section 7[,] adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i."[102]

While in many other places the public trust doctrine is traced to ancient Roman law,[103] Hawai‘i's Public Trust is grounded in aloha ʻāina, as well as other Maoli customs and traditions, which are both established by Hawaiian usage and constitute background principles of property law.[104] Article XI, section 1 recalls the 1839 Kānāwai and 1840 Constitution's understanding that ʻāina is not owned, but should be stewarded for present and future generations.[105] Consistent with aloha ʻāina, Hawai‘i's Public Trust also imposes

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Hawaii, Pub. L. 103–150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution]; HAW. CONST. art. XII, §§ 1–3 (committing to faithfully carrying out the Hawaiian Homes Commission Act "for the further rehabilitation of the Hawaiian race"), §§ 5–6 (establishing the Office of Hawaiian Affairs to hold real and personal property in trust for Native Hawaiians, including Public Land Trust revenues), § 7 (reaffirming and protecting traditional and customary Native Hawaiian rights); 2011 Haw. Sess. Laws 646 [hereinafter Act 195], codified as HAW. REV. STAT. § 10H (2014) (recognizing Kānaka as Hawai‘i's Indigenous People and reaffirming the State's support for the development of a reorganized Native Hawaiian self governing entity); Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation": Office of Hawaiian Affairs v. HCDCH*, 33 U. HAW. L. REV. 503, 528 (2011) (noting that state legislation enacted around or after the Apology Resolution—specifically, Acts 354, 359, 329, and 340—"acknowledged the long-standing harms to the Hawaiian community and the State's commitment to repairing the damage").

[100] HAW. CONST. art. XI, § 1.

[101] *Id.* art. XI, § 7 (ʻokina added).

[102] *Waiāhole*, 9 P.3d 409, 444 (Haw. 2000).

[103] D. KAPUAʻALA SPROAT, KA HULI AO CTR. FOR EXCELLENCE IN NATIVE HAWAIIAN L., OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAIʻI 7 (2009); Joseph L Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

[104] *See, e.g.*, HAW. REV. STAT. § 1-1 (adopting English common law, with certain exceptions, including when "established by Hawaiian usage").

[105] *See supra* Part II. Caselaw and laws from the Kingdom of Hawai‘i, along with Maoli custom and tradition, firmly established that natural resources, including water, were not pri-

duties of actively caring for a resource to preserve the health of our natural world. Caselaw supplements these constitutional provisions in elucidating the contours of Hawai‘i’s unique legal regime.

a. Insights from Waiāhole

The Hawai‘i Supreme Court’s 2000 decision *In re Waiāhole Ditch Combined Contested Case Hearing* (“*Waiāhole*”) was recognized globally for its pronouncements on the Public Trust.[106] The epic battle at the heart of the case spanned decades, pitting Native Hawaiians and small family farmers against Hawai‘i’s wealthiest and most powerful interests over whether water diverted from the Waiāhole Ditch would be respected as a Public Trust resource or continue to be treated as private property.[107] The court’s distillation of the Public Trust grounds the doctrine in Hawai‘i law while incorporating elements from seminal cases from other jurisdictions, weaving them into a comprehensive declaration of law and policy.[108] This landmark decision affirmed the origin of Hawai‘i’s Public Trust in Indigenous custom and law and clarified its scope and substance, including the respective burdens for those managing and seeking to use Public Trust resources.[109]

Hawai‘i’s unique history played an important role in the strong affirmation of the public nature of trust resources. The court reached back to the Hawaiian Kingdom as the origin of the Public Trust, highlighting

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vate property, but were held in trust for the benefit of the people. *See, e.g.*, Act of Oct. 26, 1846, Approving Principles Adopted by the Board of Commissioners to Quiet Land Titles, in Their Adjudication of Claims Presented to Them, *reprinted in* 2 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 81 (1847); King v. Oahu Ry. & Land Co., 11 Haw. 717, 725 (1899) (“[T]he people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use.”).

[106] *See* D. Kapua‘ala Sproat, *A Question of Wai: Seeking Justice Through Law for Hawai‘i’s Streams and Communities*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 199, 199–219 (Noelani Goodyear-Ka‘ōpua, Ikaika Hussey & Erin Kahunawaika‘ala Wright eds., 2014) [hereinafter Sproat, *Question of Wai*].

[107] *Waiāhole* was the first Hawai‘i Supreme Court case to interpret Hawai‘i’s Public Trust Doctrine under article XI, sections 1 and 7 in concert with the State Water Code, Hawai‘i Revised Statutes chapter 174C. D. Kapua‘ala Sproat & Isaac H. Moriwake, *Ke Kalo Pa‘a O Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 256–60 (Clifford Rechtschaffen & Denise Antolini eds., 2007). As sugar cultivation phased out on O‘ahu in the 1990s, divergent interests squared off in protracted litigation over whether water that had been taken from Windward streams for almost a century would continue flowing to Central O‘ahu to subsidize industrial agriculture and development; or, whether it would be returned to Windward O‘ahu streams to support traditional and customary Native Hawaiian rights and practices and ecosystem services. *Id.* This decision was the first time in Hawai‘i’s history that water diverted by plantation agriculture was ordered to be returned to its streams and communities of origin. *Id.* For details on the case, see *id.*; D. Kapua‘ala Sproat, *From Wai to Kānāwai: Water Law in Hawai‘i*, *in* NATIVE HAWAIIAN LAW: A TREATISE 522, 551–59 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter Sproat, *Water Law*].

[108] Sproat & Moriwake, *supra* note 107, at 247, 261–66 (deconstructing *Waiāhole*, including the court’s incorporation of *Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cnty.*, 658 P.2d 709 (Cal. 1983) and *Ethyl Corp. v. U.S. Env’t Prot. Agency*, 541 F.2d 1 (D.C. Cir. 1976)).

[109] Given space constraints, this Part focuses on aspects of *Waiāhole* most relevant to *Ching v. Case*. For a detailed discussion see Sproat, *Water Law*, *supra* note 107, at 551–59.

Kauikeaouli's creation of a water resources trust during the Māhele, which established Hawai'i's hybridized property system.[110] The court also pointed to Kauikeaouli's commitment to aloha ʻāina, his resources, and his people, as reflected in the 1839 Kānāwai and 1840 Constitution.[111] Kauikeaouli purposefully designed and promulgated the laws at issue to encourage use of "his lands in ways consistent with the chiefs of old" and "ultimately, to produce a pono state for society."[112] In this way, the duty to aloha ʻāina is both a precept and a necessary component of Hawai'i's Public Trust applicable to fresh water, ʻāina, and other resources.

After reviewing the history of the Public Trust, the court held that it was "an inherent attribute of sovereign authority" and ultimately a constitutional doctrine.[113] Because these trust provisions are self-executing, parties can invoke them on their own, without relying on other laws.[114] The constitutional foundation "inform[s] the [law's] interpretation, define[s] its permissible 'outer limits,' and justif[ies] its existence."[115] Thus, the Public Trust operates like other constitutional doctrines by establishing foundational principles, including aloha ʻāina, that guide judicial interpretation and can limit and enhance other legal provisions related to Public Trust resources.

The court expansively articulated the scope of Hawai'i's Public Trust. It declined to "define the full extent of article XI, section 1's reference to 'all public resources[,]'" but concluded that the Public Trust extended to "all water resources without exception or distinction."[116] The court, in rejecting the argument that the Public Trust excluded groundwater, explained that the "the public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."[117]

The court then considered the Public Trust's "substance," including the "purposes or uses it upholds and the powers and duties it confers on the state."[118] The court identified only four "public trust purposes:" environmental protection; traditional and customary Native Hawaiian practices; ap-

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[110] *Waiāhole*, 9 P.3d 409, 440–41 (Haw. 2000); *see supra* Part III.A.1.a (detailing the origin of Hawai'i's Public Trust); Part III.A.2 (summarizing the Māhele process); LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI' HOW SHALL WE LIVE IN HARMONY? 8–16 (1992) (deconstructing the Māhele).

[111] *Compare Waiāhole*, 9 P.3d at 440–41(examining the origin of the public trust during the Hawaiian Kingdom) *with* Part II, *supra* (detailing the aloha ʻāina precepts reflected in the 1839 Kānāwai and 1840 Constitution).

[112] Beamer, *Selective Appropriation*, *supra* note 1, at 150.

[113] *Waiāhole*, 9 P.3d at 443.

[114] HAW. CONST. art. XVI, § 16; *Waiāhole*, 9 P.3d at 444–45; *In re* Wai'ola o Moloka'i, 83 P.3d 664, 692 (Haw. 2004); *see also* Ching v. Case, 449 P.3d 1146, 1176 (2019) ("The State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty.").

[115] *Waiāhole*, 9 P.3d at 445.

[116] *Id.*

[117] *Id.* at 447.

[118] *Id.* at 445, 448–56.

purtenant rights; and domestic water uses.[119] A later decision added water reservations for the Department of Hawaiian Home Lands as a fifth purpose.[120] These trust purposes have priority over private commercial uses, which do not enjoy the same protection.[121] Importantly, in determining which uses should have priority, the court again looked to the "trust's 'original intent.'"[122] It emphasized that "review of the early law of the kingdom reveals the specific objective of preserving the rights of native tenants during the transition to a western system of private property."[123] Relying on court decisions and other Kingdom and contemporary laws, the Hawai'i Supreme Court upheld Native Hawaiian rights, customs, and practices as a protected Public Trust purpose.[124] Aloha 'āina is thus both a protected Public Trust purpose and a duty of trustees charged with managing the trust.

Although the court recognized the necessity of a balancing process, it imposed a weighted balancing, explaining that "any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment" and "use consistent with trust purposes [i]s the norm or 'default' condition."[125] Thus, those seeking to use Public Trust resources for private commercial gain bear the burden of justifying proposed uses in light of protected rights in the resources, including traditional and customary Maoli practices.[126]

The court generally focused on a trustee's duty as a process mandate. It underscored less "what" substantive outcomes decisionmakers must reach, and more how they must approach them.[127] The court declared that a decisionmaker must not relegate itself to the role of a "mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in

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[119] *Id.* at 448–50, 454. Appurtenant rights appertain or attach to parcels of land that were cultivated, usually with the traditional staple kalo, at the time of the Māhele and have some of the highest protection in Hawai'i water law. *See* Reppun v. Bd. of Water Supply, 656 P.2d 57, 78 (Haw. 1982); HAW. REV. STAT. §§ 174C-63, -101. Domestic water uses include individual household needs, not the aggregate household and other uses of collective entities or populations, which are considered municipal. HAW. REV. STAT. § 174C-3 (2009).

[120] *See In re* Wai'ola o Moloka'i, 83 P.3d 664, 694 (Haw. 2004). The Department of Hawaiian Home Lands was established by the Hawaiian Homes Commission Act, 42 Stat. 108 (1921).

[121] *Waiāhole*, 9 P.3d at 448–50, 454.

[122] *Id.* at 449.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 454.

[126] *Id.*

[127] The court noted that the Public Trust duty "*may* not readily translate into substantive results," *id.* at 453 (emphasis added), but it left open the potential for the Public Trust to operate as a substantive mandate, recognizing constitutional history that the Public Trust "implies that the disposition and use of these resources must be done with procedural fairness, for purposes that are justifiable and with *results that are consistent with the protection and perpetuation of the resource*." *Id.* at 454 n.40 (quoting Debates in Committee of the Whole on Conservation, Control and Development of Resources, *in* 2 CONVENTION PRO., *supra* note 92, at 866–87 (1980)) (emphasis by the court).

the resource at every stage of the planning and decisionmaking process."[128] Trustees must take a global, long-term perspective and must always act with "openness, diligence, and foresight" in decisionmaking.[129] These directives overlap with and effectuate the kuleana to aloha ʻāina. Given the intimate pilina (relationship) between people and the land, including the fact that each relies on the other for survival, aloha ʻāina must be actively practiced, and this requires attention and action at every stage of the planning and decisionmaking processes.[130] This is the dedication needed to love, serve, and honor one's elder, the ʻāina.[131]

The court concluded its Public Trust discussion by clarifying that courts must apply a heightened standard of review. While recognizing the general rule of deference to agency decisions, it maintained that courts, as with other constitutional guarantees, had the "ultimate authority to interpret and defend the public trust."[132] The court would not substitute its judgment for the agency's or legislature's, but must take a "close look" at the action to assess whether it complied with the doctrine's process mandate.[133] This protection of judicial review has proved essential in high-stakes battles where political expediency threatens decisionmaking, which includes almost every case affecting Native Hawaiian rights, including *Ching v. Case*.[134]

In addition to its pronouncements on the Public Trust, and consistent with its process mandate, the Hawai'i Supreme Court also took the pioneering step of upholding the precautionary principle as an applied legal doctrine. *Waiāhole* was the first published decision to adopt the precautionary principle as a corollary to the Public Trust.[135] The precautionary principle basically restates the trustee's duties under the Trust and prevents them from hiding behind scientific uncertainty to justify inaction.[136] This is not rocket science; it is common sense conservation: "where [scientific] uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."[137] Indeed, scientific uncertainty "does not extinguish the presumption in favor of public trust purposes or vitiate the [trustee]'s affirmative duty to protect such purposes whenever

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[128] *Id.* at 455 (citation omitted).
[129] *Id.*
[130] *See* Osorio, *supra* note 20, at 13; Goodyear-Kaʻōpua, *supra* note 7, at 32.
[131] *See* Beamer et al., *Reflections on Sustainability Concepts*, *supra* note 23, at 4.
[132] *Waiāhole*, 9 P.3d at 455.
[133] *Id.* at 456.
[134] *See, e.g.*, D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 Marq. L. Rev. 127, 137 (2011) (discussing the influences on judges and other decisionmakers in high-stakes legal battles) [hereinafter Sproat, *Wai Through Kānāwai*]; Sproat, *Question of Wai*, *supra* note 106 (detailing the politics and other influences at play in controversial cases, which are most cases implicating Native Hawaiian rights).
[135] *Waiāhole*, 9 P.3d at 466 (citation omitted).
[136] *Id.* (quoting the Commission's decision) (noting that the "lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation").
[137] *Id.* (quoting the Commission's decision).

feasible."[138] The court also recognized that the principle will evolve over time, but nevertheless agreed with what it considered its "quintessential form: at minimum, the absence of firm scientific proof should not tie the [decisionmaker's] hands in adopting reasonable measures designed to further the public interest."[139]

Waiāhole illustrated how Hawai'i's Public Trust embraces Native Hawaiian precepts, including aloha 'āina, by referencing the trust's origin in Hawaiian Kingdom law and its "original intent" of preserving the rights of Native tenants.[140] It clarified the scope and substance of the Trust while also demonstrating the contours of its process-based protections, many of which coincide perfectly with, and already effectuate, the duty to aloha 'āina.

b. Kaua'i Springs' Analytic Framework Operationalizes Hawai'i's Public Trust

Although *Waiāhole* elucidated the contours of the Public Trust, decisionmakers and courts continue to struggle with implementation. Despite the Hawai'i Supreme Court's strong pronouncements, its "process mandate" has vested administrative officials and judges with significant discretion, which has proved challenging in controversial cases including *Ching v. Case*.[141] In 2014, the Hawai'i Supreme Court crafted an analytic framework in *Kaua'i Springs* to "assist agencies" in discharging their Public Trust duties, largely as articulated in *Waiāhole*.[142]

Kaua'i Springs centered around the Kaua'i Planning Commission's denial of permits to a private water bottling company given the applicant's failure to demonstrate that its use would not adversely impact Public Trust purposes.[143] The court upheld the Planning Commission's decision and distilled prior caselaw into a six-part test.[144] When considering actions impacting Public Trust resources, decisionmakers must: (1) fulfill the duty to preserve [such] resources while also assuring reasonable and beneficial use; (2) determine whether a proposed use is consistent with trust purposes; (3) apply a presumption in favor of resource protection and public use, access, and enjoyment; (4) evaluate proposals on a case-by-case basis while recognizing that there are no vested rights in Public Trust resources; (5) apply a higher level of scrutiny for private commercial uses; and (6) adhere to a reasonable-beneficial use standard.[145] The court emphasized that applicants bear the burden of justifying their uses in light of the priority for trust pur-

[138] *Id.*
[139] *Id.* at 467.
[140] *Id.* at 449.
[141] *See infra* Parts IV, V (deconstructing *Ching v. Case*).
[142] Kaua'i Springs, Inc. v. Plan. Comm'n, 324 P.3d 951, 984–85 (Haw. 2014).
[143] *Id.* at 956–57.
[144] *Id.* at 984.
[145] *Id.*

poses and also articulated a four-part test for applicants.[146] Ultimately, the court clarified that Hawai'i's Public Trust imposes obligations on administrative agencies to be proactive in protecting natural resources and to both examine the criteria relevant to their decisions and articulate their rationale.[147]

While *Kaua'i Springs*' six-part test is helpful, part of what that decision illustrates is that any analytic framework must be consistently and contextually deployed to serve its purpose. Given the challenges in operationalizing the Public Trust since *Kaua'i Springs*, contextual legal analysis is vital to actualize restorative justice and the duty to aloha ʻāina in particular.[148]

2. Understanding Hawai'i's Public Land Trust

In addition to the Public Trust of article XI, section 1, Hawai'i's Constitution features other trust provisions with restorative justice origins and purposes.[149] The Public Land Trust of article XII, section 4 obligates the State to hold 1,200,000 acres in trust for Kānaka and the general public.[150] Though distinct from the Public Trust, the Public Land Trust also has restorative underpinnings in Native Hawaiian precepts,[151] and its acreage is a Public Trust resource.[152]

As discussed in Part II.A, Kānaka are genealogically connected to—and intimately a part of—our ancestral ʻāina, engendering a kuleana (responsibility and privilege) of kinship to care for Hawai'i.[153] Prior to western contact in 1778, Kānaka manifested this kuleana in part by managing all biocultural resources in the Hawaiian archipelago "as a public trust for present and future generations."[154]

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[146] *Id.* at 984–85. Absent this minimum showing, "a lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource." *Id.* at 984. Because the applicant in *Kaua'i Springs* was unable to demonstrate the lack of impact on Public Trust resources, the Planning Commission proactively utilized the precautionary principle to err on the side of protecting the resource. *Id.*

[147] *Id.* at 981–85.

[148] *See infra* Part V; *see, e.g.*, *In re* Maui Elec. Co., No. SCOT-21-0000041 (Haw. Mar. 2, 2022); Carmichael v. Bd. of Land & Nat. Res., 506 P.3d 211 (Haw. 2022).

[149] *See* HAW. CONST. art. XII, §§ 1–3 (Hawaiian Home Lands Trust); *id.* art. XII, § 4 (Public Land Trust). The Hawaiian Home Lands Trust is distinct from the Public Land Trust. *See infra* note 180.

[150] *See* HAW. CONST. art. XII, § 4.

[151] *See, e.g.*, Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 499–511 (2017).

[152] Ching v. Case, 449 P.3d 1146, 1150 (Haw. 2019).

[153] Kawika B. Winter, Mehana Blaich Vaughan, Natalie Kurashima, Christian Giardina, Kalani Quiocho, Kevin Chang, Malia Akutagawa, Kamanamaikalani Beamer & Fikret Berkes, *Empowering Indigenous Agency Through Community-Driven Collaborative Management to Achieve Effective Conservation: Hawai'i as an Example*, PAC. CONSERVATION BIOLOGY, Jan. 2021, at A, E, N. Mahina Tuteur, *Reframing Kānāwai: Towards A Restorative Justice Framework for Indigenous Peoples* (manuscript at 17) (forthcoming 2023) (on file with Harvard Civil Rights-Civil Liberties Law Review).

[154] Sproat, *Environmental Self-Determination*, *supra* note 88, at 168.

But the arrival of westerners in 1778 radically altered Native Hawaiians' cultural and political systems, ultimately resulting in the loss of land and self-governance.[155] Faced with interrelated pressures from foreign capitalists,[156] imperialism in the Pacific,[157] and the rapid decline of the Maoli population,[158] Kauikeaouli transitioned the Hawaiian Kingdom to a private property regime in 1848 through a process known as the Māhele (division or share)[159] to "preserve a land base for all Hawaiian people, regardless of social or political status" in the face of haole (foreign) colonization.[160] Kauikeaouli, his western advisors, and the ali'i (chiefs) adopted a plan to divide—and thus privatize—land interests, so that one-third of the 'āina would remain in the mō'ī's care, one-third would go to the ali'i and konohiki (land managers), and the final third would go to the maka'āinana (common people).[161] Kauikeaouli first identified the lands he personally wished to reserve,[162] then he and the ali'i divided out their interests in the remaining lands.[163] Kauikeaouli soon thereafter deeded 1,500,000 acres of his personal lands to the government "forever . . . unto his Chiefs and People."[164] At the end of the Māhele process, Kauikeaouli personally held 984,000 acres (23.8% of land in the nation), the government held 1,523,000 acres (37%), and the ali'i held 1,619,000 acres (39.2%).[165] The acres Kauikeaouli retained are now known as Crown Lands,[166] and those he gave

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[155] *See* MacKenzie, *Historical Background*, *supra* note 54, at 10.

[156] Within 100 years of the missionaries' arrival, five companies, of which four were founded by American missionary families, took control of the Kingdom's economy and politics, eventually helping to illegally overthrow the Kingdom in 1893. *See generally* CAROL A. MACLENNAN, SOVEREIGN SUGAR 52–102 (2014).

[157] Kauikeaouli's paramount concern in the mid-nineteenth century was western imperialism, and its impact on traditional lifeways. MacKenzie & Sproat, *supra* note 151, at 503. His concerns were well founded as every "Pacific community also succumbed to foreign rule in one form or another during this period." JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 2 (2009).

[158] For an explanation of the correlation between population decline and the need to privatize property, see VAN DYKE, *supra* note 157, at 31.

[159] *Id.* at 50.

[160] MacKenzie & Sproat, *supra* note 151, at 510; *see also* BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 143–44.

[161] VAN DYKE, *supra* note 157, at 40–41.

[162] *Id*.

[163] *Id.* at 41.

[164] MacKenzie & Sproat, *supra* note 151, at 505.

[165] VAN DYKE, *supra* note 157, at 42.

[166] *Id.* The Crown Lands were initially known as the King's Lands because they belonged to Kauikeaouli personally. MacKenzie, *Historical Background*, *supra* note 54, at 14. After Alexander Liholiho (Kamehameha IV) died intestate, however, his widow Queen Emma claimed her rightful share of one-half of the King's Lands and dower rights in the other half. *Id.* at 18. In response, the Hawai'i Supreme Court declared that the King's Lands were supposed to pass to the successors of the throne rather than to the mō'ī's heirs. *See In re* Estate of His Majesty Kamehameha IV, 2 Haw. Kingdom 715, 725 (1864). This contradicted Kauikeaouli's intentions recorded in the Buke Māhele. BEAMER, NO MĀKOU KA MANA, *supra* note 46, at 145. Nevertheless, Hawai'i's Legislature changed the name of the King's Lands to the Crown Lands and declared that the acreage was inalienable and belonged to the monarch's successors. *See* An Act to Relieve the Royal Domain from Encumbrances, and to Render the

to the government are known as Government Lands.[167] The Māhele did not, however, sever the undivided interests of the makaʻāinana in any land in the Kingdom.[168]

In 1893, a small group of Hawaiʻi-born American and European insurrectionists overthrew the Kingdom of Hawaiʻi with the help of U.S. Marines.[169] When the U.S. Congress did not pursue annexation in 1894 because U.S. President Grover Cleveland urged Congress "to make all possible reparation" and restore the monarchy that had been "robbed of its independence and its sovereignty by a misuse of the name and power of the United States,"[170] the insurrectionists declared the creation of the "Republic of Hawaiʻi" and seized the Crown Lands from Queen Liliʻuokalani, to whom the lands personally belonged.[171] Soon thereafter, the Republic merged the Government and Crown Lands into the "Public Lands" and made them alienable.[172] When the United States unilaterally annexed Hawaiʻi over near unanimous opposition from the Native Hawaiian people,[173] the Joint Resolution of Annexation purportedly transferred 1,800,000 acres of Crown and Government Lands to the United States.[174]

Same Inalienable (1865), *reprinted in* LAWS OF HIS MAJESTY KAMEHAMEHA V, KING OF THE HAWAIIAN ISLANDS 69 (1864–65). For clarity, this Article refers only to the Crown Lands.

[167] VAN DYKE, *supra* note 157, at 42.

[168] *E.g.*, Kamanamaikalani Beamer & N. Wahineʻaipohaku Tong, *The Māhele Did What? Native Interest Remains*, 10 HŪLILI 125, 130 (2016).

[169] MacKenzie, *Historical Background*, *supra* note 54, at 18–22.

[170] H.R. EXEC. DOC. NO. 47, 53D CONG, RELATING TO THE HAWAIIAN ISLANDS (GROVER CLEVELAND, Dec. 18, 1893) (2d sess. 1893), *reprinted in* H.R. EXEC. DOC. NO. 1, 53D CONG., APPENDIX II, FOREIGN RELATIONS OF THE UNITED STATES, 1894, AFFAIRS IN HAWAII 455–62 (3D SESS. 1895).

[171] MacKenzie, *Historical Background*, *supra* note 54, at 24. Article 95 of the Republic's 1894 Constitution declared that the Crown Lands were not encumbered by any trust and were the property of the government. REPUBLIC OF HAW. CONST. of 1894, art. 95, *reprinted in* FUNDAMENTAL LAW OF HAWAII 201, 237 (Lorrin Thurston ed., 1904). This constitution "manufactured a legal history for the Crown and Government lands" to legitimize the seizure of ʻŌiwi land. R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223, 251 (2009-10). Queen Liliʻuokalani sued the United States, arguing that she had a vested equitable life interest in the Crown Lands and therefore was entitled to recover the value of that interest. *See* Liliuokalani v. United States, 45 Ct. Cl. 418, 424 (1910). Relying on *In re* Estate of His Majesty Kamehameha IV, 2 Haw. Kingdom 715, 725 (1864), wherein the Hawaiʻi Supreme Court directly contradicted ʻŌiwi leaders intentions for the Māhele process, the U.S. federal claims court declared that the Crown Lands "belonged to the office and not to the individual." *Liliuokalani*, 45 Ct. Cl. at 427; *see supra* note 166 (explaining *In re* Estate of His Majesty Kamehameha IV). This contradicted the intentions of Land Commission records that distinguished Kauikeaouli's Crown Lands from the Government Lands. VAN DYKE, *supra* note 157, at 40 n.83 (quoting 3A *Privy Council Records*, Series 421, at 47–56). The court nevertheless upheld the seizure and cession of the Crown Lands to the United States. *See Liliuokalani*, 45 Ct. Cl. at 428.

[172] *See* Act of Aug. 14, 1895, No. 26, § 2, Haw. Laws Spec. Sess. 49. The Land Act of 1895 also created a homesteading program that disproportionately benefitted Americans and Europeans. MacKenzie, *Historical Background*, *supra* note 54, at 24–25 (citing VAN DYKE, *supra* note 157, at 197 tbl.9).

[173] *See* SILVA, *supra* note 24, at 157–59.

[174] MacKenzie, *Historical Background*, *supra* note 54, at 27; MacKenzie & Sproat, *supra* note 151, at 515 n.177. This is why the acreage in the Public Land Trust is often erroneously

Both the Joint Resolution of Annexation and Hawai'i's Organic Act, which established a U.S. territorial government, recognized the special trust status of the Crown and Government Lands[175] and also stipulated that revenue from the lands must be used to benefit residents of the islands.[176] The Joint Resolution and the Organic Act, however, also enabled the federal government to appropriate land for its own use.[177] Under these provisions, the federal government set aside 432,725.91 acres of Crown and Government Lands by 1959,[178] including the entire island of Kaho'olawe for the U.S. Navy to use for live-fire training.[179]

When Hawai'i entered the Union in 1959, Section 5(b) of its Admission Act transferred title to approximately 1,400,000 of the 1,800,000 acres of the Crown and Government Lands from the United States to the newly-formed State of Hawai'i.[180] The Admission Act explicitly recognized the trust status of the acreage and partially acknowledged the special relationship between Kānaka and the 'āina.[181] Section 5(f) of the Admission Act declared that the State hold the lands in a public trust and use acreage for five enumerated purposes, including "the betterment of the conditions of native

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referred to as "ceded lands." The Native Hawaiian people, however, never "ceded" the Crown and Government Lands to the United States. Instead, the "self-proclaimed" Republic of Hawai'i (comprised of those who illegally overthrew the Kingdom), ceded the stolen acreage to the United States. Eric K. Yamamoto, Carrie Ann Y. Shirota & Jayna Kanani Kim, *Indigenous Peoples' Human Rights in U.S. Courts*, *in* RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 246, 247 (Juan F. Perea, Richard Delgado, Angela P. Harris, Jean Ann Stefancic & Stephanie M. Wildman eds., 3rd ed. 2015); *see also* Williamson B. C. Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70 (2015) (arguing that the United States did not properly annex Hawai'i and, therefore, has no jurisdiction over Hawai'i today).

[175] Melody Kapilialoha MacKenzie, *Ke Ala Loa - The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i*, 47 TULSA L. REV. 621, 628 (2012) [hereinafter MacKenzie, *Ke Ala Loa*]; *see* State v. Zimring, 566 P.2d 725, 736–37 (Haw. 1977). An 1899 opinion from the U.S. Attorney General "interpreted the Joint Resolution as creating a 'special trust' for the benefit of Hawai'i's inhabitants." MacKenzie, *Ke Ala Loa*, *supra*, at 628 n.49 (quoting Hawaii-Public Lands, 22 Op. Att'y Gen. 574 (1899)).

[176] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, 30 Stat. 750; Hawaiian Organic Act, § 91, April 30, 1900, ch. 339, 31 Stat. 141 (1900).

[177] MacKenzie, *Historical Background*, *supra* note 54, at 28.

[178] HORWITZ ET AL., *supra* note 15, at 68. The federal government set aside 287,078.44 acres, obtained permits and licenses to use 117,412.74 acres, and either condemned or purchased 28,234.73 acres by 1959. *Id.*

[179] Exec. Order No. 10,436, 18 Fed. Reg. 1051 (Feb. 25, 1953).

[180] Admission Act of March 18, 1959, § 5(b), Pub. L. No. 86-3, 73 Stat 4. Of the 1,400,000 acres transferred to Hawai'i upon statehood, 203,500 acres were set aside for the Hawaiian Home Lands Trust, which is administered by the Department of Hawaiian Home Lands ("DHHL"), pursuant to the Hawaiian Homes Commission Act ("HHCA"), ch. 42, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691–718 (1958)) (omitted from codification in 1959). VAN DYKE, *supra* note 157, at 9, 237. HHCA acreage, which is held in trust for certain Kānaka beneficiaries, is excluded from the Public Land Trust. *See* HAW. CONST. art. XII, § 4. The Public Land Trust is thus about 1,200,000 acres, not 1,400,000 acres. For a thorough discussion of DHHL and the HHCA, see Paul Nāhoa Lucas, Alan T. Murakami & Avis Kuuipoleialoha Poai, *Hawaiian Homes Commission Act*, *in* NATIVE HAWAIIAN LAW: A TREATISE 176 (Melody Kapilialoha MacKenzie et al. eds., 2015).

[181] MacKenzie, *Ke Ala Loa*, *supra* note 175, at 630.

Hawaiians."[182] Through Section 5(d) and other provisions, however, the federal government retained 373,719.58 acres for national parks and military bases, including acreage that is now used for the Mākua Military Reservation on Oʻahu and the Pōhakuloa Training Area on Hawaiʻi Island.[183] Section 5(d) also allowed Congress or the President to take any of the land returned to the State for federal use within five years of admission.[184]

Though the Admission Act's trust concepts were enshrined into Hawaiʻi's Constitution in 1959,[185] Kānaka did not benefit from the trust for almost twenty years.[186] This changed in 1978 when Native Hawaiians successfully crafted constitutional amendments that sought to redress enduring wounds of colonization, including land dispossession.[187] Members of the Hawaiian Affairs Committee in particular used the 1978 ConCon as an opportunity to revisit unfulfilled commitments to Native Hawaiians.[188] "As a result of these deliberations, new sections were added to the state constitution to implement the trust provisions" of Section 5(f) of Hawaiʻi's Admission Act.[189] One amendment provided that the Section 5(b) acreage was to be held in a public trust for Kānaka and the general public.[190] This trust, now known as the Public Land Trust, sustains the Crown and Government Lands and is meant to be the foundation of reconciliation efforts between the State of Hawaiʻi and Native Hawaiians.[191] Decisionmakers have a fiduciary duty to administer the Public Land Trust solely in the interest of Kānaka and other Hawaiʻi residents,[192] as well as a duty to aloha ʻāina,[193] "the highest duty to

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[182] Admission Act of March 18, 1959, § 5(f), Pub. L. No. 86-3, 73 Stat 4. The other four purposes are supporting public schools and educational institutions, development of a farm and home ownership program, making public improvements, and public use. *Id.*

[183] U.S. Dep't of the Interior & U.S. Dep't of Justice, From Mauka to Makai: The River of Justice Must Flow Freely, Report on the Reconciliation Process Between the Federal Government and Native Hawaiians 37–38 (2000) [hereinafter From Mauka to Makai]; Horwitz et al., *supra* note 15, at 76 tbl.9. The federal government also continued to lease an additional 30,176.18 acres. From Mauka to Makai, *supra*, at 38.

[184] Admission Act of March 18, 1959, § 5(f), Pub. L. No. 86-3, 73 Stat 4.

[185] *See* Haw. Const. art. XII, § 4 (Public Land Trust); *id.* art. XII, §§ 1–3 (Hawaiian Home Lands Trust).

[186] MacKenzie, *Ke Ala Loa*, *supra* note 175, at 630–33.

[187] This is not to say that Kānaka have greatly benefitted from the trust since 1978. Indeed, issues related to the allocation of trust revenues and the alienation of trust lands remain abundant. *See id.* at 633–44.

[188] *See* Melody Kapilialoha MacKenzie, *Public Land Trust*, *in* Native Hawaiian Law: A Treatise 75, 90 (Melody Kapilialoha MacKenzie et al. eds., 2015) (detailing the intricacies of Hawaiʻi's Public Land Trust) [hereinafter MacKenzie, *Public Land Trust*].

[189] *Id.*

[190] Haw. Const. art. XII, § 4.

[191] Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp., 177 P.3d 884, 901–02, 926 (Haw. 2008), *rev'd and remanded sub nom.* Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163 (2009); MacKenzie, *Ke Ala Loa*, *supra* note 175, at 635.

[192] Pele Def. Fund v. Paty, 837 P.2d 1247, 1263 n.18 (Haw. 1992) (quoting Ahuna v. Dep't of Hawaiian Homes Lands, 640 P.2d 1161, 1169–70 (Haw. 1982)).

[193] Ching v. Case, 449 P.3d 1146, 1180, 1184 (Haw. 2019).

preserve and maintain the trust lands."[194] Many Kānaka believe Public Land Trust acreage should form the basis of a future sovereign Hawaiian nation, consistent with Kauikeaouli's intent for the Crown and Government Lands, to preserve a land base for the Native Hawaiian people and secure ʻŌiwi lifeways.[195]

B. Contextual Legal Analysis Is Vital to Actualize Restorative Justice and the Duty to Aloha ʻāina

Despite the Public Trust's and Public Land Trust's grounding in ʻŌiwi values (including aloha ʻāina) and Kingdom law, restorative justice for Kānaka and our ʻāina does not often flow from decisions grounded in these principles. This is in part due to the constraints of legal formalism, the prevailing jurisprudential approach.[196] Formalism casts the law as a neutral tool that can be mechanistically applied to facts to obtain "justice."[197] Formalist analyses rely almost exclusively on retrospective methods, such as originalism and *stare decisis*,[198] and sterilize the legal process as "objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics."[199]

Legal realists, however, demonstrated that law and the legal process are often not neutral, and instead "reflect the interests of those in power at a given time."[200] This is particularly applicable in complex cases, such as *Ching v. Case*, with tremendous cultural, environmental, legal, and political ramifications because "judges have admitted for decades that personal values can have an influence on their decisions in uncertain or hard cases."[201] While studies indicate that "judges care[ ] about getting the correct legal result,"[202] the new legal realists, building on their predecessors' foundational insights, have empirically demonstrated that decisionmakers are influenced

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[194] Ching v. Case, No. 14-1-1085-04 GWBC, 2018 WL 11225507, ¶ 20 (Haw. Cir. Ct. Apr. 3, 2018).

[195] *See* MacKenzie, *Public Land Trust*, *supra* note 188, at 123. The State committed to transferring Kahoʻolawe, to a sovereign Native Hawaiian entity "upon its recognition by the United States and the State of Hawaii." HAW. REV. STAT. § 6K-9 (2009).

[196] Sproat, *Water Law*, *supra* note 107, at 155.

[197] *Id.* at 154–55; *see also* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 496–99 (1988); Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 91, 95 (1995); Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANNU. REV. L. SOC. SCI. 341, 343 (2010).

[198] Farber, *supra* note 197, at 91, 95.

[199] Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 731 (2009) (internal quotations omitted) (citation omitted) [hereinafter Tamanaha, *Understanding Legal Realism*].

[200] Tuteur, *supra* note 153, at 4–5.

[201] BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 146 (2009); *see* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U L. Rev. 875, 972 (2003) ("A hard case is hard because fleshing out ambiguous legal text calls for a controversial moral judgement.").

[202] Tamanaha, *Understanding Legal Realism*, *supra* note 199, at 136.

by their own personal perspectives, as well as those of their peers.[203] With this empirical work revealing how the law actually operates, it is accepted that "[w]e are all realists now."[204]

These insights are especially important to understanding how the law operates for Kānaka and other Native Peoples. Throughout the colonial process, histories about Indigenous Peoples have been constructed and transformed to legally justify cultural devastation and the theft of natural resources.[205] In turn, laws are often not neutral for Native Peoples, and "justice" rarely results from a mechanistic application of law to facts. The U.S. Supreme Court's decision in *Johnson v. M'Intosh*[206] is instructive. There, the Court analyzed whether Native Americans held allodial title to their land and could sell property to parties other than the countries that colonized them.[207] Relying on the doctrine of discovery, which assumed European superiority over "fierce savages," the Court found that title to the land was vested in the government "by whose subjects, or by whose authority, it was made."[208] Native Peoples merely had rights of occupancy because the colonizer had an "exclusive right" to "appropriate the lands occupied by the Indians."[209] Formalist methods like *stare decisis* enabled the Court to embrace regressive rules like the doctrine of discovery on a set of selected facts (Native Peoples are uncivilized "savages").

Even sympathetic decisionmakers misconstrue "justice" in complex cases because they lack the tools to expand their analyses beyond formalism's narrow constraints to meaningfully engage Native Peoples' claims, which often encompass both cultural and environmental components and implicate restorative justice principles.[210] Contextual legal analysis, an alternative jurisprudential approach explained in Part V, is key to meaningfully engaging Native claims and actualizing restorative justice principles on the ground.[211]

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[203] *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 837–41 (2008); Epstein & Jacobi, *supra* note 197; Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005).

[204] Tamanaha, *Understanding Legal Realism*, *supra* note 199, at 67.

[205] Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 200 (2001).

[206] 21 U.S. (8 Wheat.) 543 (1823).

[207] *Id.* at 571–72.

[208] *Id.* at 573, 590.

[209] *Id.* at 584.

[210] *See* Melody Kapilialoha MacKenzie, Susan K. Serrano & Koalani Laura Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RES. & ENV'T 37, 79 (2007); Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 312, 355 (2001).

[211] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 172–77.

IV. The Legal Duty to Aloha ʻĀina: *Ching v. Case* in Context

Ching v. Case highlighted DLNR's lack of response to the U.S. military's obliteration of Pōhakuloa, a sacred region on Hawai'i Island.[212] Too often descriptions of the damage inflicted on *one* place by *one* branch of the military are geographically and temporally isolated. This narrow framing obscures the military's decades-long pattern and practice of exploiting Pacific Islands for strategic gain[213] and reproduces settler colonial narratives that cast Oceania as an uninhabited wasteland to legitimize militarization.[214] This framing also constrains legal and political dialogues about the nature of the harm and the possibilities for repair.[215] Thus, this Part situates DLNR's inaction in response to the military's obliteration of Pōhakuloa—the issue at the heart of *Ching*—within the moʻokūʻauhau (genealogy) of militarization in Hawai'i, partially exemplified by the military's destruction and neglect of Kahoʻolawe, Waikāne Valley, and Mākua.

A. Partial Moʻokūʻauhau of U.S. Military Destruction in Hawai'i

1. Kahoʻolawe

Kahoʻolawe, one of the Hawaiian Islands, is a wahi pana (storied place) that is dedicated to Kanaloa—the god of the ocean, currents, and navigation—and a puʻuhonua (place of refuge) for Kānaka.[216] The island was a center of traditional navigation between Hawai'i and Tahiti throughout the thirteenth century,[217] and the marine life that thrives within Kahoʻolawe's reefs nourishes Maui communities today.[218]

The U.S. Navy began to use the island for live-fire training during World War II.[219] Pursuant to Hawai'i's Admission Act, U.S. President Dwight D. Eisenhower later set aside the entire island for use as a Navy bombing range.[220] Live-fire training devastated biocultural resources.[221]

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[212] Ching v. Case, 449 P.3d 1146, 1150–51 (Haw. 2019).

[213] *See, e.g.*, Sasha Davis, Empires' Edge: Militarization, Resistance, and Transcending Hegemony in the Pacific 10–18 (2015).

[214] *See id.* at 52.

[215] *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. Rev. 1747, 1756–57 (2000).

[216] Davianna Pomaikaʻi McGregor & Noa Emmett Aluli, *Mai Ke Kai Mai Ke Ola, From the Ocean Comes Life: Hawaiian Customs, Uses, and Practices on Kahoʻolawe Relating to the Surrounding Ocean*, 26 Hawaiian J. Hist. 231, 235, 238, 240 (1992).

[217] *Id.* at 243.

[218] *Id.* at 235.

[219] Koalani Laura Kaulukukui, *Island of Kahoʻolawe*, *in* Native Hawaiian Law: A Treatise 148, 156–62 (Melody Kapilialoha MacKenzie et al. eds., 2015).

[220] *See* Exec. Order No. 10,436, 18 Fed. Reg. 1051 (Feb. 25, 1953).

[221] Kahoʻolawe Island Res. Comm'n, Hoʻōla Hou I Ke Kino O Kanaloa: Kahoʻolawe Environmental Restoration Plan vi, 23 (1998).

Reminiscent of the catastrophic environmental crisis at Kapūkakī today,[222] the Navy cracked Kahoʻolawe's freshwater lens by detonating a series of explosions on the island's surface in 1965.[223] Salt water subsequently contaminated most of the island's freshwater resources, which continues to limit restoration potential today.[224]

After decades-long protests and strategic litigation led by Protect Kahoʻolawe ʻOhana[225] and other groups, President George H. W. Bush halted the bombing in 1990.[226] But the island was "uninhabitable," and "mostly inaccessible" when title was transferred back to Hawaiʻi in 1994.[227] Kahoʻolawe is the first ʻāina returned to Kānaka and is held in the Public Land Trust for a future, sovereign Native Hawaiian nation.[228] As contemplated by federal legislation,[229] the Navy promised to clear the entire island's surface and 30% of the subsurface of unexploded ordnance[230] but reneged on its commitment.[231] By 2004, only 75% of the surface had been cleared and only 10% had been cleared to a depth of four feet.[232] As of 2022, the Kahoʻolawe Island Reserve Commission, Protect Kahoʻolawe ʻohana, and volunteers continue to restore the island. The United States nevertheless re-

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[222] *See Red Hill*, Sierra Club of Haw., https://sierraclubhawaii.org/redhill (last visited June 9, 2022), *archived at* https://perma.cc/BM8A-LAAG.

[223] *See Kahoʻolawe, Honuaʻula, Māui*, AVAKonohiki, http://www.avakonohiki.org/kaho699olawe.html (last visited June 7, 2022), *archived at* https://perma.cc/CX2G-YQ9J.

[224] *See id.*

[225] The Protect Kahoʻolawe ʻOhana ("PKO") is an ʻŌiwi "grassroots organization dedicated to the island of Kahoʻolawe and the principles of Aloha ʻāina throughout Hawaiʻi." Protect Kahoʻolawe ʻOhana, http://www.protectkahoolaweohana.org/ (last visited July 11, 2022), *archived at* https://perma.cc/BU5G-PACG. The group was founded in the 1970s to stop the bombing of Kahoʻolawe and reclaim the island for Kānaka. *Id.* For a discussion of PKO, see MacKenzie et al., *supra* note 210, at 42.

[226] *See* Memorandum on the Kahoʻolawe, Hawaii, Weapons Range, 26 Weekly Comp. Pres. Doc. 1635 (Oct. 29, 1990); *see also* Jonathan Kamakawiwoʻole Osorio, *Hawaiian Souls: The Movement to Stop the U.S. Military Bombing of Kahoʻolawe*, *in* A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty 137, 137–57 (Noelani Goodyear-Kaʻōpua et al. eds., 2014). U.S. Senator Daniel K. Inouye played a pivotal role in returning Kahoʻolawe and its surrounding waters to Hawaiʻi and beginning the restoration process by sponsoring legislation that authorized the conveyance of the island and secured $400 million for the removal of unexploded ordnance. *See generally Kahoʻolawe History*, Kahoʻolawe Island Res. Comm'n, http://kahoolawe.hawaii.gov/history.shtml (last visited June 8, 2022), *archived at* https://perma.cc/3XBU-2FZR.

[227] Jordan Kealaikalani Inafuku, Comment, *E Kūkulu ke Ea: Hawaiʻi's Duty to Fund Kahoʻolawe's Restoration Following the Navy's Incomplete Cleanup*, 16 Asian-Pac. L. & Pol'y J. 22, 24 (2015).

[228] *See* Haw. Rev. Stat. § 6K-9.

[229] Defense Appropriations Act of 1994, Pub. L. No. 103-139, tit. X, 107 Stat. 1418 (1993).

[230] *See* Memorandum of Understanding Between the United States Department of the Navy and the State of Hawaii Concerning the Island of Kahoʻolawe, Hawaii, at VI(A)(1), (C)(1)–(2) (1994).

[231] Kahoʻolawe Island Rsrv. Comm'n, Access & Risk Management Plan for the Kahoʻolawe Island Reserve 12 (2005).

[232] Kahoʻolawe Island Rsrv. Comm'n, Kahoʻolawe Island Reserve FY20 Year-In-Review 24 (2020).

tains legal responsibility in perpetuity for removing all unexploded ordnance.[233]

2. Waikāne Valley

Waikāne Valley on O'ahu radiates historical and cultural significance.[234] Kāne, the foremost akua in the Hawaiian pantheon, first dug a ditch to irrigate Paliuli and other lands around Waikāne.[235] Two famous springs mentioned in the Kumulipo, an 'Ōiwi cosmogony, flow through Waikāne.[236] Heiau (religious complexes) dot the 'āina, including the Kahukukala heiau, named after the great-great grandfather of Raymond Kamaka, whose 'ohana (extended family) have stewarded Waikāne for generations.[237] Ronald Kamaka, Raymond's father, added the Waikāne Taro Flats, an ancient lo'i kalo (wetland taro) complex, to the National Register of Historic Places.[238] The Waikāne Taro Flats are the only place in the world where physical evidence of traditional Native Hawaiian earthen mound kalo planting has been found.[239]

Throughout World War II until the 1960s, U.S. forces leased 1,061 acres in Waikāne Valley for live-fire training, including 187.4 acres from the Kamakas.[240] In the lease, the United States committed to restoring the land to its original condition and removing all unexploded ordnance, shells, and ammunition.[241] In 1976, the Marine Corps assured the Kamakas that their land was "free of ordnance hazards" and that all lease obligations had been fulfilled.[242] But the Kamaka 'ohana discovered shells and explosion craters littered across their land.[243] The Marines subsequently cleared 24,400 pounds of debris and explosives but could not certify the land as ordnance-free.[244]

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[233] *See* Defense Appropriations Act of 1994, tit. X, §§ 10001(e)(3), 10002 (a)(4).

[234] Kekuni Blaisdell, Nālani Minton & Ulla Hasager, *Ka Ho'okolokolonui Kānaka Maoli, 1993: The Peoples' International Tribunal, Hawai'i*, *in* A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty 283, 290 (Noelani Goodyear-Ka'ōpua et al. eds., 2014).

[235] *He Moolelo Kaako No Hiiakaikapoliopele*, Ka Hoku o Hawaii, Jan. 12, 1926; Sites of Oahu 187 (comp. by Elspeth P. Sterling & Catherine C. Summers, 1978).

[236] *He Moolelo Kaako No Hiiakaikapoliopele*, *supra* note 235; Sites of Oahu, *supra* note 235, at 187.

[237] Teresa Dawson, *Marines' Plan for Jungle Training in Waikane Valley Reopens Old Wounds*, Env't Haw. (May 11, 2013), https://www.environment-hawaii.org/?p=3057, *archived at* https://perma.cc/3U2T-TYS5; Sites of Oahu, *supra* note 235, at 187–88.

[238] Dawson, *supra* note 237.

[239] *See From Fertile Fields to No-Man's Land: The Transformation of Waikane Valley*, Env't Haw. (Aug. 1992), https://www.environment-hawaii.org/?p=3850, *archived at* https://perma.cc/C3B6-ZD64 [hereinafter *Transformation of Waikāne*]; E.S. Craighill Handy & Elizabeth Green Handy with the Collaboration of Mary Kawena Puku'i, Native Planters in Old Hawai'i, their Life, Lore, & Environment (3rd ed. 1991) (explaining the significance of different cultivation methods).

[240] *See Transformation of Waikāne*, *supra* note 239.

[241] Dawson, *supra* note 237.

[242] *Id.*

[243] *Id*.

[244] *Id*.

Believing their ʻāina was safe, the Kamakas lived and farmed on their land until 1983 when heavy rainfall exposed thousands of unexploded rounds of ammunition. A subsequent military investigation found an additional 480 rockets.[245] Instead of cleaning the land as contractually obligated, the United States moved to condemn the nearly 200 acres for a mere $735,000, persuading a federal judge that the land was so contaminated with unexploded ordnance that restoration was impractical and too costly.[246] In 2002, the Marines announced that it would begin jungle warfare training on the Kamaka's ʻāina, despite clearing none of the explosives that purportedly made the land so unsafe that it warranted condemnation.[247] The Marines abandoned this plan after widespread community opposition[248] and are still investigating how to restore this sacred ʻāina.[249]

3. Mākua

Mākua on Oʻahu is a puʻuhonua and was home to myriad natural and human communities.[250] After the illegal overthrow of the Hawaiian Kingdom in 1893, however, foreign agribusiness drove Kānaka families out of the valley to make way for cattle ranching. A few decades later, the United States declared martial law in Hawaiʻi after the attack on Puʻuloa (Pearl Harbor), enabling the military to seize land in Mākua for live-fire training and forcing residents to vacate.[251] In 1964, President Lyndon Johnson set aside and leased Public Land Trust acreage in Mākua to create a military training reservation.[252] Kānaka were repeatedly evicted by police, in part, so the military could expand operations.[253] In addition to obliterating cultural sites, live-fire training caused wildfires and leached toxic chemicals into the soil and ocean, threatening marine life and local communities dependent on

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[245] *Id.*

[246] This is an absurdly low sum for nearly 200 acres in Hawaiʻi, even with the contamination. Restoration was estimated to cost over $7,000,000. *Id.* While Raymond Kamaka did not settle, the final settlement agreement reached between some members of the Kamaka ʻohana and the Navy enables the Kamakas to regain title if Congress appropriates funding to clear the land, and the Navy follows through with restoration. *Id.*

[247] *Id.*

[248] *Military Studies Waikane Valley Bomb Cleanup*, DMZ Hawaiʻi (June 21, 2011), http://www.dmzhawaii.org/?p=8997, *archived at* https://perma.cc/RT48-F3C2.

[249] *See S-4/ECPD/Waikane Valley RAB*, Marines, https://www.mcbhawaii.marines.mil/Offices-Staff/S-4-Installations-Logistics/Facilities/Environmental/Waikane-Valley-RAB/ (last visited June 7, 2022).

[250] *See generally* Mākua - To Heal a Nation (Nā Maka o ka ʻāina 1996).

[251] Kalamaokaʻāina Niheu, *Puʻuhonua: Sanctuary and Struggle at Mākua*, *in* A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty 161, 164 (Noelani Goodyear-Kaʻōpua et al. eds., 2014).

[252] Exec. Order No. 11166, 29 Fed. Reg. 11,803 (Aug. 15, 1964); Horwitz et al., *supra* note 15, at 76 tbl.9. President Johnson also set aside other Public Land Trust acreage on Oʻahu and Hawaiʻi Island, including Pōhakuloa, for military use. Horwitz et al., *supra* note 15, at 76 tbl.9.

[253] Niheu, *supra* note 251, at 161–78.

the ocean for nourishment.[254] After a protracted legal battle for access to and protection of more than one hundred cultural sites in the valley, the Maoli-led nonprofit Mālama Mākua secured an injunction in 2001 barring live-fire training there.[255] Unexploded ordnance and debris have yet to be removed, even though the military is contractually obligated to do so.[256]

4. Pōhakuloa

Pōhakuloa is a hallowed region connecting the heavens, earth, and three sacred mountains—Maunakea, Maunaloa, and Hualālai—in the piko (navel) of Hawai'i Island.[257] 'Ōiwi cosmologies recount that Maunakea and the surrounding 'āina mauna (mountainous lands) where Pōhakuloa resides are genealogically linked to Papa (Earth Mother) and Wākea (Sky Father), as well as their daughter, Ho'ohokukalani, the progenitor of the kalo plant and Hāloa, the ancestor of the Native Hawaiian people.[258] Pōhakuloa's significance is reflected in its name, which may be translated as "the land of the night of long prayer."[259] 'Ōiwi names are both descriptive and significant as they encode biocultural knowledge onto the land.[260] Ancient Kānaka classified Hawai'i's landscapes, oceanscapes, and heavenscapes, as well as all plant and animal life, with names reflecting Indigenous knowledge compiled over centuries.[261] Pōhakuloa may have been named with reverence because it

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[254] *E.g.*, *Army Lays Waste Riches of Makua Valley*, Env't Haw. (Nov. 2013), https://www.environment-hawaii.org/?p=3902, *archived at* https://perma.cc/3RCU-P274.

[255] Makua v. Rumsfeld, 163 F. Supp. 2d 1202 (D. Haw. 2001). Earthjustice, a nonprofit environmental law firm, has played a pivotal role in protecting Mākua over two decades of litigation. *See generally Down to Earth: David Henkin on Oahu's Makua Valley*, Earthjustice (Feb. 2012), https://earthjustice.org/features/down-to-earth-david-henkin-on-oahu-s-makua-valley, *archived at* https://perma.cc/EGX5-ZMJA. Earthjustice's support is partially responsible for the different outcomes in the Mākua and Waikāne Valley litigation.

[256] Haw. Dep't of Land & Nat. Res., State General Lease No. S-3848, U.S. Lease, Contract No. DA-94-626-ENG-79 ¶ 11 (Aug. 20, 1964), *available at* https://www.malamamakua.org/mkua-in-government-documents, *archived at* https://perma.cc/6TNX-HQ6C (scroll to and click on "Copy of 65-Year Lease of Mākua Between Hawai'i State Board of Land and Natural Resources and the United States for Military Purposes"). In 2022, U.S. Representative Kai-Ali'i Kahele introduced a bill, named after the co-founder of Mālama Mākua, that would require the United States to return 782 acres in Mākua and create an environmental restoration fund. *See* Leandra Wai Act, H.R. 7130, 117th Cong. (2022).

[257] Cultural Surveys Hawai'i, Inc., Brigade Combat Team (SBCT), U.S. Army Pōhakuloa Training Area (PTA), Island of Hawai'i, Hawai'i 62 (2014) [hereinafter CSH].

[258] *Id.* at 61–62. Ho'ohōkūkalani named Hāloa after his older sibling, Hāloanakalaukapalili, who was stillborn. Ho'ohōkūkalani buried his body outside, and the kalo plant grew from his grave.

[259] *Id.* at 61.

[260] Kepā Maly & Onaona Maly, Kumu Pono Assocs., HiWaikii61-111202, He Wahi Mo'olelo No Ka 'āina A Me Nā 'Ohana O Waiki'i Ma Waikōloa (Kalana O Waimea, Kohala), A Me Ka 'āina Mauna: A Collection of Traditions and Historical Accounts of the Lands and Families of Waiki'i at Waikōloa (Waimea Region, South Kohala), and the Mountain Lands, Island of Hawai'i 16 (2002).

[261] *See generally* Mary Kawena Pukui, Samuel H. Elbert & Esther T. Mookini, Place Names of Hawai'i (1974).

is part of the wao akua, an "inland realm" traditionally "uninhabited by humans because of [its] habitation by the gods."[262] The wao akua is distinguished from the wao kanaka, the human realm where people live and go about their day-to-day lives.[263] "These different realms," ʻŌiwi cultural practitioner Kealoha Pisciotta explains, "differentiate our state of being. In the wao akua, one must be in ceremony all the time and recultivating their relationship with the ʻāina and akua."[264]

Today, cultural practitioners engage in constitutionally-protected traditional and customary Native Hawaiian practices throughout Pōhakuloa.[265] Iwi kūpuna (Native Hawaiian ancestral remains) have been discovered across Pōhakuloa in puʻu (cinder cones).[266] Puʻu are also sacred dwelling places of akua, and those buried within them were often significant relations, such as aliʻi (chiefs) and high priests.[267] ʻAuwai akua (waterways of the gods) collect and channel upland waters down to the sea.[268] There are a multitude of cultural sites within the region, including large heiau (religious complexes), such as Ahu-a-Umi and Puʻu Keʻekeʻe, commemorating prominent figures in ʻŌiwi history and smaller heiau, like cairns and standing stones.[269]

This region is also environmentally significant, containing "one of the highest concentrations of rare species on earth" with "a combination of plant communities and habitats that can no longer be found elsewhere."[270] At least three endangered species—the ʻakēʻakē (Hawaiian storm petrel),[271] ʻōpeʻapeʻa (Hawaiian hoary bat),[272] and nēnē (Hawaiian goose)[273]—also call it home.[274] Ten thousand-year-old pāhoehoe and ʻā lava flows cover most of Pōhakuloa.[275] Archaeologists continue to find centuries-old artifacts in the

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[262] Devin Kamealoha Forrest, Wao Akua 1 (June 24, 2021) (unpublished manuscript) (on file with Harvard Civil Rights-Civil Liberties Law Review).

[263] *Id.* at 2. Prior to 1778, the division between these realms was crucial to maintaining balanced management of biocultural resources. *Id.* (citation omitted).

[264] Zoom Interview with Kealoha Pisciotta, Pōhakuloa Training Area Cultural Monitor (June 12, 2021) [hereinafter Pisciotta Interview].

[265] *See* Ching v. Case, No. 14-1-1085-04 GWBC, 2018 WL 11225507, at *1 (Haw. Cir. Ct. Apr. 3, 2018).

[266] CSH, *supra* note 257, at 75.

[267] *Id.* at 75.

[268] *Id.* at 69–71.

[269] *Id.* at 59.

[270] *Id.* at 66.

[271] 32 Fed. Reg. 4001 (Mar. 11, 1967).

[272] 35 Fed. Reg. 16047 (Oct. 13, 1970) (codified in 50 C.F.R. § 17.11(h)).

[273] 32 Fed. Reg. 4001 (Mar. 11, 1967). The nçnç was reclassified as threatened in 2019. 84 Fed. Reg. 69918 (Dec. 19, 2019) (codified in 50 C.F.R. § 17.41(d)).

[274] Uncle Kū Ching, *The Mālama ʻāina Case*, Mālama i ka Honua, Apr.-June 2020, at 2–3.

[275] Lisa Shapiro et al., Pac. Legacy, Inc. & Garcia & Assocs., Archaeological Investigations of Two Work Areas for the Legacy Resource Management Program at Pohakuloa Training Area Island of Hawaiʻi, Hawaiʻi 4 (1998).

lava tube systems beneath Pōhakuloa,[276] further confirming that the region was a corridor for adze makers, feather collectors, and Kānaka traveling across Hawai'i Island.[277]

Archeological sites, however, are less prevalent in this region because Kānaka of old did not permanently inhabit Pōhakuloa and other parts of the wao akua, such as the summit of Maunakea, out of deep respect for these places.[278] 'Ōiwi expressions of reverence can conflict with western notions, which hold that people should visit hallowed grounds—like Arlington National Cemetery and Notre-Dame Cathedral—to show respect for and revel in the place's significance. For Kānaka, some revered places should not be visited, disturbed, or altered.[279] Put simply, our ancestors did not permanently inhabit Pōhakuloa or Maunakea because these places are too sacred.[280] Even so, the military has already identified at least 1,198 "archaeological sites" in the region.[281] It should be noted, however, that the comparatively small number of identified sites in the region may actually be due to a lack of meaningful surveying: as of 2018, the military had only surveyed about 38.5% of its training area in Pōhakuloa,[282] and the statutory definition of "archeological site" excludes most biocultural resources that are sacred to Kānaka.[283]

Nevertheless, the military perversely uses the lack of identified archeological sites—and its destruction of those once present—to justify obliterating the Pōhakuloa Training Area ("PTA"),[284] a 134,000-acre training complex touted as the cornerstone of the U.S. Pacific Command.[285] The military has exploited the region since the 1930s.[286] President Johnson set aside

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[276] CHRISTOPHER M. MONAHAN, SWCA ENV'T CONSULTANTS, CULTURAL RESOURCE EVALUATIONS OF STRYKER TRANSFORMATION AREAS IN HAWAI'I 308–17 (2009).

[277] Ching Interview, *supra* note 18.

[278] Pisciotta Interview, *supra* note 264.

[279] *Id.*

[280] Ching Interview, *supra* note 18.

[281] U.S. ARMY GARRISON-PŌHAKULOA, AN INTEGRATED CULTURAL RESOURCES MANAGEMENT PLAN 44 (2018) [hereinafter ICRMP].

[282] As of 2018, USAG-Pōhakuloa has only surveyed 20% of the ordnance impact area and 50% of the rest of PTA. *Id.* at 47. PTA is about 132,820 acres total, the impact area is about 51,000 acres, and the remaining complex is about 81,820 acres. *See* HHF PLANNERS, REAL PROPERTY MASTER PLAN: POHAKULOA TRAINING AREA DRAFT FINAL 2 (2020). Twenty percent of 51,000 acres is 10,200 acres, and fifty percent of 81,820 acres is 40,910 acres. Thus, only 38.5% (51,110 acres) was surveyed as of 2018.

[283] *See* 16 U.S.C. § 470bb(1) (defining "archeological site," as a place where "any material remains of past human life or activities which are of archaeological interest" and are at least 100 years old are found). The military affords some protections from arbitrary removal for sites that meet this definition, but sites are not protected when found within proposed construction areas unless they come under the purview of other preservation laws. ICRMP, *supra* note 281, at 42.

[284] *Id.*

[285] Ching v. Case, 449 P.3d 1146, 1150 n.2 (Haw. 2019); HHF PLANNERS, *supra* note 282, at 6.

[286] PROGRAMMATIC AGREEMENT AMONG THE U.S. ARMY GARRISON, PŌHAKULOA TRAINING AREA, THE U.S. ARMY GARRISON, HAWAII, AND THE HAWAII STATE HISTORIC PRESERVATION OFFICER REGARDING ROUTINE MILITARY TRAINING ACTIONS AND RELATED ACTIVITIES

and leased land for PTA in 1964 at the same time as the Mākua set-aside and lease.[287] The Pōhakuloa lease gives the United States "unrestricted control and use" of 22,900 acres for only $1.00 for 65 years and vests the federal and state governments with specific duties to protect the land, including a requirement that the United States clean up after each training exercise and remove all debris when the lease expires, if economically feasible.[288]

PTA is primarily used for live-fire training exercises.[289] Old growth forests and puʻu are targets for aerial and airborne weapons.[290] Soldiers continue to tear down smaller heiau[291] and destroy or block ʻauwai akua, triggering flash floods.[292] Uncontrolled, invasive ungulates devastate native plants,[293] many of which are found nowhere else in the world. The impact area is riddled with unexploded ordnance to such an extent that the military cannot safely inspect it.[294] Kiaʻi mauna (guardians of the mountain) protecting Maunakea from state-backed development feel the ground shake when the military bombs Pōhakuloa.[295] ʻŌiwi cultural monitors, who spent months counseling the military on the impacts of live-fire training, warn that "Pōhakuloa is in grave danger and if not attended to may be[ ] lost forever."[296]

Because Kānaka are genealogically related to Hawaiʻi, the annihilation of Kahoʻolawe, Waikāne, Mākua, and Pōhakuloa physically tears families apart. But Kānaka are rising, pulled by the magnetism of aloha ʻāina, to challenge colonial conditions. Given "all we have endured, and all the ways our intimacy between each other has been straightened and damaged, possibility and our many practices of aloha are revolutionary."[297] Defending

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AT UNITED STATES ARMY INSTALLATIONS ON THE ISLAND OF HAWAIʻI, HAWAIʻI 1-2 (2018); HHF PLANNERS, *supra* note 282, at 1.

[287] Exec. Order No. 11,167, 29 Fed. Reg. 11,805 (Aug. 15, 1964); HORWITZ ET AL., *supra* note 15, at 76 tbl.9.

[288] *Ching*, 449 P.3d at 1151 n.5. Specifically, the United States is obligated to make reasonable efforts to remove or deactivate ammunition at the end of each training exercise, take reasonable action to prevent unnecessary damage to natural resources, avoid contaminating freshwater resources, and remove military debris and trash. *Id.* at 1151 n.3, 1151 n.4. The United States also promised to return the leased acreage when the lease expires in 2029. *Id.* at 1151 n.5. The lease obligates DLNR to take reasonable action to remove trash left by the public and gives DLNR the right to enter the leased acreage at any reasonable time approved by the military. *Id.* at 1151 n.6, 1151 n.7.

[289] HHF PLANNERS, *supra* note 282, at 2.

[290] CSH, *supra* note 257, at 75.

[291] *See* ICRMP, *supra* note 281, at 50.

[292] CSH, *supra* note 257, at 71.

[293] *Id.* at 67–69.

[294] *Id.* at 75–76.

[295] Pisciotta Interview, *supra* note 264. For more information on the struggle to protect Maunakea, see Noelani Goodyear-Kaʻōpua, *Protectors of the Future, Not Protestors of the Past: Indigenous Pacific Activism and Mauna a Wākea*, 116 S. ATL. Q. 184 (2017).

[296] CSH, *supra* note 257, at 64.

[297] OSORIO, *supra* note 20, at xxiii.

ʻāina, Uncle Kū explains, "is largely based on readiness, and we're coming to those times where we, as Hawaiians, are ready."[298]

B. Deconstructing Ching v. Case

Uncle Kū and Aunty Maxine, the plaintiffs in *Ching v. Case*, witnessed the military's exploitation of Kahoʻolawe, Waikāne, Mākua, and Pōhakuloa, and have fought to protect Maunakea for decades.[299] These kūpuna (elders) have magnetized successive movements to resist colonial subordination in pursuit of a self-determined future for the lāhui (Native Hawaiian nation and/or people). "The wao akua,"[300] ʻŌiwi cultural practitioner Kealoha Pisciotta explains, "calls to Aunty Maxine and Uncle Kū," and, in turn, "they call out to us," magnetizing others to resist subjugation.[301] In this way, Uncle Kū and Aunty Maxine embody and imbue aloha ʻāina.

Over the course of ten years of volunteering with the Pōhakuloa Cultural Advisory Committee, Uncle Kū reconnected with the ʻāina but grew frustrated with the military's refusal to protect the land.[302] In 2014, he requested state records of the military's compliance with the Pōhakuloa lease, as well as any documents regarding DLNR's efforts to ensure that the military was in compliance with the clean-up provisions.[303] The State did not have any records.[304] Three months later, Uncle Kū and Aunty Maxine, a Kanaka community-organizer and member of the Protect Kahoʻolawe ʻohana, sued DLNR for breaching its Public Trust duties by failing to monitor the military's lease compliance,[305] which requires the military to remove debris and take reasonable action to prevent environmental—and thus cultural—degradation.[306]

DLNR argued that three newly discovered inspection reports, as well as a few third-party reports and cooperative agreements with the military demonstrated that the agency fulfilled its Public Trust obligations.[307] The Hawaiʻi Supreme Court, however, ruled that DLNR's inspection reports

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[298] Ching Interview, *supra* note 18.

[299] For accounts of their decades-long aloha ʻāina activism, see Moanikeʻala Akaka, Maxine Kahaulelio, Terrilee Kekoʻolani-Raymond & Loretta Ritte, Nā Wāhine Koa: Hawaiian Women for Sovereignty and Demilitarization 4–5, 93–121 (Noelani Goodyear-Kaʻōpua ed. 2018); Lauren Muneoka, *Meet the Mauna Kea Hui - Kukauakahi (Clarence Ching)*, Kahea (Aug. 14, 2011), http://kahea.org/blog/mk-vignette-kukauakahi-clarence-ching, *archived at* https://perma.cc/P5CU-KMBT.

[300] "Wao akua" can mean "the realm of the gods." *See supra* notes 262–64 and accompanying text.

[301] Pisciotta Interview, *supra* note 264.

[302] Ching Interview, *supra* note 18.

[303] Ching v. Case, 449 P.3d 1146, 1152 (Haw. 2019).

[304] *Id*.

[305] First Amended Complaint, *supra* note 16, ¶ 1.

[306] *Ching*, 449 P.3d at 1151 n.3, 1151 n.4, 1151 n.5.

[307] *Id.* at 1178–79.

were "grossly inadequate."[308] The first inspection was done entirely on foot by one person over the course of a single day in 1984.[309] The second report was not signed and contained no findings.[310] The third report was initiated, not surprisingly, only after Uncle Kū and Aunty Maxine filed suit and found that the land was in "unsatisfactory" condition.[311] Third-party reports, some of which were prepared by federal agencies, revealed that the military was not in compliance with the terms of the lease and that unexploded ordnance, junk cars, and trash littered PTA.[312] DLNR, however, never followed up with the military about these reports or the land's decrepit condition.[313]

In a path-forging opinion, the Hawai'i Supreme Court rejected DLNR's argument that it had no duty to monitor leased trust acreage,[314] and, in doing so, vested the agency with affirmative monitoring duties.[315] The court reasoned that Hawai'i's Admission Act, constitution, and caselaw, as well as the common law of trusts imposed a duty to preserve trust property.[316] "The *most basic aspect* of the State's trust duties" the court opined, "is the obligation to protect and maintain the trust property and regulate its use."[317] "Under the common law," DLNR has "an obligation to reasonably monitor the trust property" regardless of whether it is leased to a third party.[318] Monitoring "ensures that a trustee fulfills the mandate of elementary trust law that trust property not be permitted to fall into ruin on the trustee's watch."[319] "To hold that the State does not have an independent trust obligation to reasonably monitor the trust property," the court reasoned, would not only run afoul of precedent, but also "allow the State to turn a blind eye to imminent dam-

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[308] *Id.* at 1162. The trial court had similarly determined that DLNR's records were "spotty at best." Ching v. Case, No. 14-1-1085-04 GWBC, 2018 WL 11225507, ¶ 20 (Haw. Cir. Ct. Apr. 3, 2018). The trial court ultimately found that DLNR breached its "trust obligations by failing to malama 'aina the Subject Lands." *Id.* at 15. The court ordered the agency to fulfill its duties by "promptly initiat[ing] and undertak[ing] affirmative activity to malama 'aina the Subject Lands" in part by creating a written plan with detailed protocols. *Id.* at 15–16.

[309] *Ching*, 449 P.3d at 1158. PTA is 134,000 acres. *Id.* at 1150 n.2.

[310] *Id.* at 1158.

[311] *Id.* at 1178–79.

[312] *Id.* at 1179. Though the plaintiffs purposefully only brought claims against DLNR to avoid the federal government's sovereign immunity, the court acknowledged that the ancillary reports suggested that the United States was not in compliance with the lease. *Id.*

[313] *Id.* at 1180.

[314] *Id.* at 1176–77. Specifically, DLNR argued that it did not have an obligation to reasonably monitor leased land because (1) no statute explicitly required it to ensure U.S. compliance, and (2) it could only initiate a formal action upon finding that the military violated lease provisions. *Id.* at 1176–77.

[315] *Id.* at 1180, 1184.

[316] *Id.* at 1175–76.

[317] *Id.* at 1168 (quoting State v. Zimring, 566 P.2d 725, 735 (Haw. 1977); RESTATEMENT (SECOND) OF TRUSTS § 176 (AM. L. INST. 1959)) (internal quotations omitted) (emphasis added).

[318] *Id.* (citing RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. b (AM. L. INST. 2007); Tibble v. Edison Int'l, 575 U.S. 523, 528 (2015)).

[319] *Id.* (citing United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)) (internal quotations omitted).

age, leaving beneficiaries powerless to prevent damage before it occurs."[320] DLNR thus cannot "passively allow" land "to fall into ruin," and instead "must take an active role in preserving trust property."[321]

The court further explained that the monitoring duty necessarily includes an obligation to investigate once DLNR is made aware of possible harm to trust resources.[322] This duty to investigate obligates DLNR to make reasonable efforts to monitor the military's compliance with lease terms meant to protect trust acreage.[323] The court found that DLNR breached all of these duties by failing to (1) conduct regular monitoring, (2) ensure that the U.S. was complying with the lease, and (3) appropriately follow-up with the military when it became aware of potential lease violations.[324]

The Hawai'i Supreme Court then took two groundbreaking steps, first affirming that acreage held in the Public Land Trust of article XII, section 4 of Hawai'i's Constitution is also a protected Public Trust resource under article XI, section 1, and then establishing the legal duty to aloha 'āina.

1. Public Land Trust Acreage is a Public Trust Resource

The *Ching* court unanimously affirmed for the first time that 'āina held in the Public Land Trust (article XII, section 4) is also a protected resource under the Public Trust (article XI, section 1).[325] DLNR is the trustee of the Public Land Trust and has fiduciary duties under Hawai'i's Constitution.[326] Pōhakuloa, as well as Kaho'olawe and Mākua, is Public Land Trust acreage.[327] The court had previously applied the article XI, section 1 Public Trust to navigable waters,[328] the shoreline below the upper reaches of the wash of the waves,[329] lava extensions,[330] water resources,[331] and conservation land.[332]

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[320] *Id.* (citing Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1011 (Haw. 2006)).

[321] *Id.* at 1175 (citing *White Mountain Apache Tribe*, 537 U.S. at 475).

[322] *Id.*

[323] *Id.* at 1175–76.

[324] *Id.* at 1180.

[325] *Id.* at 1150, 1175. For an explanation of Hawai'i's Public Trust and Public Land Trust, see Part III.A.

[326] Pele Def. Fund v. Paty, 837 P.2d 1247, 1263 n.18 (Haw. 1992) (quoting Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1169–70 (Haw. 1982)) (detailing DLNR's fiduciary duties).

[327] *Public Land Trust Information System*, STATE OF HAW., https://pltis.hawaii.gov/HomeAuthenticated/Map, *archived at* https://perma.cc/KB9C-CYWY (last visited June 11, 2022) (search for and click on "Mākua", "Kaho'olawe", and "Pōhakuloa").

[328] King v. Oahu Ry. & Land Co., 11 Haw. 717, 723–25 (1899).

[329] County of Hawaii v. Sotomura, 517 P.2d 57, 63 (Haw. 1973).

[330] State v. Zimring, 566 P.2d 725, 735 (Haw. 1977).

[331] *See, e.g.*, Reppun v. Bd. of Water Supply, 656 P.2d 57, 66–67 (Haw. 1982); *Waiāhole*, 9 P.3d 409, 444 (Haw. 2000); *In re* Wai'ola o Moloka'i, 83 P.3d 664, 694 (Haw. 2004); *In re* Kukui (Moloka'i) Inc., 174 P.3d 320 (Haw. 2007); Kelly v. 1250 Oceanside Partners, 140 P.3d 985 (Haw. 2006).

[332] *In re* Contested Case Hearing re Conservation Dist. Use Application HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve (*In re TMT*), 431 P.3d 752, 773 (Haw. 2018). Conservation districts are areas specially designated for protection under a Hawai'i-wide land district classification system that overlays county zoning schemes. Hawai'i Supreme

In *Ching*, the court unanimously confirmed that Public Land Trust acreage is also a Public Trust resource.[333] Prior to *Ching*, the State had strong fiduciary duties relating to Public Land Trust acreage,[334] but these duties did not include the broad array of protections afforded to Public Trust resources through the balancing requirement, presumption in favor of trust purposes, precautionary principle, and other trust mandates established in *Waiāhole*, *Kauaʻi Springs*, and other seminal cases.[335]

For Kānaka, the article XI, section 1 Public Trust affords the potential for greater protections for our biocultural resources, which have always been a beloved family member and an extension of ourselves. Despite the Public Trust's reparative origins and the U.S. Congress' explicit recognition of the innate connection between Kānaka and ʻāina,[336] trust resources have—and continue to be—abused and neglected. The importance of the Hawaiʻi Supreme Court's acknowledgement of the value of ʻāina to Kānaka, as well as its refusal to allow the State to shirk its constitutional obligations is imperative from both a restorative justice perspective and to provide meaningful remedies for environmental and cultural damage resulting from the military industrial complex.

The court, however, has yet to articulate whether a resource receives heightened protections when it implicates multiple constitutional provisions. It is unclear how the court's constitutional analyses of article XII, section 4 Public Land Trust acreage will evolve now that the acreage is explicitly considered an article XI, section 1 Public Trust resource, but foundational Public Trust cases, like *Waiāhole* and *Kauaʻi Springs*, must be a starting point.[337] Relatedly, the court still must clarify whether natural resources receive an additional layer of protection when they are integral to traditional and customary Native Hawaiian practices safeguarded by article XII, section 7.

Court Justice Richard Pollack's *In re TMT* concurrence noted that the conservation land at issue was also part of the article XII, section 4 Public Land Trust, *id.* at 782–83 (Pollack, J., concurring), but the majority did not explicitly state that article XI, section 1 Public Trust protections apply to all Public Land Trust acreage or deploy the *Kauaʻi Springs* analytic framework.

[333] Ching v. Case, 449 P.3d 1146, 1150 (Haw. 2019).

[334] *E.g.*, Pele Def. Fund v. Paty, 837 P.2d 1247, 1263 n.18 (Haw. 1992) (quoting Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1169–70 (Haw. 1982)) (declaring that the State has a fiduciary duty under Hawaiʻi's Constitution to administer the Public Land Trust "solely in the interest of the beneficiaries," use "reasonable skill and care to make trust property productive," and act "impartially" in situations involving more than one beneficiary).

[335] See *supra* Part III.A.1 for a discussion of Public Trust protections, *Waiāhole*, and *Kauaʻi Springs*.

[336] Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("[T]he indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum . . . . [T]he health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land[.]").

[337] For a discussion of these cases, see *supra* Part III.A.1.

2. Duty to Aloha ʻāina

The *Ching* court then took a second extraordinary step and affirmed the trial court's imposition of the duty to aloha ʻāina.[338] The Honorable Gary W.B. Chang, the trial court judge, explained that the duty to aloha ʻāina imposes on Hawaiʻi decisionmakers an obligation "to use their best reasonable efforts to discharge their duties and obligations" under the Public Trust.[339] Judge Chang described the duty to aloha ʻāina as "the highest duty to preserve and maintain trust lands."[340] This duty further integrates Kānaka values into Hawaiʻi law, a crucial part of protecting and restoring Indigenous lifeways.[341] Although ʻŌiwi customs, traditions, and precepts are a vital foundation for Hawaiʻi's laws through its constitution,[342] common law,[343] and statutes,[344] decisionmakers often disregard laws protecting Kānaka, biocultural resources, and ʻŌiwi culture, rendering these legal mandates illusory. By imposing a duty to aloha ʻāina, the *Ching* court not only refused to allow decisionmakers to neglect their constitutional obligations to Native Hawaiians and our resources, but it actualized restorative justice principles, which are essential to begin to heal the harms flowing from colonization, including the damage at Pōhakuloa. Hawaiʻi's commitment to restorative justice infuses international human rights norms of self-determination for Indigenous Peoples into Hawaiʻi law and the duty to aloha ʻāina in particular.

Unfortunately, however, the Hawaiʻi Supreme Court did not fully describe this emergent duty or how decisionmakers should operationalize it—the court merely affirmed Judge Chang's imposition of the duty to aloha ʻāina.[345] This raised questions about the efficacy of any duty to aloha ʻāina

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[338] *Ching*, 449 P.3d at 1180–84. Specifically, the trial court vested the State with the duty and then ordered DLNR to create a plan that complies with that duty. *Id.* at 1180. The Hawaiʻi Supreme Court affirmed this order. *Id.* at 1184.

[339] Ching v. Case, No. 14-1-1085-04 GWBC, 2018 WL 11225507, at *27–29 (Haw. Cir. Ct. Apr. 3, 2018).

[340] *Id.* at *8.

[341] *See, e.g.*, Suzanne Von Der Porten, Rob E. de Loë & Deb McGregor, *Incorporating Indigenous Knowledge Systems into Collaborative Governance for Water: Challenges and Opportunities*, 50 J. CANADIAN STUD. 214 (2016); Kekuhi Kealiikanakaoleohaililani & Christian P. Giardina, *Embracing the Sacred: An Indigenous Framework for Tomorrow's Sustainability Science*, 11 SUSTAINABILITY SCI. 57 (2016); OFF. HAW. AFFS. ET AL., MAI KA PŌ MAI: A NATIVE HAWAIIAN GUIDANCE DOCUMENT FOR PAPAHĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT (2021).

[342] HAW. CONST. art. XI, §§ 1, 7 (Public Trust Doctrine); HAW. CONST. art. XII, § 4 (Public Land Trust), HAW. CONST. art. XII, § 7 (traditional and customary Native Hawaiian rights).

[343] *See, e.g.*, Pele Def. Fund v. Paty 837 P.2d 1247, 1270–72 (Haw. 1992); Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 903 P.2d 1246, 1250 (Haw. 1995); *see also* Melody Kapilialoha MacKenzie, *Ke Ala Pono - The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447 (2011).

[344] Traditional "Hawaiian usage" is incorporated into state law. *See* HAW. REV. STAT. § 1-1 (2009); *see also* HAW. REV. STAT. § 5-7.5 (2009) (defining "Aloha Spirit" and directing Hawaiʻi officials to "give consideration" to it).

[345] Ching v. Case, 449 P.3d 1146, 1180, 1184 (Haw. 2019).

and what would result when even sympathetic decisionmakers well-versed in the ongoing harms of colonization are tasked with interpreting laws rooted in restorative justice principles.

Though the *Ching* court did not detail how Hawai'i's decisionmakers should operationalize the duty to aloha ʻāina in practice, the court did order DLNR to create a plan to aloha ʻāina Pōhakuloa.[346] After nearly three years of negotiations, Judge Chang approved DLNR's Management Plan in April 2021 for the roughly 23,000 acres of leased trust land at Pōhakuloa.[347] The Plan obligates DLNR to periodically inspect high priority areas and make public reports.[348] It also recommends—but does not require—that the agency inspect at least 500 acres annually and suggest any "necessary corrective action" to bring the United States into compliance with the 1964 lease.[349] It does require DLNR to notify Native Hawaiian Legal Corporation,[350] the firm representing Uncle Kū and Aunty Maxine, thirty days prior to planned inspections and allow them to send two observers.[351] Finally, the Plan directs DLNR to review semi-annual U.S. inspection reports and help the military seek federal funding to clean up unexploded ordnance.[352]

Native Hawaiian Legal Corporation described the Plan as "woefully inadequate."[353] The Plan's reliance on mere suggestions, as opposed to quantifiable requirements, renders the duty to aloha ʻāina illusory yet again. DLNR can continue to shirk its constitutional duties without penalty because the agency is not required to inspect a minimum number of acres. DLNR could conduct *no* inspections and suffer *no* penalties. Despite DLNR's constitutional duties to protect and preserve traditional and customary Native Hawaiian rights in Pōhakuloa, DLNR is not required to facilitate any meaningful Native Hawaiian involvement. Moreover, while DLNR must make its reports public, the Plan lacks the transparency mandated in *Ching* to ensure "effectiveness through public oversight."[354] Such oversight would, for example, provide the public an opportunity to review and comment on the Plan

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[346] *Id.* at 1184.

[347] *See* Court Ordered DLNR Management Plan for Lease Lands at Pohakuloa, Ching v. Case, 449 P.3d 1146 (Haw. Cir. Ct. Apr. 20, 2021) (No. 14-1-1085-04 GWBC).

[348] *Id.* at 3–5.

[349] *Id.* PTA is 134,000 acres in total, and about 23,000 acres are leased trust lands. *Ching*, 449 P.3d at 1150, 1150 n.2.

[350] *See Mission*, Native Hawaiian Legal Corp., https://www.nativehawaiianlegalcorp.org/mission, *archived at* https://perma.cc/66AM-V3FA (last visited June 11, 2022). Native Hawaiian Legal Corporation was founded to help Hawai'i's Indigenous communities attain restorative justice under the law. *Id.*

[351] Court Ordered DLNR Management Plan for Lease Lands at Pohakuloa at 4, Ching v. Case, 449 P.3d 1146 (Haw. Cir. Ct. Apr. 20, 2021) (No. 14-1-1085-04 GWBC).

[352] *Id.* at 6.

[353] Plaintiffs' Request the Court Reject Defendants' Submission of Court-Ordered DLNR Management Plan for Leased Lands at Pōhakuloa at 2, Ching v. Case, 449 P.3d 1146 (Haw. Cir. Ct. Feb. 19, 2019) (No. 14-1-1085-04 GWBC).

[354] The *Ching* court ordered DLNR to establish a procedure for "reasonable transparency" with Kānaka and other beneficiaries, ensuring the plan's "effectiveness through public oversight." *Ching*, 449 P.3d at 1181, 1184.

before agency approval, as well as the ability to participate in ongoing public meetings with opportunities to testify.[355] The Plan's lack of meaningful transparency not only runs afoul of *Ching*, but also state legislation,[356] the second Restatement of Trusts,[357] the Public Land Trust,[358] and the Public Trust Doctrine.[359] In sum, despite Hawai'i's commitment to restorative justice, favorable legal language, and trust principles, the Plan ultimately fell far short of DLNR's duty to aloha 'āina PTA as a Public Trust resource for present and future generations. The Plan thus poignantly illustrates how formalist approaches are insufficient for adjudicating Native Peoples' claims, even with myriad legal provisions advancing restorative justice.

V. Operationalizing the Duty to Aloha 'āina through the Four Values of Restorative Justice for Native Peoples

DLNR's Pōhakuloa Management Plan is a poignant example of how the legal process alone often cannot actualize restorative justice for Native communities. As alluded to in Part III, the struggle to recognize—let alone remedy—Native Peoples' claims partly arises from the constraints of legal formalism, the prevailing approach to law and the legal process today.[360] Contextual legal analysis, a jurisprudential approach grounded in the new legal realism,[361] is key to expanding past formalism's narrow confines and actualizing restorative justice in a broad array of Indigenous Peoples' claims. Flowing from the new legal realism's empirical findings on the role of personal ideologies in decisionmaking,[362] contextual legal analysis examines: "Who crafts the laws? Who interprets the laws? Who benefits from the laws? Who is hurt by the laws? What is at stake when the laws are 'blindly' applied? And, what institutional and public constraints limit judges in their decisionmaking?"[363]

For Native communities, contextual legal inquiry must be incisive enough to evaluate on a case-by-case basis the enduring wounds of coloniza-

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[355] Plaintiffs' Request the Court Reject Defendants' Submission of Court-Ordered DLNR Management Plan for Leased Lands at Pōhakuloa, *supra* note 353, at 8.

[356] Agency decisions and actions must be conducted "as openly as possible." Haw. Rev. Stat. § 92-1 (2009).

[357] The Restatement (Second) of Trusts, to which the Hawai'i Supreme Court tethered DLNR's trust duties, provides that beneficiaries are "always entitled" to information "reasonably necessary" for them "to enforce [their] rights under the trust or to prevent or redress a breach of trust." Restatement (Second) of Trusts § 173 cmt. c (Am. L. Inst. 1979).

[358] DLNR also has a fiduciary Public Land Trust duty to inform beneficiaries of material facts affecting their interests in the trust property, even absent a specific information request. Off. of Hawaiian Affs. v. State, 133 P.3d 767, 784 (Haw. 2006).

[359] The Hawai'i Supreme Court emphasized that agencies should operate with a "level of openness" when fulfilling Public Trust duties. *Waiāhole*, 9 P.3d 409, 455 (Haw. 2000).

[360] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 155. For an in-depth discussion of legal formalism, see Singer, *supra* note 197; Farber, *supra* note 197, at 91, 95.

[361] *See* Sproat, *Wai Through Kānāwai*, *supra* note 134, at 167–72.

[362] *See supra* Part III.B.

[363] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 162 (citation omitted).

tion, including land dispossession, cultural destruction, and the loss of political sovereignty, and must prioritize the restoration of self-governance, reconstruction of suppressed culture, and return of the natural and cultural resources upon which culture depends.[364] Restorative justice is crucial to meaningfully engaging these unique aspects of indigeneity. Incorporating restorative justice principles into Hawai'i's law, however, is not enough because decisionmakers are still unclear as to what restorative justice actually means in practice. Similarly, infusing international human rights norms of self-determination for Indigenous Peoples into Hawai'i law and the duty to aloha ʻāina in particular is not sufficient because decisionmakers do not have tools to operationalize their duty in ʻŌiwi communities. Without tools to meaningfully engage restorative justice claims and a framework to implement the duty to aloha ʻāina on the ground, even sympathetic decisionmakers will continue to offer ineffective remedies that merely preserve status quo subjugation of Kānaka and our biocultural resources—as is the case with DLNR's Plan.

The Four Values of Restorative Justice for Native Peoples is an analytic framework decisionmakers can deploy to meaningfully engage restorative justice claims and operationalize the duty to aloha ʻāina in practice. To illustrate how these tools of critical inquiry work in complex cases, we revisit the Plan, demonstrating how the Four Values would have helped DLNR step towards justice for Pōhakuloa and Kānaka.

A. The Four Values of Restorative Justice for Native Peoples

The Four Values of Restorative Justice for Native Peoples is a framework of contextual legal inquiry for Indigenous claims and adjudicatory decisions.[365] It analyzes four realms, or "values," of restorative justice embodied in the human rights principle of self-determination: moʻomeheu (cultural integrity), ʻāina (land and natural resources), mauli ola (social determinants of health and well-being), and ea (self-determination).[366] Not only have Indigenous Peoples been damaged by the forces of colonialism in each of these four realms, but these realms are also both customarily significant and recognized by international human rights principles as salient dimensions of restorative justice.[367]

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[364] *Id.* at 172; *see also* Yamamoto & Lyman, *supra* note 210, at 344.

[365] Sproat, *Environmental Self-Determination*, *supra* note 88, at 197–99 (citing S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Towards a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309, 342–60 (1994)); Sproat, *Wai Through Kānāwai*, *supra* note 134, at 172–85.

[366] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 173 (citing Anaya, *supra* note 365, at 342–60); Sproat, *Environmental Self-Determination*, *supra* note 88, at 197.

[367] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 173; Anaya, *supra* note 365, at 342–60; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

The Hawai‘i Supreme Court has long acknowledged the importance of analytic frameworks in operationalizing constitutional mandates on the ground. In *Ka Pa‘akai O Ka ‘āina v. Land Use Commission*, a seminal case interpreting article XII, section 7 protections for traditional and customary Native Hawaiian practices, the court recognized that Native Hawaiians' rights "must be enforceable" if they are "to be meaningfully preserved and protected[.]"[368] For the "rights to be enforceable, an appropriate analytical framework for enforcement" was necessary.[369] The court declared that this "analytical framework must endeavor to accommodate the competing interests of protecting [N]ative Hawaiian culture and rights, on the one hand, and economic development and security, on the other."[370]

The court later took these general points of critical inquiry and gave them specificity for particular resources and communities.[371] For example, to operationalize agencies' constitutional,[372] statutory,[373] and common law[374] obligations to protect traditional and customary Native Hawaiian practices, the *Ka Pa‘akai* court declared that Hawai‘i's Land Use Commission must apply a three-part analytic framework when reviewing petitions to reclassify land district boundaries.[375] The *Ka Pa‘akai* framework tasks the agency with making "specific findings and conclusions" as to "(1) the identity and scope" of "cultural, historical, or natural resources[,]" including traditional and customary Native Hawaiian rights practiced in the area; "(2) the extent to which those resources—including traditional and customary [N]ative Hawaiian rights—will be affected or impaired by the proposed action;" and "(3) the feasible action" the agency should take to "reasonably protect [N]ative Hawaiian rights[.]"[376]

Similarly, in *Kaua‘i Springs, Inc. v. Planning Commission*, the court provided an analytic framework for the minimum obligations agencies must fulfill under Hawai‘i's Public Trust when evaluating proposed uses of freshwater resources.[377] The court clarified that the applicant has the "burden to justify the[ir] proposed [ ] use in light of the trust purposes" and supplied a separate framework for the applicant to discharge their burden.[378]

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[368] 7 P.3d 1068, 1083 (Haw. 2000).

[369] *Id.*

[370] *Id.*

[371] *See, e.g.*, Kaua‘i Springs, Inc. v. Plan. Comm'n, 324 P.3d 951, 984–85 (Haw. 2014).

[372] HAW. CONST. art. XII, § 7.

[373] *See, e.g.*, HAW. REV. STAT. § 1-1 (2009).

[374] *See, e.g.*, Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 903 P.2d 1246, 1271–72 (Haw. 1995).

[375] *Ka Pa‘akai*, 7 P.3d at 1084. All Hawai‘i decisionmakers must utilize *Ka Pa‘akai*'s framework because it helps "effectuate" the State's affirmative constitutional duty to protect and preserve traditional and customary Native Hawaiian rights, but *Ka Pa‘akai* was specifically about the Land Use Commission. *See id.*

[376] *Id.*

[377] *See* 324 P.3d 951, 984–85 (Haw. 2014); *supra* Part III.A.1.b (describing the analytic framework).

[378] *Kaua‘i Springs*, 324 P.3d at 984–85.

For Hawai‘i decisionmakers, the Four Values should not supplant analytic frameworks established in *Ka Pa‘akai*,[379] *Kaua‘i Springs*,[380] and other cases, though these frameworks still require refinement and interpretation to ensure that Native Hawaiian rights are "meaningfully preserved," "protected," and "enforceable."[381] The Four Values, rather, are tools of contextual inquiry for decisionmakers to use when evaluating proposed actions under established frameworks to expand analyses beyond formalist constraints and get at "what is really going on" and "what is really at stake" within the historical, social, and political context of settler colonialism.[382] The Four Values, moreover, can retroactively examine whether justice was actually served in specific decisions and help shape reconciliatory initiatives.

The Hawai‘i Supreme Court's explicit recognition of the duty to aloha ʻāina and the crucial role of the Four Values in assessing actions impacting Kānaka and biocultural resources would be valuable for Hawai‘i's courts, legislature, and administrative agencies. Though this framework is ʻŌiwi-centered, considering a proposed action's impact on cultural integrity, natural resources, health, and self-determination will benefit all of Hawai‘i's communities, especially given the U.S. military industrial complex's impacts on all Hawai‘i residents. Beyond our shores, this framework provides a broad template for other Indigenous Peoples to infuse international human rights norms into local laws and effectuate restorative justice initiatives rooted in their own values and traditions.[383]

1. Mo‘omeheu: Cultural Integrity

The first value, mo‘omeheu, analyzes an action's impact on cultural integrity. This is a necessary starting place for decisionmakers because Native Peoples are "in a constant struggle to maintain traditional lifestyles due to a myriad of factors, including colonization and other pressures of a quickly changing world."[384] Mo‘omeheu thus examines whether a proposed action "support[s] and restore[s] cultural integrity as a partial remedy for past

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[379] *Ka Pa‘akai*, 7 P.3d at 1083–84.

[380] *Kaua‘i Springs*, 324 P.3d at 984–85.

[381] *Ka Pa‘akai*, 7 P.3d at 1083.

[382] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 171, 207.

[383] *See generally* Sproat, *Environmental Self-Determination*, *supra* note 88 (proffering a restorative justice framework emanating from local legal regimes to more fully claim and realize the Indigenous right to environmental self-determination in the context of global warming. More specifically, the framework examines Kānaka's potential deployment of Hawai‘i law that embodies restorative justice principles to fashion meaningful remedies for colonialism's longstanding environmental and cultural damage as one model for how other Indigenous Peoples can do the same in their own communities).

[384] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 179 (citations omitted); *see also* Kame‘eleihiwa, *supra* note 110, at 2–3 (explaining the importance of centering Maoli worldviews in Native Hawaiian scholarship).

harms, or perpetuate[s] conditions that continue to undermine cultural survival."[385]

2. ʻāina: Land and Natural Resources

ʻāina, the second value, means land or "that which feeds" in ʻōlelo Hawaiʻi (the Hawaiian language). Consistent with ʻŌiwi understandings, it refers here to all resources that sustain Native Hawaiians physically, culturally, and politically, as well as the reciprocal relationship between Kānaka and the environment, embodied in the concepts of kuleana and aloha ʻāina.[386] Hawaiʻi's landscapes, seascapes, and heavenscapes are the foundation of Indigenous identity and sustain Kānaka well-being.[387] ʻāina is also deeply intertwined with "self-determination because a land base allows Indigenous Peoples to live and develop freely in order to pursue their cultural and political sovereignty."[388] This value interrogates whether an action "perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way."[389]

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

Mauli ola, the third value, analyzes a proposed action's "potential to improve health, education, living standards" of Native Hawaiians.[390] Examining impacts on social determinants of health and well-being is crucial because the ʻŌiwi population plummeted in the century following western contact in 1778 due to introduced diseases.[391] Native Hawaiian well-being further suffered as Americans and Europeans plundered biocultural resources for profit and sought to assimilate Kānaka into colonial subordination.[392] This value thus examines whether a "decision improves social welfare conditions or perpetuates the status quo of Natives bringing up the bottom of most, if not all, socio-economic indicators."[393]

4. Ea: Self-Determination

Ea, the final value, recognizes that restoration of self-determination is vitally important to remedy the dispossession of Kānaka from our ʻāina, which, in turn, deprives Native Hawaiians of cultural and political sover-

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[385] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 179 (citations omitted).
[386] Tuteur, *supra* note 153, at 16–17.
[387] *Id.* at 17.
[388] *Id*.
[389] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 181.
[390] *Id.* at 183.
[391] Anaya, *supra* note 365, at 315–16 (citation omitted).
[392] *Id.* at 317–18.
[393] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 182–83.

eignty.[394] Ea "upholds the accommodation of spheres of governmental or administrative autonomy for indigenous communities, while at the same time upholding measures to ensure their effective participation in all decisions affecting them left to the larger institutions of government."[395] This value examines whether an action perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-determination.[396]

Though each value entails a separate analysis, they are inextricably intertwined. "Culture cannot exist in a vacuum—its integrity is bound to ʻāina and other resources upon which Indigenous Peoples depend for physical and spiritual survival."[397] In turn, "Native communities' social welfare is defined by cultural veracity and access to, and the health of, natural resources."[398] Finally, "cultural and political self-determination influence who will control Indigenous Peoples' destinies—including the resources that define cultural integrity and social welfare—and whether that fate will be shaped internally or by outside forces, including colonial powers or their vestiges."[399] These values are minimum standards for the development of remedial measures to redress colonialism's impacts. Together, they comprise an analytic framework or backstop that roots analyses of actions impacting Native communities in salient principles of self-determination to help decisionmakers actualize restorative justice in practice and meaningfully operationalize the duty to aloha ʻāina.

B. Revisiting DLNR's Pōhakuloa Management Plan with the Four Values

To illustrate how the Four Values of Restorative Justice work in practice, we revisit the court-ordered Management Plan for Pōhakuloa, which neither fulfills the duty to aloha ʻāina, nor long-recognized trust obligations.[400] These failings should not so much detract from *Ching*'s path-forging implications but instead highlight the limits of a formalist approach to Native Peoples' claims—even when the applicable laws are grounded in restorative justice and judges are supportive of Indigenous rights. Deploying the Four Values would have shifted the Plan past a narrow recitation of illusory recommendations to actually address the claims for cultural restoration at the heart of Aunty Maxine and Uncle Kū's aloha ʻāina and lawsuit.

To fulfill the first value, moʻomeheu, the court would examine how the Plan could support and restore cultural integrity as a partial remedy for DLNR's failure to fulfill its constitutional Public Trust and Public Land Trust

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[394] Sproat, *Environmental Self-Determination*, *supra* note 88, at 198.
[395] Anaya, *supra* note 365, at 355.
[396] Sproat, *Wai Through Kānāwai*, *supra* note 134, at 185.
[397] Sproat, *Environmental Self-Determination*, *supra* note 88, at 197–98 (citations omitted).
[398] *Id.*
[399] *Id.*
[400] *See supra* Part IV.B.

duties.[401] The court could contextualize its analysis by noting that Kānaka have repeatedly called on DLNR to meaningfully consider the sacred nature of Pōhakuloa's ʻāina mauna (mountain lands) and our genealogical connection to the region prior to signing off on exploitative land uses. But time and time again, DLNR and other agencies ignore Kānaka or downplay our concerns in favor of economic, political, or private ventures.[402] Thus, to support cultural integrity, the court could require DLNR to facilitate meaningful Native Hawaiian involvement in crafting, executing, and assessing the Plan.[403] There are no people better suited than Kānaka, who hold traditional ecological knowledge passed down over centuries of biocultural resource stewardship, to help agencies fulfill their duty to aloha ʻāina. Cultural monitors have already compiled comprehensive recommendations for protecting and preserving Pōhakuloa.[404] To be sure, DLNR's trust duties are non-delegable,[405] and the agency could not pass its obligations to Kānaka communities. At a minimum, however, the court could order DLNR to comply with laws requiring that agency decisions be made at public meetings,[406] so Kānaka could have had an opportunity to review the Plan and offer suggestions.

Relatedly, the court could also require DLNR to fulfill its constitutional responsibility "to act only after independently considering the effect of [its] actions on Hawaiian traditions and practices."[407] Part of considering Kānaka perspectives is understanding—and respecting—that ʻāina is an ancestor and part of the ʻohana. In the same way that people must be made whole, the ʻāina must be made whole for its own sake, as a manifestation of akua, and because it is a living altar for cultural practice. Such consideration operationalizes DLNR's duty established in *Waiāhole* to "take the initiative in considering, protecting, and advancing" rights in Public Trust resources "at every

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[401] *See supra* Part V.A.1.

[402] For example, Kānaka have repeatedly explained that the summit of Maunakea, a mountain on Hawaiʻi Island overlooking Pōhakuloa, is the one of the most sacred places. Despite widespread opposition, DLNR has allowed thirteen telescopes to be built on Maunakea and has attempted to permit another, the Thirty Meter Telescope ("TMT"). Kānaka-led protests and strategic litigation halted TMT's construction until the Hawaiʻi Supreme Court declared that the project could proceed in *In Re TMT*, 431 P.3d 752, 757 (Haw. 2018). For a discussion of this decision, see Terina Kamailelauliʻi Faʻagau, Comment, *Reclaiming the Past for Mauna a Wākea's Future: The Battle Over Collective Memory and Hawaiʻi's Most Sacred Mountain*, 22 Asian-Pac. L. & Pol'y J. 1, 37–64 (2021).

[403] Though this Article focuses on Hawaiʻi law, consultation with Native communities is a fundamental part of Indigenous Peoples' right to free, prior, and informed consent under international law. *See* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 367, arts. 10, 11, 19, 28, 29.

[404] *See* CSH, *supra* note 257, at 75.

[405] Ching v. Case, 449 P.3d 1146, 1179 (Haw. 2019) ("An affirmative duty of the State to protect and preserve constitutional rights is by its very nature non-delegable.").

[406] The Plan was never approved at an open meeting, and there was no opportunity for public review or comment, as required by law. Plaintiffs Request the Court Reject Defendants' Submission of Court-Ordered DLNR Management Plan for Leased Lands at Pōhakuloa, *supra* note 353, at 8–10.

[407] *Ching*, 449 P.3d at 1179 (quoting Ka Paʻakai O Kaʻ āina v. Land Use Comm'n, 7 P.3d 1068, 1083 (Haw. 2000)) (internal quotations omitted).

stage of the planning and decisionmaking process" with a "a global, long-term perspective."[408]

For the second value, ʻāina, the court would analyze how the Plan could attempt to redress historical injustices in a significant way.[409] Though there are a multitude of persisting injustices related to Hawaiʻi Island's ʻāina mauna,[410] the court could focus on redressing DLNR's failure to monitor the trust land for nearly sixty years by requiring the agency to inspect a minimum number of acres annually and spend a minimum amount of time on each inspection. DLNR argued that such minimum requirements would "go far beyond" the trial court's original order.[411] According to Native Hawaiian Legal Corporation, however, the Plan's reliance on voluntary recommendations rather than mandatory requirements "allows DLNR to continue to act with impunity."[412]

The imposition of minimum requirements is further supported by DLNR's fiduciary duty of loyalty to Native Hawaiians,[413] which obligates DLNR to administer the trust solely in the interest of Kānaka, the beneficiaries.[414] Because ʻāina is the basis of our identity, the health of our people, and our self-determination, it is undoubtedly in the interest of Public Trust beneficiaries to require, not merely recommend, that DLNR fulfill its duties by inspecting a minimum amount of acreage annually.

For the third value, mauli ola, the court would examine how the Plan could improve social welfare conditions.[415] Two glaring hazards at Pōhakuloa are the military's use of munitions with white phosphorus[416] and depleted uranium ("DU").[417] White phosphorus and DU are ecologically

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[408] *Waiāhole*, 9 P.3d 409, 455 (Haw. 2000).

[409] *See supra* Part V.A.2.

[410] *See, e.g.*, Faʻagau, *supra* note 402 (detailing "the incomplete 'history' of injustices" relied upon by decisionmakers in complex decisions impacting Maunakea).

[411] Defendants' Position Statement Re: Court-Ordered DLNR Management Plan for Leased Lands at Pohakuloa at 4, Ching v. Case, 449 P.3d 1146 (Haw. Cir. Ct. Feb. 14, 2020) (No. 14-1-1085-04 GWBC).

[412] Plaintiffs' Objections to the Defendants' Post-Remand Management Plan for Leased Lands at Pōhakuloa Filed November 8, 2019 at 6, Ching v. Case, 449 P.3d 1146 (Haw. Cir. Ct. Nov. 22, 2019) (No. 14-1-1085-04 GWBC).

[413] *Id*.

[414] Pele Def. Fund v. Paty, 837 P.2d 1247, 1263 n.18 (Haw. 1992) (quoting Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1169–70 (Haw. 1982)).

[415] *See supra* Part V.A.3.

[416] White phosphorus is a toxic substance used by the military as an incendiary agent because it catches fire when it contacts air and produces smoke clouds. *White Phosphorus: Systemic Agent*, Ctrs. For Disease Control & Prevention, https://www.cdc.gov/niosh/ershdb/emergencyresponsecard_29750025.html (last visited June 7, 2022), *archived at* https://perma.cc/M2LE-3WBM. White phosphorus is controversial under international law. *E.g.*, Thomas Gibbons-Neff, *U.S.-Led Forces Appear to be Using White Phosphorus in Populated Areas in Iraq and Syria*, Wash. Post (June 9, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/06/09/u-s-led-forces-appear-to-be-using-white-phosphorous-in-populated-areas-in-iraq-and-syria/, *archived at* https://perma.cc/DJN9-WBEV.

[417] DU, a byproduct of the uranium enrichment process, is used in tank armor and munitions. *Depleted Uranium*, U.S. Dep't Veterans Affs., https://www.publichealth.va.gov/expo-

devastating and physically endanger everyone in the region.[418] Moreover, the risks associated with these toxic substances are not confined to the ʻāina mauna: Pōhakuloa's ʻauwai akua channel water down to the ocean, and Pōhakuloa's groundwater is linked to Maunakea's aquifer, a crucial source of freshwater for all of Hawai'i Island. The extent of the environmental contamination from toxic substances is unknown. The military concedes that training activities have caused a variety of health and safety hazards at PTA, including contamination from lead, asbestos, polychlorinated biphenyls, and other chemicals.[419]

To meet the bare minimum required by the duty to aloha ʻāina under the third value, the court could have required DLNR to investigate the extent of environmental contamination at PTA and the resulting risk to public health. The *Waiāhole* court declared that agencies have a duty to preserve "the rights of present and future generations" in Public Trust resources.[420] A duty to aloha ʻāina grounded in Hawai'i's Public Trust "compels [agencies] to duly consider the cumulative impact[s] on trust purposes and to implement reasonable measures to mitigate this impact[.]"[421] Under the Plan, however, DLNR can continue to "passively allow" the ʻāina mauna to "fall into ruin" from the cumulative impacts of the toxic substances used in live-fire training,[422] endangering the health of Kānaka practitioners, local communities, and the thousands of troops cycling through Pōhakuloa each year. Such apathy is antithetical to DLNR's constitutional duty to take "an active role in preserving trust property" for future generations.[423]

For the final value, ea, the court would analyze how the Plan could attempt to redress the continued denial of self-determination.[424] Kānaka have sought to restore control over biocultural resources as a measure of self-

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sures/depleted_uranium/index.asp (last visited June 7, 2022), *archived at* https://perma.cc/3MDM-ZNTV. It has significant health and environmental impacts. *Id.*

[418] *See, e.g.*, Seyed Mohammad Mojabi, Azade Navazi, Farzane Feizi & Morteza Ghourchi, *Environmental Impacts of White Phosphorus Weapons on Urban Areas*, Int'l Conf. on Env't Eng'g & Applications, 2010, at 112; *Depleted Uranium: Source, Exposure and Health Effects Executive Summary*, World Health Org., https://www.who.int/ionizing_radiation/pub_meet/en/DU_Eng.pdf (last visited July 27, 2021), *archived at* https://perma.cc/7PAL-FU8E.

[419] Marine Corps Base Haw., Environmental Assessment for the Construction of an Urban Close Air Support Range and an Aviation Bulls-Eye Range at Pohakuloa Training Area, Hawaii (2013). Polychlorinated biphenyls are human-made organic chemicals that are banned in the United States due to their severe health and environmental impacts. *Learn About Polychlorinated Biphenyls (PCBs)*, EPA, https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs (last visited July 27, 2021), *archived at* https://perma.cc/BF3S-SAGT.

[420] *Waiāhole*, 9 P.3d 409, 453 (Haw. 2000). For a discussion of *Waiāhole*, see *supra* Part III.A.1.a.

[421] *Waiāhole*, 9 P.3d at 455.

[422] Ching v. Case, 449 P.3d 1146, 1175 (Haw. 2019) (citing United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)).

[423] *Id.*

[424] *See supra* Part V.A.4.

determination since the illegal overthrow in 1893.[425] To try to protect and preserve a land base for a future Native Hawaiian nation, the court could have required DLNR to attempt to *ensure*—not merely attempt to *assess*—U.S. compliance with the lease.[426] Indeed, the Hawai‘i Supreme Court has recognized the importance of DLNR's Public Land Trust obligations to Native Hawaiian self-determination and acknowledged that trust acreage is "the *foundation* (or starting point) for reconciliation" between the State and Kānaka.[427] The court anticipated that this reconciliation would include the settlement of Kānaka's "unrelinquished claims" to land.[428] Thus, at a minimum, to fulfill the final value, the court could recognize that Pōhakuloa is not only culturally and environmentally sacred, but it is also a vital land base for self-determination. The court would also need to consider the military's annihilation of Kaho‘olawe, Waikāne, and Mākua, as well as DLNR's willingness to passively allow the United States to obliterate Pōhakuloa. This cultural and historical context reveals that ensuring—rather than merely assessing—U.S. compliance is necessary.

These are just a few examples of ways the court could have deployed the Four Values to inch closer to restorative justice for Pōhakuloa and Kānaka. The value of this framework lies in its ground-level applicability: regardless of the political, economic, social, or historical constraints of any case, analyzing impacts on cultural integrity, land and natural resources, health and well-being, and self-determination will bring an action closer to conceptualizing "justice" for impacted communities. Deploying the Four Values is crucial to meaningfully analyzing an action's impact on Kānaka, especially in difficult cases with vast cultural, environmental, and political implications. All Hawai‘i residents benefit from the preservation of delicate ecosystems and restoration of ʻŌiwi culture, which make these islands unlike any other place in the world. DLNR also stands to benefit from deploying this framework because meaningful engagement with the values operationalizes the duty to aloha ʻāina, which agencies must fulfill to be pono (balanced, just) and avoid future litigation.[429] Without contextualizing their inquiries, agencies and courts—even those seeking to advance heal-

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[425] Kānaka have successfully reclaimed the Wao Kele o Puna rainforest on Hawai‘i Island, Waimea Valley on O‘ahu, and Kaho‘olawe Island. MacKenzie et al., *supra* note 210, at 37. These land reclamations were acts of environmental preservation and also "hard-fought efforts to restore to Native Hawaiians a measure of self-determination, cultural restoration, and economic self-sufficiency." *Id.* at 79.

[426] Whether the Plan would seek to ensure compliance or merely assess compliance was disputed. *Compare* Plaintiffs' Objections to Defendants' February 14, 2020 Position Statement at 5–6, Ching v. Case, 449 P.3d 1146 (Haw. Cir. Ct. Feb. 28, 2020) (No. 14-1-1085-04 GWBC) *with* Defendants' Position Statement Re: Court-Ordered DLNR Management Plan for Leased Lands at Pohakuloa, *supra* note 411, at 2–3.

[427] Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp., 177 P.3d 884, 902 (Haw. 2008), *rev'd and remanded sub nom.* Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163 (2009) (reversed on other grounds) (emphasis added).

[428] *Id.*

[429] *See* Ching, 449 P.3d at 1183.

ing—will continue to struggle with what restorative justice and the duty to aloha ʻāina means in practice, and Kānaka communities will remain in colonization's shadow.

VI. Conclusion

Ching v. Case's ruling that Pōhakuloa's sacred ʻāina is both part of the Public Land Trust of article XII, section 4 and also a Public Trust resource under article XI, section 1 is path-forging on multiple levels. It has the potential to usher in a new era of more comprehensive resource management that embraces aloha ʻāina as both a best praxis and a fiduciary duty, opening the door for future decisions grounded in place-based context and Indigenous cultural practice. Unfortunately, a detailed analysis of the decision and resulting Management Plan exposes the fact that the legal process struggles to deliver justice for Native communities, especially in complex cases with environmental and cultural components. Contextual legal analysis, and the Four Values of Restorative Justice in particular, offer the best hope of delivering on the promise of restorative justice and operationalizing the duty to aloha ʻāina. In the same way that poʻe aloha ʻāina such as Uncle Kū and Aunty Maxine have magnetized an entire self-determination movement, we are hopeful that judges and other decisionmakers "imbued with aloha for their land can pass on their aloha" to others.[430]

[430] *Ka Mana o Ka Mageneti*, *supra* note 5, at 7 ("Ua hiki i nā mākua i piha i ke aloha i ka ʻāina e ʻānai aku i ka ʻume e ke aloha i ka ʻāina iloko o kā lākou mau keiki a lilo kçlā mau keiki i mau keiki kaulana no ko lākou ʻāina makuahine.").