

An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation

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I. INTRODUCTION

This article explores indigenous peoples’ proactive responses to the deleterious impacts of climate change by deconstructing how native peoples claim and realize an indigenous right to environmental self-determination.¹ Responses to climate change must be driven by native peoples’ choices. But those choices will inevitably entail interaction with state, local, or tribal agencies, private businesses, and non-indigenous residents. In large part, the local legal regime’s handling of natural resources and indigenous peoples’ claims will frame these

1. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625 (2007) [hereinafter Tsosie, *Indigenous People and Environmental Justice*] (outlining the indigenous right to environmental self-determination). The indigenous right to environmental self-determination includes indigenous peoples’ “right to survive as a distinct people and the right to restrain national governments from undertaking policies that would jeopardize their continued physical or cultural survival.” *Id.* at 1665. See also *infra* Part IV.A (detailing this right).

interactions, particularly when such claims clash with western-imposed values and practices.² That clash, even today, is nearly always about more than competing land or water uses. It is steeped in a history of conquest, confiscation, cultural suppression, betrayal, and halting reparative initiatives.³

For this reason, native peoples' claims to land, water, and other resources are most appropriately framed not simply as "environmental" issues, but, more aptly, as "environmental justice" issues.⁴ When an indigenous group and the local legal regime interact around environmental justice, the tenor and even outcome of those interactions potentially turn upon the extent to which *restorative justice* underpins local laws.⁵ This becomes crucial. A local legal regime's embrace of restorative justice principles in its dealings with native peoples (even in general terms) creates a key opening for shaping those interactions and related decision-making according to international human rights norms of self-determination for indigenous peoples.⁶ In this context, the

2. "Local" is used broadly to encompass state, municipal, city, and tribal governments. *See also infra* Part III (outlining one relevant legal regime). The terms native and indigenous will be used interchangeably throughout this article.

3. *See generally* Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986) (describing the history of America's physical and cultural genocide of native people and how that shaped Indian law's legal and political climate).

4. *See, e.g.,* Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RES. & ENV'T 37, 38 2007 [hereinafter MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*] ("For many indigenous peoples, environmental justice is thus largely about cultural and economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment."). The United States Environmental Protection Agency defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." *Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <http://www3.epa.gov/environmentaljustice> (last visited Jan. 12, 2016). *See infra* Part II.A and note 19 for discussion on how environmental justice differs for indigenous peoples.

5. Restorative justice seeks to transform the way society thinks about how to reconcile wrongful acts with an emphasis on repairing injustice. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 162 (2007) (reviewing criticisms of restorative justice and empirical assessments examining its effectiveness). *See also* MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 4, at 38 (For indigenous people, including Native Hawaiians, restorative justice "is in large part about doing justice through reclamation and restoration of land and culture."); *infra* Part III. *See generally* RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH (Sheila M. Murphy & Michael P. Seng eds., 2015). Some international human rights norms "enjoy universal protection by customary international law across all boundaries and civilizations." *What Are Human Rights?*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (last visited Jan. 17, 2016).

6. *See* S. James Anaya, *The Native Hawaiian People and International Human Rights Law*:

question is: as a matter of environmental justice for indigenous peoples, do state and local governments have an affirmative restorative justice obligation to address the deleterious impacts of climate change? And, if so, what does that obligation look like?

This article proffers 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 climate change.⁷ More specifically, it examines Native Hawaiians'⁸ potential deployment of local laws that embody restorative justice principles to fashion meaningful remedies for the longstanding environmental and cultural damage from a history of colonialism and a present and future of climate change. For indigenous peoples, restorative justice is a cornerstone of redress because the harms suffered are not simple unequal treatment (entailing the remedy of equal treatment), but rather the loss of land, culture, health, and self-governance. So justice is not so much about seeking equality, but the restoration of those things wrongly taken or destroyed.⁹

This notion of restorative justice is imperative because it links environmental justice for native peoples to principles of self-determination. As a fundamental expression of restorative justice, self-determination is essential to this task to begin to heal the harms flowing from colonization. It is critical, in this context and others, because indigenous peoples are seeking to remedy cultural destruction, land dispossession, the loss of self-governance, and more. Preeminent Native American legal scholar Rebecca Tsosie opened the door to an indigenous right to environmental self-determination by framing climate change as an environmental justice issue for native peoples and implicating the international human right of self-determination as crucial to addressing it.¹⁰

Toward a Remedy for Past and Continuing Wrongs, 28 GA. L. REV. 309 (1994) (explaining the import of international human rights norms of self-determination for indigenous people and Native Hawaiians in particular).

7. See *infra* Parts IV, V (proffering and applying an analytical framework).

8. See *infra* Parts IV, V. Native Hawaiian, native Hawaiian, Hawaiian, Kānaka Maoli, and Maoli are used interchangeably and without reference to blood quantum. Kānaka Maoli or Maoli is the indigenous Hawaiian name for the population inhabiting Hawai'i at the time of the first western contact. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (1971) at 118 [hereinafter HAWAIIAN DICTIONARY] (noting that Kānaka Maoli historically referred to a full-blooded "Hawaiian person").

9. See, e.g., MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 4, at 38-42, 79.

10. See, e.g., Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1627-28.

One way to do so, as developed in an earlier article,¹¹ is for decision-makers to focus on four realms of self-determination for native peoples: (1) cultural integrity; (2) lands and other natural resources; (3) social welfare and development; and (4) self-government.¹² These realms or values are a starting point for analysis because they synthesize international human rights notions of self-determination for formerly colonized peoples. Each value is a salient dimension of restorative justice for native peoples. And, together, they comprise an analytic framework for the development of affirmative measures to redress the consequences of colonization, including climate change.¹³

All of this is central to Native Hawaiian cultural survival today and into the future. For Kānaka Maoli and other indigenous peoples, climate change imperils both traditional homelands and native identity.¹⁴ By employing this developing framework to assess a proposed action's effects on each of the four realms of self-determination, state, county, and indigenous decision-makers can begin to shape environmental justice for native peoples.¹⁵ Given colonialism's destructive impulses, this human rights-infused contextual analysis can guide the actual interactive dynamics of local decision-making, paying special attention to the value choices and interests implicated by each potential outcome.¹⁶ This approach integrates history into a larger analytic

11. See D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 137 (2011) [hereinafter Sproat, *Wai Through Kānāwai*] (deploying for the first time Professor Anaya's four values as an analytical framework to interrogate environmental justice issues affecting indigenous peoples).

12. Anaya, *supra* note 6, at 342-60 (fusing international human rights principles of self-determination to identify four analytical categories that are both customarily significant and key dimensions of restorative justice for indigenous peoples in general and Kānaka Maoli in particular); see also *infra* Part IV.C (detailing the four values).

13. See *infra* Parts IV, V (proffering and applying an analytical framework).

14. See *supra* note 8 (defining Kānaka Maoli). See also CLIMATE CHANGE AND PACIFIC ISLANDS: INDICATORS AND IMPACTS: REPORT FOR THE 2012 PACIFIC ISLANDS REGIONAL CLIMATE ASSESSMENT xi (Victoria W. Keener et al. eds., 2013) [hereinafter CLIMATE CHANGE AND PACIFIC ISLANDS].

15. Attempts to address this damage often epitomize the clash between western-imposed values and practices and indigenous lifeways. That clash underscores both the environmental justice aspects of climate change and the importance of self-determination in crafting meaningful responses by native people in concert with local decision-making bodies. See, e.g., Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 359 (2006); Sproat, *Wai Through Kānāwai*, *supra* note 11; see also *infra* Parts IV.C, V (deconstructing the four values).

16. Contextual analysis exposes how a narrow, mechanistic approach to issues prevents society from internalizing the real injustice to historically disadvantaged groups, including indigenous peoples. It shifts the framework to expose decisions' true results by assessing what is really going on, what is at stake, and how decisions implicate power and status. See Juan Perea et al., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 3-4 (2000) (articulating

framework that has the potential to craft bona fide restorative justice responses to climate change's real-life impacts.

Indeed, because of a pro-sovereignty movement that included Native Hawaiian political and legal advocacy, Hawai'i's legal regime now embraces, directly and indirectly, principles of restorative justice for Native Hawaiians. That embrace is manifested collectively in sections of Hawai'i's constitution, local statutes, administrative regulations, and court decisions. And it reflects a broadly stated acknowledgment of the persisting cultural and environmental injuries to Hawai'i's indigenous people, as well as a generally expressed commitment to preserving that which remains and restoring what was wrongly taken or destroyed. This local legal regime's embrace of restorative justice offers an opening for carefully crafted claims to Kānaka Maoli self-determination as a basis for compelling state and local government action to facilitate indigenous efforts to address climate change's caustic impacts.

At bottom, by employing and refining this framework, this article speaks not only to Native Hawaiians, but also to indigenous peoples around the globe fighting for environmental justice. It provides insight into the significance of preliminary political work in infusing notions of restorative justice into local legal regimes—domestic law openings that later, through targeted advocacy, become portals for introducing international human rights norms of self-determination.

This strategic jurisprudential approach has yet to be fully developed in the context of global climate change. Doing so provides one example of how native people can import international norms into local laws and then deploy those laws to some advantage. It also makes human rights norms legally relevant at the domestic level. This is especially pertinent to indigenous peoples such as Native Hawaiians who have not been officially recognized by governmental powers.¹⁷ In short, this approach

tools of critical inquiry); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post Civil-Rights America*, 95 MICH. L. REV. 821 (1997) (offering a critical race praxis framework that integrates progressive race theory with frontline justice practice).

17. For Kānaka Maoli, the challenge of addressing the impacts of climate change is further complicated by the fact that “[a]lthough the federal and state governments recognize their status as indigenous peoples and extend certain political and legal rights, Native Hawaiians do not enjoy the same status as ‘federally recognized’ tribal governments[.]” Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 79, 81 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013) [hereinafter Tsosie, *Comparative Models of Sovereignty*]. Given this distinction, Kānaka Maoli do not yet “have the ability to regulate their lands and resources as distinct governments, nor do they have the ability to receive statutory delegations of federal authority, which would allow them to exercise meaningful control over air, water, or land resources.” *Id.* at 82. Despite the lack of federal recognition, Kānaka Maoli “possess cultural forms of sovereignty, even though they lack the same political status as federally recognized

to guide, and possibly compel, local decision-makers to proactively combat climate change provides a broad template for infusing international human rights norms into local laws and embracing restorative justice to effect the indigenous right to environmental self-determination.

Below, Part II explains how climate change is an environmental injustice for indigenous peoples, provides cultural and historical context for the relationship between Kānaka Maoli and native resources, and details some of climate change's impacts on Maoli communities and culture. Part III deconstructs restorative justice as well as the aspects of Hawai'i's State Constitution, which expressly, if generally, protect native rights and practices. Part IV employs international human rights norms of restorative justice and indigenous cultural values to guide the interpretation of decision-makers' duties to proactively respond to climate change devastation in ways that are consistent with and respectful of indigenous culture and lifeways. Finally, Part V deploys this developing framework to analyze two Hawai'i controversies—protection of kalo and pa'akai cultivation—that exemplify how native peoples can realize the indigenous right to environmental self-determination at the local level.¹⁸

II. CLIMATE CHANGE AND ITS IMPACTS ON NATIVE PEOPLES AND RESOURCES

A. *Climate Change and Environmental Injustice for Indigenous Peoples*

Climate change is simply the latest environmental injustice that native peoples must grapple with, exacerbating a long and painful history of cultural and ecological devastation due to significant harms imposed by colonization. Although many associate environmental justice with the siting of toxic facilities in low-income communities or communities of color, for “indigenous peoples, environmental justice is mainly about cultural and economic self-determination practices and belief systems that connect their history, spirituality, and livelihood to

Indian tribes. Cultural sovereignty is a tool to protect native rights to language, religion, and culture, including traditional ecological knowledge.” See Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW: A TREATISE 264, 303-23 (Melody Kapilialoha MacKenzie et al. eds., 2015) (explaining the processes for federal and other recognition).

18. Kalo (*Colocasia esculenta*) is a staple food, but it is also revered like an elder sibling. See E.S. CRAIGHILL HANDY, ET. AL., NATIVE PLANTERS IN OLD HAWAI'I: THEIR LIFE, LORE & ENVIRONMENT 69-118 (4th ed. 1995) (detailing the practices and culture of kalo cultivation in ancient Hawai'i, including the role of kalo in Kānaka Maoli society). Kalo is “taro,” and pa'akai is “salt.” HAWAIIAN DICTIONARY, *supra* note 8, at 115, 283.

the natural environment.”¹⁹

Recent reports estimate that millions of people across the world will be forced to relocate as a result of rising seas, flooding, drought, and increased storms.²⁰ In this context, climate change’s impacts, “while problematic for all peoples, fall[] disproportionately on Native peoples in the regions such as the Arctic and Pacific, where the environment is closely tied to indigenous lifeways.”²¹ In many cases, simply accepting the inevitability of global warming and adapting “will prove genocidal for many groups of indigenous people.”²² From Papua New Guinea, to the Arctic, to Bangladesh, “loss of homeland is already occurring and may accelerate as slow-onset and sudden disasters due to climate change compromise human habitats.”²³ Because indigenous peoples share a spiritual and cultural connection to ancestral resources, any such loss will result in the loss of culture.²⁴ For many, climate change threatens the very survival of entire territories and peoples.²⁵ Communities in

19. Eric K. Yamamoto & Jen-L. W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 311 (2001). See generally Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1164 (1994) (deconstructing environmental justice issues for native peoples).

20. Hannah Barnes, *How Many Climate Migrants Will There Be?*, BBC NEWS (Sept. 2, 2013), <http://www.bbc.com/news/magazine-23899195>.

21. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1628.

22. *Id.* at 1675.

23. Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era*, CLIMATE L., Fall 2011, at 2, 345-74, 348.

24. *Id.* at 360-61 (discussing Pacific Island cultures’ vital connection to land). Professor Tsosie explains:

One of the greatest evils of European imperialism and the United States’ expansion into the West during the nineteenth century was the forcible appropriation of indigenous lands and the wholesale removal of indigenous people. The genocide of indigenous peoples was justified by policymakers as being necessary for the triumph of European civilization and for the achievement of the “manifest destiny” of the United States. Contemporary policymakers must not repeat this dynamic in the context of climate change policy.

Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1674 (footnote omitted).

25. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1636-39 (describing the impacts on small Pacific islands). Sheila Watt-Cloutier, former chair of the Inuit Circumpolar Council, explained that the group filed a petition to the Inter-American Commission on Human Rights on behalf of all Inuit from the United States and Canada whose traditional lands are threatened by climate change out of a commitment to cultural survival: “Inuit are an ancient people. Our way of life is dependent upon the natural environment and the animals. Climate change is destroying our environment and eroding our culture. But we refuse to disappear. We will not become a footnote to globalization.” Press Release, Inuit Circumpolar Conference Can., Inuit Petition Inter-American Comm’n on Human Rights to Oppose Climate Change Caused by

threatened areas are seriously considering relocation as a last resort, and many are already moving.²⁶ But forcing adaptation or migration amplifies longstanding injustice because “from an indigenous perspective, justice can only be achieved by an affirmative commitment to protect indigenous peoples within their traditional lands.”²⁷ The decision to stay or move raises significant political, legal, and cultural issues and, for some, neither adaptation nor migration is an option because indigenous identity and entire cultures and ways of life are inextricably bound to specific lands and resources.²⁸

Professor Tsosie is a leading scholar examining the harmful impact of climate change on indigenous peoples. Based on her review of empirical studies, along with her insight as a Native American academic, she concluded that the deleterious impacts of climate change on native

the U.S. (Dec. 7, 2005), <http://www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html>.

26. Marissa Knodel, *Conceptualizing Climate Justice in Kivalina*, 37 SEATTLE U. L. REV. 1179, 1185 (2014) (explaining that in the northwestern Alaska village of Kivalina, “[d]eclines in sea ice, increases in the frequency of sea storms, and melting permafrost have accelerated erosion of the island to the point where relocation is necessary”).

27. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1676.

28. See Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169 (2008); Ashley Rawlings, *Erosion-Induced Community Displacement in Newtok, Alaska and the Need to Modify FEMA and NEPA to Establish a Relocation Framework for a Warming World*, 5 SEATTLE J. ENVTL. L. 199, 200-01, 209 (2015) (describing various relocation options for the indigenous Newtok community in Alaska and explaining that some Newtok elders do not want to relocate because it will destroy their identity and culture). The choice to relocate raises many difficult issues:

Even community relocation is no panacea, however; it requires substantial resources, identifying an appropriate relocation site, and, for communities [such as many indigenous communities] whose cultural identities are tied to a geographical place, the risk of fundamental cultural disruption. One of the most contested issues will be the choice between protection and retreat. At least in the short term, protected communities avoid dislocation and can maintain social cohesion. . . . The political decision over whether to protect or retreat has significant social justice implications. How will adaptation planners choose which areas to protect and which to abandon? . . . Differences in political power are also likely to determine who receives protection and who must leave.

Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 ENVTL. L. REP. NEWS & ANALYSIS 11125, 11134 (2012) (footnotes omitted). Generally, climate adaptation aims to “realize gains from opportunities or to reduce the damages that result from climate change.” Burkett, *Just Solutions to Climate Change*, at 171 (quoting Neil A. Leary, *A Welfare Theoretic Analysis of Climate Change Inequities*, in FAIRNESS IN ADAPTATION TO CLIMATE CHANGE 155, 155 (W. Neil Adger et al. eds., 2006). “Mitigation, alternatively, describes actions that will slow or constrain climate change.” *Id.*

peoples are extensive and are likely to become increasingly ubiquitous.²⁹ Those effects reverberate through indigenous land, culture, economics, and self-governance. In important respects, they will imperil indigenous peoples' very survival. Her inquiry also revealed that current responses to climate change are sorely inadequate, in part because indigenous peoples often lack the political and financial resources to rectify the issue on their own.³⁰

Tsosie thus examined a broad range of options for indigenous peoples to combat climate change, including the assertion of international human rights norms through domestic law and litigation in different fora.³¹ She concluded that fundamental environmental justice problems such as climate change are best remedied by an indigenous right to environmental self-determination, given the complexity of these matters and that many solutions are often beyond indigenous peoples' reach.³² This right to environmental self-determination is grounded in international human rights norms, and "[i]n the context of climate change policy, recognition of a right to self-determination would impose affirmative obligations on nation-states to engage in a mitigation strategy in order to avoid catastrophic harm to indigenous peoples."³³

In Hawai'i, environmental self-determination starts with Tsosie's insight, but requires further development in light of how international human rights norms interact with broad state legal prescriptions to shape environmental justice for Kānaka Maoli.³⁴ As detailed herein, if self-determination is contextualized as a form of restorative justice, and local laws have embraced restorative justice as a fundamental concept in redressing native peoples' issues, then importing international human rights norms into local laws becomes crucial for decision-makers to begin to address environmental justice impacts and climate change in particular. As set forth in Part IV, *infra*, these values provide apt guidance (steeped in notions of restorative justice) for local decision-makers in Hawai'i and beyond.

29. See Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188 (2009). See also Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1.

30. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1675.

31. See *id.* at 1625.

32. See *id.* at 1674-77.

33. *Id.* at 1674.

34. See Sproat, *Wai Through Kānāwai*, *supra* note 11, at 172-88 (proposing developing an analytical framework for indigenous peoples' environmental justice issues that utilizes international human rights norms); see also *infra* Part IV.

B. *Kānaka Maoli Cultural Survival and the Integrity of Hawai'i's Natural and Cultural Resources*

Some insight into the Native Hawaiian worldview is necessary to begin to comprehend climate change's impacts in Hawai'i and on its indigenous people in particular. As Tsosie observed, "[i]ndigenous peoples and the lands that sustain them are closely linked through ancient epistemologies that organize the universe quite differently than Western epistemology does."³⁵ Understanding the innate spiritual connection that Kānaka Maoli share with native resources provides a crucial foundation for decision-makers and communities to come together to craft proactive policies to address climate change's catastrophic harms. One creation story is in the Kumulipo, the great chant of the cosmos that traces the birth of Kānaka Maoli to the beginning of time in Hawai'i.³⁶

The Kumulipo explains that Maoli descend from akua (ancestors or gods) and are physically related to all living things in the Hawaiian archipelago.³⁷ As younger siblings, Native Hawaiians are bound to their extended family and have a kuleana (responsibility and privilege) to care for Hawai'i's natural and cultural resources.³⁸ Given the familial

35. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1677.

36. HANDY, ET. AL., *supra* note 18, at 74-75. *See, e.g.*, MARTHA WARREN BECKWITH, *THE KUMULIPO: A HAWAIIAN CREATION CHANT* (1972). The Kumulipo is detailed and complex with sixteen wā (intervals) and over 2,000 lines. *Id.* at 37. Although Maoli undoubtedly have ties to extended family throughout Polynesia, the Kumulipo explains that in the beginning there was pō, or darkness, and from this darkness came life. *Id.* at 42-49. Pō gave birth to two children: a son named Kumulipo and a daughter named Pō'ele. *Id.* at 50-93. Through their union, Kumulipo and Pō'ele created the natural world. *Id.* The first child born to them was the coral polyp, which created the foundation for all life in the sea. *Id.* at 55-56. Born in continuing sequential order were all of the plants and animals in Hawai'i nei, which became 'aumakua or guardians that continue to watch over Kānaka Maoli. *Id.* at 50-93. Pō had many children that comprised all aspects of Hawai'i's natural world. *Id.* at 37. After all of the Hawaiian Islands were born, Wākea (Skyfather) had a child with Ho'ohōkūkalani, which was stillborn. *Id.* at 117. They buried it outside of their home and a kalo plant grew from its grave. *Id.* Wākea and Ho'ohōkūkalani had a second child, named Hāloa in honor of its elder sibling, which was the first Kānaka Maoli—the first human child born in Hawai'i. *Id.* This summary omits some details; for more information, review a copy of the text itself.

37. *See* BECKWITH, *supra* note 36, at 117 (referencing the ancestry of the Maoli).

38. *See* MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 4, at 37.

The land, like a cherished relative, cared for the Native Hawaiian people and, in return, the people cared for the land. The principle of *mālama 'āina* (to take care of the land) is therefore directly linked to conserving and protecting not only the land and its resources but also humankind and the spiritual world as well.

relationship between Maoli and the native environment, elder siblings support younger ones by providing the resources necessary to sustain human and other life.³⁹ In return, Kānaka Maoli care for their elder siblings by managing those resources as a public trust for present and future generations.⁴⁰

This complex, reciprocal relationship was the foundation of traditional Kānaka Maoli society.⁴¹ Although management systems varied between islands and evolved over time, in general, terrestrial and marine resources were overseen by a class of ali'i (leaders) and actively managed by maka'āinana (people of the land).⁴² Ali'i "administered the land and other resources on behalf of the gods. This trust concept continued throughout the political hierarchy and was reinforced by reciprocal rights and obligations of each stratum of society."⁴³ Although maka'āinana may have resided in one ahupua'a (traditional land division that roughly approximates a watershed), they accessed other areas beyond the boundaries of that ahupua'a to gather food or other resources necessary to survive and thrive.⁴⁴ At bottom, there is an "inseparable

Id. See also HAWAIIAN DICTIONARY, *supra* note 8, at 179 (kuleana means responsibility and privilege).

39. See MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 4, at 37.

40. *Id.* For thousands of years, Hawai'i was governed by custom and tradition. When these laws were reduced to writing, the first written constitution of the Hawaiian Kingdom declared that the land along with its resources "belonged to the Chiefs and people in common, of whom [the King] was the head and had the management of landed property." HAWAII STATE ARCHIVES, TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA II, 11-12 (1842), <http://punawaiola.org/saxon/SaxonServlet?source=http://Punawaiola.org/fedora/get/Punawaiola:71031842001/XMLText&style=http://Punawaiola.org:8080/KDA/Transforms/KDAGetTransform.xml> (stating, simply, a policy of public land management, with no reference to the spiritual underpinnings).

41. MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 8-10.

42. *Id.* at 8-9. See also DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 25-29 (2007) (providing an overview of the traditional resource management system). For more information on the 'aha system of traditional land management, see DVD: Ā MAU Ā MAU: TO CONTINUE FOREVER (Produced by Nālanī Minton, 2000) [hereinafter Ā MAU Ā MAU].

43. See MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 9.

44. See DAVID M. FORMAN & SUSAN K. SERRANO, HO'OHANA AKU, A HO'OLA AKU: A LEGAL PRIMER FOR TRADITIONAL AND CUSTOMARY RIGHTS IN HAWAII 12-14 (2012) [hereinafter HO'OHANA AKU, A HO'OLA AKU]. Ahupua'a are land divisions that roughly approximate watersheds; they divide the Hawaiian Islands like pieces of a pie, generally following natural boundaries (such as mountain ridges) and continuing into the ocean. See PAUL F. NAHOA LUCAS, A DICTIONARY OF HAWAIIAN LEGAL LAND-TERMS 4 (1995). When adverse climate conditions destroyed crops or made fishing difficult, gathering for food "became the primary

spiritual—and genealogical—connection between Native Hawaiians and their land and environment . . . the land, or ‘āina, is not a mere physical reality,” it is integral to social, cultural, and spiritual life.⁴⁵

Since the documented arrival of foreigners beginning in about 1778, traditional Maoli society has changed completely.⁴⁶ The decimation of Native Hawaiians by disease, imposition of industrial agriculture, and illegal overthrow of the Hawaiian Kingdom by the United States military inflicted significant cultural harms, many of which remain unaddressed today.⁴⁷

For example, the arrival of westerners in Hawai‘i facilitated physical and cultural genocide, as was the case with indigenous peoples the world over.⁴⁸ Living in the most isolated island chain in the world made the native population particularly susceptible to introduced diseases.⁴⁹ Kānaka Maoli society was decimated, with the indigenous population plummeting from about one million to less than 40,000 within the first

means of survival.” HO‘OHANA AKU, A HO‘ŌLA AKU, *supra* note 44, at 5. Resident chiefs monitored gathering practices, which helped to manage and conserve resources. *Id.* In general, subsistence activities “serve as a bridge between a community’s efforts to feed and sustain its families—its economic life—and its cultural and spiritual life.” Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples’ Subsistence Rights*, 58 CLEV. ST. L. REV. 273, 337 (2010).

45. See MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 4, at 37.

46. Anaya, *supra* note 6, at 312-19 (detailing changes in Maoli society since the arrival of foreigners); JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, *DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887* (2002) (same); NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* (2004) (same); HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I* (1993) (same).

47. See, e.g., Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) [hereinafter *Apology Resolution*]; OSORIO, *supra* note 46, at 44-73, 250-60 (detailing cultural harms); TRASK, *supra* note 46 (same); SILVA, *supra* note 46 (same). As one example, many Hawaiians found they no longer could farm or gain access to the traditional gathering areas in the mountains and the ocean that once supported them. Other Hawaiians were left landless. As a result, many were forced to move to urban areas to seek employment. They abandoned traditional subsistence living, which had supported the Hawaiian culture for centuries. Anaya, *supra* note 6, at 315 (quoting NATIVE HAWAIIAN RIGHTS HANDBOOK 44 (Melody Kapilialoha MacKenzie ed., 1991)).

48. See OSWALD A. BUSHNELL, *THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAI‘I* 147 (1993) (detailing the impact of foreign diseases on the Maoli population); see also Anaya, *supra* note 6, at 315 (quoting NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 47, at 44) (stating that western encroachment engendered conditions such that many believed the Native Hawaiian race would be exterminated). See generally DAVID E. STANNARD, *BEFORE THE HORROR: THE POPULATION OF HAWAI‘I ON THE EVE OF WESTERN CONTACT* (1989) (discussing the decline of the Native Hawaiian population).

49. See BUSHNELL, *supra* note 48, at 134-54 (detailing the impact of foreign diseases on the Maoli population). See generally STANNARD, *supra* note 48 (discussing the Native Hawaiian population).

century of contact.⁵⁰ Foreigners also employed other tools of colonialism; for instance, English was imposed as the language of instruction in schools and cultural activities, including the hula (ceremonial chant and dance), were banned.⁵¹ Critically, foreigners displaced Kānaka Maoli from native lands.⁵² A system of private property was instituted over a period of years beginning in about 1845.⁵³ Despite best intentions on the part of the ali‘i, many did not understand this new system, and it resulted in stripping most Maoli of title to ancestral resources.⁵⁴ In the end, less than half of one percent of Hawai‘i’s total acreage was distributed to maka‘āinana via this kuleana process and property quickly passed to foreign and largely American interests.⁵⁵ In addition to severely restricting Native Hawaiians’ ability to continue subsistence lifestyles, alienation from land and water resources had a devastating psychological effect given Kānaka Maoli’s strong spiritual and familial connection to the environment.⁵⁶ Ultimately, these harms culminated in the 1893 overthrow of Hawai‘i’s sovereign Kingdom by a handful of missionary descendants assisted by the United States military.⁵⁷

Eventually, an investigation established by the president and

50. BUSHNELL, *supra* note 48, at 134-54 (detailing the impact of foreign diseases on the Maoli population).

51. See Richard R. Day, *The Ultimate Inequality: Linguistic Genocide*, in LANGUAGE OF INEQUALITY 163, 166-67 (Nessa Wolfsman & Joan Manes eds., 1985); Noenoe K. Silva, *He Kānāwai E Ho‘opau I Na Hula Kuolo Hawai‘i: The Political Economy of Banning the Hula*, in 34 THE HAWAIIAN JOURNAL OF HISTORY 29-48 (2000).

52. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI‘I? 30-53 (2008). See generally LILIKALĀ KAME‘ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 8-16 (1992) (documenting the displacement of Maoli from native lands).

53. KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION (2014). For a detailed explanation of the Māhele process, which “transformed the traditional Land system from one of communal tenure to private ownership on the capitalist model,” see KAME‘ELEIHIWA, *supra* note 52, at 8-16.

54. KAME‘ELEIHIWA, *supra* note 46, at 9-11.

55. See Julian Aguon, *Native Hawaiians and International Law*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 357 (stating that “[b]y the latter part of the century, foreigners, mostly American, owned more than a million acres and leased another three-quarters of a million acres of land.”); MCGREGOR, *supra* note 42, at 37-40; see also Donovan C. Preza, *The Empirical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848* at 138-43 (May 2010) (unpublished M.A. thesis, Univ. of Hawai‘i at Mānoa) (on file with author) (explaining that the overthrow of the Hawaiian Kingdom ultimately led to the dispossession of Maoli from traditional homelands as non-Maoli disproportionately benefitted from government land sales).

56. Anaya, *supra* note 6, at 312-19; Paul Nāhoa Lucas, Alan T. Murakami & Avis Kuuipoleialoha Poai, *Hawaiian Homes Commission Act*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 181-82.

57. Apology Resolution, *supra* note 47.

conducted by former Congressman James Blount “concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government.”⁵⁸ Then-President Grover Cleveland characterized the exploits of the United States’ agents as an “act of war” and determined that “a substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.”⁵⁹ A century later, in 1993, Congress “acknowledge[d] the historic significance of the illegal overthrow of the Kingdom of Hawaii[,]” apologized for the United States’ role, and committed “to support reconciliation efforts.”⁶⁰ More than twenty years after that apology, however, considerable harms persist—especially in the realms of native land, culture, social welfare, and self-determination.⁶¹ The damage that flows from this historic injustice is, thus, the foundation for present-day restorative justice initiatives.

As detailed below, climate change’s impacts on Hawai‘i’s environment will likely exacerbate already significant challenges to Kānaka Maoli culture, identity, social welfare, and self-determination efforts. Because indigenous culture is inextricably bound to Hawai‘i’s natural environment, place-based practices cannot continue without the resources to support them. These cultural practices are vital to connect contemporary Kānaka Maoli with their ancestors. They are also crucial pieces of a reborn, and thriving, indigenous economy.⁶² In the face of

58. *Id.*

59. *Id.* See U.S. President Grover Cleveland’s Message to Senate and House of Representatives (Dec. 1, 1893), in REPORT OF THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE (1893), <http://www.hawaii-nation.org/cleveland.html>.

60. Apology Resolution, *supra* note 47.

61. Maoli today face many social challenges as a result of the harms of colonization. Kānaka Maoli are disparately impacted by morbid obesity, substance abuse, depression and other mental illnesses, diabetes, respiratory illness, heart disease, and cancer mortality. BROOKE S. EVANS, OBESITY IN HAWAII: HEALTH POLICY OPTIONS 3, 6, http://www.publicpolicycenter.hawaii.edu/projects-programs/_reports-briefs/obesity-white-paper.pdf. Further, Maoli are disadvantaged socioeconomically. S. M. KANA’IAUPUNI ET AL., INCOME AND POVERTY AMONG NATIVE HAWAIIANS: SUMMARY OF KA HUAKA’I FINDINGS 1 (2005), http://www.ksbe.edu/_assets/spi/pdfs/reports/demography_well-being/05_06_5.pdf. For example, Kānaka Maoli families in Hawai‘i have the lowest mean family income of all major ethnic groups in the state. *Id.* at 2. In addition, Maoli are overrepresented and disparately treated in the criminal justice system in Hawai‘i. See OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 10-13 (2010), http://19of32x2yl33s8o4xza0gf14.wpengine.netdna-cdn.com/wp-content/uploads/2014/12/ir_final_web_rev.pdf.

62. This is not to say that traditional practices must be done in a traditional manner. Indeed, indigenous gathering, fishing, and other practices have evolved to take advantage of modern technology. See MCGREGOR, *supra* note 42, at 15. Even with developments in tools and

global climate change, and in the spirit of indigenous self-determination, many Kānaka Maoli continue to live and grow native culture, which requires access to the resources that support traditional subsistence, cultural, and religious practices.⁶³

C. Climate Change's Projected Impacts on Traditional and Customary Practices

For Kānaka Maoli and others who rely on natural and cultural resources to support their quality of life, climate change is a significant peril.⁶⁴ In Hawai'i, not unlike other places around the world, scientists have already documented substantial impacts, which are affecting every aspect of life. As a recent comprehensive study of climate change impacts on pacific islands noted:

Freshwater supplies for natural systems, as well as communities and businesses, are at risk. Food security is threatened through impacts on both agriculture and fisheries. The built environment is also at risk from coastal flooding and erosion as sea levels incrementally increase. Loss of habitat for endangered species . . . is expected along with increased coral bleaching episodes, expansion of avian malaria to higher elevations, and changes in the distribution and survival of the area's marine biodiversity. Over the coming decades, impacts are expected to become more widespread and more severe.⁶⁵

But what does this really mean for Hawai'i and its residents? Given the importance of natural resources to the perpetuation of Maoli culture, this section focuses on climate change's projected impacts on traditional and customary Native Hawaiian practices from ma uka (mountains) to ma kai (sea).⁶⁶

techniques, changing weather patterns threaten the very existence of natural resources themselves, which cannot be reversed.

63. *See id.*

64. *See* UNIV. OF HAW. AT MĀNOA SEA GRANT COLL. PROGRAM, CLIMATE CHANGE IMPACTS IN HAWAI'I: A SUMMARY OF CLIMATE CHANGE AND ITS IMPACTS TO HAWAI'I'S ECOSYSTEMS AND COMMUNITIES (2014), <http://seagrant.soest.hawaii.edu/sites/default/files/publications/smfinal-hawaiiclimatechange.pdf> [hereinafter CLIMATE CHANGE IMPACTS IN HAWAI'I]. Because the impacts of climate change in Hawai'i are unique, it "is important to focus on the localized impacts . . . to adequately understand and prepare for the changes to come." *Id.* at 4.

65. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at xi.

66. In the interest of succinctness, the following sections include illustrative (not exhaustive) examples of climate change's impacts on Maoli culture and practices.

1. *Ma uka: Impacts on Upland Forests and Maoli Cultural Practices.*

The importance of Hawai'i's native forests extends beyond their borders—any damage to this sacred space will likely have cascading impacts throughout the ahupua'a.⁶⁷ Not only do healthy forests anchor the soil to prevent large amounts of sediment from washing off mountains into the ocean and destroying coral reefs and coastal fishing resources, forests also feed the streams that enable agriculture to flourish and sustain indigenous and other communities.⁶⁸

The Hawaiian archipelago contains forty-eight Native Hawaiian forest and woodland types where over 175 species of native trees thrived, almost none of which are found anywhere else on Earth.⁶⁹ Slowly, traditional horizontal land divisions—such as wao akua or wao kānaka—that were marked by changes in plant life, are shifting upward as a result of climate change, in part due to higher temperatures and increased drought.⁷⁰ Between 90 and 95 percent of Hawai'i's dryland forests have already disappeared in the last century.⁷¹ And, some wet native ecosystems at higher elevations may cease to exist by 2100.⁷²

67. DEP'T OF LAND & NAT. RESOURCES, *THE RAIN FOLLOWS THE FOREST: A PLAN TO REPLENISH HAWAII'S SOURCE OF WATER 2* (2011), <http://dlnr.hawaii.gov/rain/files/2014/02/The-Rain-Follows-the-Forest.pdf>. In recognition that protecting mauka forests is absolutely critical for the health of all ecosystems, the State Department of Land and Natural Resources ("DLNR") has embarked on an ambitious watershed protection program called "The Rain Follows the Forest" to prevent and manage the growing presence of invasive alien species and protect against the impacts of climate change. See *The Rain Follows the Forest*, DEP'T OF LAND & NAT. RESOURCES, <http://hawaii.gov/dlnr/rain> (last visited July 12, 2015).

68. THE NATURE CONSERVANCY OF HAW., *LAST STAND: THE VANISHING HAWAIIAN FOREST 5-6* (Grady Timmons ed., 2003) [hereinafter *LAST STAND*]. Because neither the online nor the hard copy include page numbers, the pagination here mirrors the book's natural order.

69. Sam 'Ohukani'ōhi'a Gon III, *Forward: Think Mauka*, in *WAO AKUA: SACRED SOURCE OF LIFE*, DIVISION OF FORESTRY & WILDLIFE, DEP'T OF LAND & NAT. RESOURCES x (Frank Stewart ed., 2003).

70. JO-ANN LEONG ET AL., *Chapter 23: Hawai'i and U.S. Affiliated Pacific Islands*, in *CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT*, U.S. GLOBAL CHANGE RESEARCH PROGRAM 543 (J. M. Milillo et al. eds., 2014) [hereinafter *THIRD NATIONAL CLIMATE ASSESSMENT*] ("Existing climate zones on high islands are generally projected to shift upslope in response to climate change."). In general, the rate of warming air temperature in Hawai'i has quadrupled in the last forty years to over 0.3 degrees Fahrenheit per decade, with the increase especially drastic in higher elevations. *CLIMATE CHANGE IMPACTS IN HAWAII*, *supra* note 64, at 21. See also *CLIMATE CHANGE AND PACIFIC ISLANDS*, *supra* note 14, at 55.

71. *What Is a Dryland Forest?*, KA'AHAHUI 'O KA NĀHELEHELE, <http://www.drylandforest.org/what-dryland-forest-1> (last visited May 8, 2016).

72. *CLIMATE CHANGE AND PACIFIC ISLANDS*, *supra* note 14, at 25. For example, Maoli highly valued older or larger trees in the uplands, some of which can no longer be found. PUALANI KANAKA'OLE KANAHELE, *Native Hawaiian Environment*, in *WAO AKUA: SACRED SOURCE OF*

The decline of Hawai‘i’s unique forests as a result of climate change has already significantly altered the distribution and abundance of many native plants and animals.⁷³ Today, three quarters of Hawai‘i’s endemic birds are on the federal endangered species list.⁷⁴ The rapid loss of the palila (*Loxioides bailleui*) provides one example of how the changing climate impacts native birds, which both limits the perpetuation of cultural knowledge across generations and severs the connection between indigenous people and natural and cultural resources.⁷⁵ When the palila’s whistle-like call was heard resounding through the forest, Maoli knew that rain would soon fall.⁷⁶ Heard less and less, the palila’s demise illustrates that “each time we lose another Hawaiian plant or bird or forest, we lose a living part of our ancient culture.”⁷⁷

Forests are a vital system for the continuum of life cycles in Hawai‘i, capturing fresh water in the form of mist and rain, and absorbing and releasing it into streams and aquifers⁷⁸ which eventually feed nearshore marine areas, the ocean, and communities.⁷⁹ Trees house the seeds necessary for regeneration, acting as a food source for insects, birds, animals, and others.⁸⁰ Due to their significance as the source of physical and spiritual nourishment, the misty uplands are called wao akua, or the realm of the gods, sacred to Kū, the god of war and governance.⁸¹ Many of the plants and animals inhabiting the wao akua

LIFE, DIVISION OF FORESTRY & WILDLIFE, DEP’T OF LAND & NAT. RESOURCES 14 (Frank Stewart ed., 2003). A good example of this reverence for upland trees was that for the ‘ōhia lehua (*Metrosideros polymorpha*), considered to be the physical manifestation of Kū, the taking of which was considered a sacred act. LAST STAND, *supra* note 68, at 12.

73. See THIRD NATIONAL CLIMATE ASSESSMENT, *supra* note 70, at 543. Even before climate impacts became apparent, the damage wrought by invasive plants and animals introduced by humans, among other threats, has rendered Hawai‘i’s native forests among the most endangered in the world. LAST STAND, *supra* note 68, at 14.

74. *Paradise for Some, But an Ongoing Extinction Crisis for Birds*, AMERICAN BIRD CONSERVANCY, <https://abcbirds.org/program/hawaii/> (last visited Feb. 15, 2016).

75. KANAHELE, *supra* note 72, at 3. The subalpine dry forest habitat of the palila is one of the most threatened in Hawai‘i, with higher temperatures causing great fluctuation in food sources. *Id.*

76. *Forested Watersheds and Cultural Resources*, HAWAI‘I ASS’N OF WATERSHED P’SHPIS, <http://hawp.org/forested-watersheds-and-cultural-resources/> (last visited July 12, 2015).

77. LAST STAND, *supra* note 68, at 10.

78. The United States Geological Survey (“USGS”) defines an aquifer as “a formation, group of formations, or part of a formation that contains sufficient saturated, permeable material to yield significant quantities of water to wells and springs.” *Aquifer Basics*, U.S. GEOLOGICAL SURVEY, <http://water.usgs.gov/ogw/aquiferbasics/> (last visited July 12, 2015).

79. LAST STAND, *supra* note 68, at 2-3.

80. KANAHELE, *supra* note 72, at 8.

81. GON III, *supra* note 69, at x. See also KANAHELE, *supra* note 72, at 14 (noting that Kānaka Maoli recognized the regenerative energy of the forest, believing that it was necessary to

are considered kinolau (the physical embodiment of spirits).⁸² Entry into the forest, considered a sacred space, required adherence to strict protocol.⁸³ In ancient times, Maoli communities used forest products for housing, clothing, games, adornment, and other medical and spiritual purposes.⁸⁴ Today, many of these practices continue. For example, artisans travel ma uka to gather timber to craft wooden calabashes for storage and food containers.⁸⁵ Lā'au lapa'au (native healing) practitioners venture into forests in search of plants for traditional healing.⁸⁶ Climate change imperils these important ecosystems, and the cultural practices and indigenous lifeways that they enable. The intricate link between the health of Hawaiian forests and the survival of Maoli culture is exemplified by the impact on upland gathering practices related to hula, a traditional dance form.⁸⁷ Healthy forests are essential to the perpetuation of this sacred art that has preserved history through oral tradition since ancient times and holds invaluable significance in contemporary Hawai'i.⁸⁸ Laka, the goddess of hula, is a forest-dweller, whose kinolau are some of the fragrant forest plants used on the kūahu (hula altar).⁸⁹ Although cultural practitioners continue to gather plants for traditional protocols, it is now difficult to find the necessary resources.⁹⁰ For example, the kauila plant (*Colubrina oppositifolia*), used to craft ka lā'au (hula implements), is becoming increasingly rare.⁹¹

leave some some areas alone).

82. *Forested Watersheds and Cultural Resources*, *supra* note 76.

83. *Id.*

84. KANAHELE, *supra* note 72, at 8-11.

85. ALANI APIO, *Giving Back*, in WAO AKUA: SACRED SOURCE OF LIFE, DIVISION OF FORESTRY & WILDLIFE, DEP'T OF LAND & NAT. RESOURCES 84-85 (Frank Stewart ed., 2003).

86. GON III, *supra* note 69, at x. Lā'au Lapa'au is "curing medicine." HAWAIIAN DICTIONARY, *supra* note 8, at 174.

87. See generally, TAMARA TICKTIN ET AL., *Traditional Gathering of Native Hula Plants in Alien-Invaded Hawaiian Forests: Adaptive Practices, Impacts on Alien Invasive Species and Conservation Implications*, ENVTL. CONSERVATION 33(3) 185 (2006) (describing hula).

88. *Id.* (documenting past and current gathering of hula plants, ecological impacts of contemporary gathering practices of native hula species in alien-dominated forests, and relationships between traditional practices and past and modern conservation).

89. PUALANI KANAKA'OLE KANAHELE, KA HONUA OLA: THE LIVING EARTH 123 (2011) [hereinafter KA HONUA OLA]. The kinolau of Kāne is fresh water and sunlight, which affords life and growth to the kinolau of Laka. *Id.* Hi'iakaikapoliopole, literally translated as "causative of growth on or in lava," is a healer responsible for increasing growth among vegetation. *Id.* at 33, 123. Hi'iaka is sister to Pelehonuamea, often referred to as Pele, one of Hawai'i's dominant female akua who governs the volcanic eruptions on Hawai'i Island. *Id.* at xv.

90. TICKTIN ET AL., *supra* note 87, at 189, 191. Some practitioners must eradicate invasive alien plants from desired locations every time they gather. *Id.*

91. *Forested Watersheds and Cultural Resources*, *supra* note 76. For more information on the status and many uses of these plants and others, see NATIVE PLANTS HAWAII,

To perpetuate hula as a cultural practice, these plants, many of them endangered, must be better protected.⁹² After all, “inspiration for hula is received when the plants are present and when the dancer wears the plants for hula.”⁹³

2. *Ma waena: Impacts on Native Hawaiian Traditional Agriculture.*

As water flows from the forest, down through the ahupua‘a, it passes “from the wao akua, the realm of the gods, to the wao kanaka, the realm of man, where it sustained agriculture, aquaculture, and other human activities.”⁹⁴ A number of factors are already combining in a perfect storm with the potential to destroy traditional Maoli agriculture. Scientists predict that the significant decline in rainfall, as well as reduced stream flow and ground water,⁹⁵ will likely parch the land in some areas, while increasing temperatures and rising seas will intensify saltwater intrusion⁹⁶ and flood lowland plains favored for indigenous agriculture.⁹⁷ Each of these documented trends pose serious threats to the replenishment and sustainability of Hawai‘i’s water resources and the cultural practices that they support.⁹⁸

Scientists have verified a significant decrease in Hawai‘i’s rainfall over the past century, with an especially steep decline since 1980,⁹⁹

<http://nativeplants.hawaii.edu/index/> (last visited July 11, 2015).

92. Jacquelyn Carberry, *Hula Plants’ Steward*, HONOLULU STAR BULLETIN (Feb. 8, 2008), <http://archives.starbulletin.com/2008/02/08/features/story04.html>.

93. KANAHELE, KA HONUA OLA, *supra* note 89, at 123. In an age of growing urbanization, hula is “one of the very few remaining activities that tie people to the disappearing native forests.” TICKTIN ET AL., *supra* note 87, at 192.

94. Michael Buck, *Introduction: Rains Always Follow the Forest, in WAO AKUA: SACRED SOURCE OF LIFE*, DIV. OF FORESTRY & WILDLIFE, DEP’T OF LAND & NAT. RES. xiv (Frank Stewart ed., 2003).

95. Ground water is “any water found beneath the surface of the earth, whether in perched supply, dike-confined, flowing, or percolating in underground channels or streams, under artesian pressure or not, or otherwise.” HAW. REV. STAT. § 174C-3 (2014).

96. Saltwater intrusion means displacement of fresh or ground water by the advance of saltwater due to its greater density, usually in coastal and estuarine areas. *Glossary of Climate Change Terms*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/glossary.html> (last visited July 15, 2015).

97. See DOUGLAS CODIGA & KYLIE WAGER, CTR. FOR ISLAND CLIMATE ADAPTATION AND POLICY, SEA-LEVEL RISE AND COASTAL LAND USE IN HAWAI‘I: A POLICY TOOL KIT FOR STATE AND LOCAL GOVERNMENTS 1, 5-6, 12 (2011), http://seagrant.soest.hawaii.edu/sites/default/files/publications/icap-sealevelrisetoolkit_web-1_2.pdf (estimating that Hawai‘i will experience sea level rise of one foot by 2050 and three feet by the end of the century).

98. *See id.*

99. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at 24, 40. Precipitation in Hawai‘i is highly variable, from about eight inches near the summit of Mauna Kea to over 400

which means less fresh water in Hawai'i's streams and aquifers.¹⁰⁰ The downward trend in base flow¹⁰¹ also indicates a decrease in ground water discharge to streams, which implies a decline in overall ground water recharge and storage.¹⁰² This revelation has serious implications for Hawai'i's drinking water supply, 99 percent of which comes from ground water.¹⁰³

Sea level rise will further aggravate this problem by reducing the area available for farming and increasing the salinity of groundwater resources, which provide more than 90 percent of drinking water and about half of the water used for agricultural irrigation on O'ahu,¹⁰⁴ where nearly 70 percent of Hawai'i's population currently resides.¹⁰⁵ Researchers estimate that Hawai'i will experience sea level rise of one foot by 2050 and three feet by the end of the century.¹⁰⁶ This trend, along with changes in rainfall patterns and increased drought, is expected to have grave consequences for Hawai'i farmers and food security,¹⁰⁷ as well as disastrous impacts on some of the most important

inches on the windward slope of Haleakalā, Maui, and differs significantly between the windward (wet) and leeward (dry) sides of the island. *Id.* at 9, 40. Regardless of this variation, over the last century studies have documented a general downward trend statewide. *Id.* at 39-40.

100. For USGS' definition of "aquifer," see U.S. GEOLOGICAL SURVEY, *supra* note 78.

101. USGS defines base flow as the "sustained flow of a stream in the absence of direct runoff," or "natural base flow that is sustained largely by groundwater discharges." *Water Science Glossary of Terms*, U.S. GEOLOGICAL SURVEY, <http://ga.water.usgs.gov/edu/dictionary.html> (last visited July 12, 2015).

102. DELWYN S. OKI, U.S. GEOLOGICAL SURVEY, TRENDS IN STREAMFLOW CHARACTERISTICS AT LONG-TERM GAGING STATIONS, HAWAII 36, 193-202 (2004), <http://pubs.usgs.gov/sir/2004/5080/pdf/sir20045080.pdf>.

103. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at 45 (citing STEPHEN B. GINGERICH & DELWYN S. OKI, U.S. GEOLOGICAL SURVEY, GROUNDWATER IN HAWAII FS-126-00 (2000)). In addition, the increasing population will use more fresh water, which will trigger declines in water levels, further increasing the risk of saltwater intrusion while exacerbating decreased ground water discharge to streams and the ocean. *Id.* at 32-33.

104. See CODIGA & WAGER, *supra* note 97, at 5-6 (explaining that high water tables, when combined with high tides, heavy rains, and high surf, may lead to large-scale inundation of low-lying areas).

105. *State & County Quick Facts*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/15/15003.html> (last visited July 12, 2015).

106. CODIGA & WAGER, *supra* note 97, at 1.

107. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at 56. Hypothetically, prolonged drought could threaten crop productivity or storms could damage infrastructure such as irrigation systems, which would also seriously affect Hawai'i's food security. *Id.* at 26-27. Food security is an important issue as the state is almost entirely dependent on imported food, fuel, and material. *Id.* at 27. Hawai'i imports an estimated 92 percent of its food. Colin M. Stewart, *Food Security on State Senate's Plate*, WEST HAWAII TODAY (Mar. 3, 2013), <http://westhawaii.com/sections/news/local-news/food-security-state-senate%E2%80%99s-plate.html>. If delivery of outside food were to stop, Hawai'i has an inventory of fresh produce that would last consumers no more than ten days. *Id.*

Maoli practices in existence today.¹⁰⁸ Maoli communities relied and continue to rely on streams and springs to satisfy many needs, primarily for distributing flow sufficient to cultivate the staple crop kalo (discussed in detail in Part V.A) and to gather native stream life.¹⁰⁹

3. *Ma kai: Impacts on Coastal and Nearshore Marine Areas and Practices.*

Ma kai (coastal) areas support a myriad of significant traditional and customary practices, including burying ancestral bones and cultivating salt in coastal areas, gathering sealife and maintaining fishponds in nearshore marine areas, and fishing and voyaging in the open ocean.¹¹⁰ Although indigenous gathering and fishing knowledge has evolved to take advantage of modern technology,¹¹¹ changing weather patterns have the potential to alter the nearshore environment and open ocean, as well as the practices they enable, forever.¹¹²

Studies verify that increasing temperatures are already altering marine species distribution,¹¹³ while the rise in atmospheric carbon dioxide will contribute to ocean acidification (lower pH levels) and significantly affect coral reef growth.¹¹⁴ This will devastate subsistence

108. Moreover, surface water diversions have already altered at least 58 percent of the 366 perennial streams in Hawai'i. R. P. Walter et al., *Climate Change and Conservation of Endemic Amphidromous Fishes in Hawaiian Streams*, 16 ENDANG. SPEC. RES. 263, 263-64 (2012).

109. Emma Metcalf Nakuina, *Ancient Hawaiian Water Rights*, in HAWAIIAN ALMANAC AND ANNUAL FOR 1894 79, 83 (Thomas G. Thrum ed., 1893). Consistent ma uka to ma kai flow is essential for both bringing nutrients from the uplands to the sea and providing a travel corridor through which native stream animals, including 'o'opu, 'ōpae, and hīhīwai (or wī), can migrate between the streams and the ocean to complete their life cycles. D. Kapua'ala Sproat, *Water, in THE VALUE OF HAWAII: KNOWING THE PAST, SHAPING THE FUTURE* 187, 188 (Craig Howes & Jonathan Kay Kamakawiwo'ole Osorio eds., 2010). These staples provided an important food source for Kānaka Maoli, especially during winter months. Ty P. Kāwika Tengan, *Report on the Archival, Historical and Archaeological Resources of Nā Wai 'Ehā, Wailuku District, Island of Maui* 14-15 (2007) (quoting L. Pule, *Ka Hae Hawai'i* (Aug. 12, 1857)). The decrease in rainfall and streamflow will cause a gradual decline in populations of native aquatic species. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at 26. In addition, streamflow decline may interrupt movement of native species along streams, preventing those that spend their larval stages in the ocean from returning to the stream to complete their life cycle. *Id.* at 55.

110. See MARGARET TITCOMB WITH THE COLLABORATION OF MARY KAWENA PUKUI, *NATIVE USE OF FISH IN HAWAII* 4 (1972); Natasha L.N. Baldauf, *Iwi Kūpuna: Native Hawaiian Burial Rights*, in *NATIVE HAWAIIAN LAW: A TREATISE*, *supra* note 17, at 912-15.

111. See MCGREGOR, *supra* note 42, at 15.

112. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at 90 ("Climate variability and change . . . [will] affect many of the physical and biological processes on both land and in water and [will] have cascading effects on water quality, species composition and diversity, wind, currents, waves, soil conditions, and habitat availability.").

113. *Id.* at 24.

114. Gary D. Brewer, *Science-Based Strategies for Sustaining Coral Ecosystems*, U.S.

fisheries in island communities, including Hawai'i.¹¹⁵ Changes in rainfall and extreme weather events can also lead to greater runoff of sediment and land-based sources of pollution. Runoff will negatively impact both water quality and the nearshore marine area in general, which provides foraging and nursery areas for many coastal species.¹¹⁶ The Hawai'i Supreme Court has recognized that ground and surface waters are intimately linked and that decreased ground water flows can negatively impact the nearshore environment, which is critical for the perpetuation of indigenous gathering practices.¹¹⁷ Over the past century, 70 percent of Hawai'i's beaches have eroded and over thirteen miles of beach have been completely lost to erosion.¹¹⁸

Coastal erosion and rapid sea level rise threaten the cultural practice of burying 'iwi kūpuna (ancestral bones) along Hawai'i's shores, which prevents the 'uhane (spirit) from joining the 'aumākua (family or personal gods; deified ancestors) in eternity, causing injury and spiritual trauma to both the deceased and living descendants.¹¹⁹

Ancient Hawaiian fishponds are another ecologically and culturally significant resource that are vulnerable to climate change's impacts,

DEP'T OF THE INTERIOR & U.S. GEOLOGICAL SURVEY CIRCULAR 3089, 3 (2009). Increasing ocean acidification will lead to a decline in the rates of reef organisms' calcification, which is the process by which coral polyps create their hard skeletons. *Id.* This will significantly affect new coral growth, reduce the ability of corals to build reefs, and will also increase erosion, causing reef habitats to become even more fragile. THIRD NATIONAL CLIMATE ASSESSMENT, *supra* note 70, at 540. Coral reefs are critical to ocean ecosystems and the indigenous practices they enable.

115. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at 28 (citing N. Maclellan, *The Future is Here: Climate Change in the Pacific*, OXFAM BRIEFING PAPER, OXFAM AUSTRALIA & OXFAM NEW ZEALAND (2009)).

116. *Id.* at 26, 94-95.

117. *In re Wai'ola o Moloka'i*, 83 P.3d 664, 706 (Haw. 2004). Limu kala (*Sargassum echinocarpum*) is one of the most important varieties of limu, an edible seaweed, because it continues to be used in ho'oponopono (a traditional healing/mediation process), held by families or individuals who are settling a dispute. ISABELLA AIONA ABBOTT, LIMU: AN ETHNOBOTANICAL STUDY OF SOME HAWAIIAN SEAWEEDES 11 (4th ed. 1996). By the end of the ceremony, everyone must agree to a resolution and eat the limu to symbolize their collective forgiveness. *Id.* The decline in limu availability will mean that this form of sustenance, and the cultural practices it supports, may not exist for future generations. See LISA ASATO, *Limu Stories*, KA WAI OLA 13 (July 2014), https://issuu.com/kawaiola/docs/kwo714_edit_web.

118. CLIMATE CHANGE IMPACTS IN HAWAII, *supra* note 64, at 18. Scientists project that portions of low lying coastal areas, such as Hanalei, Kaua'i; Hilo, Hawai'i; Kahului, Maui; and Waikī Beach, O'ahu may be submerged in the future. *Id.* at 18.

119. NATASHA BALDAUF & MALIA AKUTAGAWA, HO'I HOU I KA IWIKUAMO'O: A LEGAL PRIMER FOR THE PROTECTION OF IWI KŪPUNA IN HAWAII NEI 7 (2013) [hereinafter HO'I HOU I KA IWIKUAMO'O]; Baldauf, *Iwi Kūpuna: Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 912-15; Haunani Kāne et al., *Vulnerability Assessment of Hawai'i's Cultural Assets Attributable to Erosion Using Shoreline Trend Analysis Techniques*, 28 J. COASTAL RES. 533 (2012).

including sea level rise, increasing surface water runoff, and saltwater intrusion into springs.¹²⁰ These changes are interrupting the delicate balance between salt and fresh water as well as the indigenous management system that fishpond practitioners carefully designed.¹²¹ The extensive knowledge and sophisticated techniques of lawai‘a (fishermen), passed down from generation to generation, enabled them to fish in a highly productive, but sustainable, manner.¹²² Slowly, changes in ocean temperatures are altering fish distribution patterns and variations in winds and ocean chemistry are affecting the dispersal of other species in the food chain.¹²³ All of this will likely alter how and where Kānaka Maoli are able to fish, further impacting traditional culture and lifestyles.¹²⁴

120. Telephone Interview with Malia Akutagawa, Assistant Professor, William S. Richardson School of Law (July 29, 2013) (describing the disastrous impacts of sea level rise on Moloka‘i fishponds). In the past, only major tidal fluctuations would cause water to breach fishpond walls but today saltwater regularly enters fishponds during high tide, changing the chemistry of the pond and compromising the nutrients necessary for aquatic life to thrive. *Id.*; see also *Impacts of Environmental Change on Treaty Rights, Traditional Lifestyles, and Tribal Homelands: Hearing on S. HRG. 112-686 Before the S. Comm. on Indian Affairs*, 112th Cong. 2 (2012) (statement of Malia Akutagawa), <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg78095/pdf/CHRG-112shrg78095.pdf>.

121. Telephone Interview with Malia Akutagawa, Assistant Professor, William S. Richardson School of Law (July 29, 2013) (noting that many fishpond practitioners have observed that an increase in the severity and frequency of storms has resulted in more runoff and the eventual destruction of some fishpond structures). Loko kuapā (rock walled fishponds), the “ultimate aquaculture achievement of the native Hawaiians,” included an additional feature “that can only be described as an ancient engineering marvel.” Barry A. Costa-Pierce, *Aquaculture in Ancient Hawai‘i*, 37(5) BIOSCIENCE 326 (1987). Kānaka Maoli built ‘auwai (canals) through the walls of the ponds to connect the ponds directly to the sea, which served to stock, harvest, and clean the seawater ponds with minimal human effort. *Id.* Mākāhā (sluice walls), the most distinctive and unique feature of Hawaiian fishponds, allowed circulation. GRAYDON KEALA ET AL., *LOKO I‘A: A MANUAL ON HAWAIIAN FISPOND RESTORATION AND MANAGEMENT* 11 (2007), <http://www.ctahr.hawaii.edu/oc/freepubs/pdf/Loko%20I%20a%20Full%20Publication.pdf>.

122. JEAN SCOTT MACKELLAR, *HAWAII GOES FISHING* 15 (1968) (“The fisherman . . . was taught by his father who in turn had learned from his father before him the location of the best fishing grounds.”). “The fisherman or lawai‘a was a man of position in his village. He knew the stars, the tides and the clouds. He could predict the weather and he knew when the fish would be fat and tasty[.]” *Id.* at 16.

123. CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at 25-26. See also MICHAEL W. GUIDRY & FRED T. MACKENZIE, *FUTURE CLIMATE CHANGE, SEA-LEVEL RISE, AND OCEAN ACIDIFICATION: IMPLICATIONS FOR HAWAII‘I AND WESTERN PACIFIC FISHERIES MANAGEMENT*, http://seagrant.soest.hawaii.edu/sites/default/files/publications/web_fisheries_case_study.pdf.

124. In addition, the traditional practice of navigating across the open ocean, using the stars, winds, and currents as a compass, may be impacted by climate change. The successful sail of the vessel Hōkūle‘a from Hawai‘i to Tahiti in 1976 proved to the world that Polynesian exploration and settlement was intentional and that Kānaka Maoli were pioneering seafarers who had mastered the vast Pacific Ocean. Herb Kawainui Kāne, *Founding the Polynesian Voyaging Society: Building and Naming Hōkūle‘a*, in VOYAGERS (1991), http://pvs.kcc.hawaii.edu/ike/kalai_waa/kane_building_hokulea.html (last visited July 15, 2015).

In sum, climate change's impacts threaten Kānaka Maoli cultural survival. Ma ka hana ka 'ike: the learning or knowing is in the doing.¹²⁵ Native Hawaiians' identity as indigenous people is inextricably tied to these islands and their natural and cultural resources. For these lifeways to endure, a more comprehensive understanding of their significance is sorely needed—"a significance that often extends beyond the resources' function as food for the body, to include their value as nourishment for the soul."¹²⁶ This perspective underscores the importance of native communities' use of self-determination to fashion meaningful restorative justice responses to the on-the-ground impacts of climate change.¹²⁷

III. CLAIMING AND REALIZING AN INDIGENOUS RIGHT TO ENVIRONMENTAL SELF-DETERMINATION—THE CASE OF HAWAII

A. Restorative Justice for Indigenous Peoples

A holistic approach to restorative justice seeks "to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."¹²⁸ At the philosophical and sociological levels, restorative justice raises critical questions about who should have power over crime, punishment, restitution, reconciliation, and the resolution of community concerns to help society evolve.¹²⁹ This is especially important for indigenous communities grappling with threats to their very survival, such as climate change.

What became well known in the 1970s as a reaction to an overly harsh criminal justice system,¹³⁰ has since expanded into a social and

Rougher seas, unpredictable weather, and more frequent storms will make traditional voyaging more difficult, and perhaps one day impossible. See H.L. McMillen et al., *Small Islands, Valuable Insights: Systems of Customary Resource Use and Resilience to Climate Change in the Pacific*, 19(4) *ECOLOGY AND SOC'Y* 44 (2014).

125. MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS, No. 2088 (1983).

126. Dussias, *supra* note 44, at 276.

127. *Id.* Tsosie observed, "[i]ndigenous lifeways present an opportunity to understand facets of human life that are otherwise unknowable. The only hope for our survival as a global community is our willingness to protect that which is precious and sacred and to respect even that which is beyond our limited experience." *Id.*

128. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (2002). See also *RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH*, *supra* note 5.

129. Menkel-Meadow, *supra* note 5, at 162.

130. *Id.* at 163. Much of the existing literature focuses on restorative justice as an alternative to traditional punitive and retributive criminal justice processes, especially in the juvenile justice system. *Id.* at 168 (explaining that in Aotearoa (New Zealand), family

political movement to institutionalize peaceful approaches to harm, problem-solving, and violations of legal and human rights.¹³¹ Restorative justice increasingly informs a variety of other legal and political processes, including public policy regulation, corporate conflict management, and nonlegal disputes in schools, communities, and families.¹³²

Restorative justice, as a concept and in practice, has indigenous roots. It was conceived in traditional cultures that required harmony in their relationships with each other, nature, and the spiritual world, to maintain balance and self-sufficiency.¹³³ Many indigenous communities continue to rely on restorative justice as a tool to resolve disputes and redress harm.¹³⁴ For instance, Native Hawaiian communities still practice ho‘oponopono, “[t]he specific family conference in which relationships were ‘set right’ through prayer, discussion, confession, repentance, and mutual restitution and forgiveness.”¹³⁵ For Kānaka Maoli, all people and life is interconnected and, as a result, a perpetrator and victim are inextricably linked.¹³⁶

conferencing modeled on both traditional Māori and modern practices is now mandatory in juvenile justice).

131. *Id.* at 162-64. See also DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 63-70 (3d ed. 2006) (providing examples of restorative justice programs including family group conferences, healing circles, and truth and reconciliation commissions). For personal accounts of practitioners using restorative justice principles in a variety of settings, see RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH, *supra* note 5.

132. See JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002).

133. Although these practices vary widely between communities, the dispute resolution process usually involves some narration before victims, offenders, family members, and community members, with outcomes arrived at collectively, which are often accompanied by ceremonies of healing and forgiveness. Menkel-Meadow, *supra* note 5, at 167.

134. See, e.g., Sarah Ciftci & Deirde Howard-Wagner, *Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Pilot Program in Nowra*, 16(2) AUSTRALIAN INDIGENOUS L. REV. 81-88 (2012); Antje Deckert & William R. Wood, *Socrates in Aotearoa: Reaching Restorative Justice in New Zealand*, 16(1) CONTEMP. JUST. REV. 70-90 (2013).

135. See MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, NĀNĀ I KE KUMU—LOOK TO THE SOURCE 60 (1st ed. 1972). For an overview of the ho‘oponopono process and how it differs from western alternative dispute resolution, see N. Kanale Sadowski & K. Ka‘ano‘i Walk, *Pili ‘Ohana: Family Relationships*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 1130-36. Ho‘oponopono has been institutionalized in a range of non-traditional settings, including educational forums on conflict resolution in the State correctional system and child welfare services. *Id.* at 1132.

136. Wilma Friesma, *Restoring Connections: Hawaiian Values and the EPIC ‘Ohana, Inc. Programs that Serve the Children and Families in Hawai‘i’s Foster Care System*, in RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH, *supra* note 5, at 221-38. Wrongdoing creates a knot, or hihia, in the connection between perpetrator and victim and, as

Eric K. Yamamoto is one of the foremost legal scholars to have linked restorative justice principles, which are usually applied to individuals or discrete communities, to broader indigenous peoples' claims for repair of the ravages of western expansion. He did so in the realm of environmental justice in particular, maintaining that environmental injustice was about more than the racially discriminatory siting of polluting facilities, and asserting that the damage to native peoples' environments had special meaning (including destruction of culture, economic undercutting, and the disruption of lifeways).¹³⁷ He therefore advanced restoration as the appropriate remedial concept, rather than equality of treatment, to redress environmentally-related injustices for indigenous peoples and Kānaka Maoli in particular.¹³⁸ This article seeks to further expand the use of this idea of restorative justice for indigenous peoples, particularly in the climate change arena.

B. *Hawai'i's Starting Point: The 1978 Constitutional Convention*

Hawai'i has deeply committed to restorative justice for its indigenous people. Delegates to the 1978 Constitutional Convention ("Con Con") were more numerous in attendance, younger, included more women, involved fewer established politicians, and, overall, more closely reflected Hawai'i's racial and ethnic diversity than previous constitutional conventions.¹³⁹ Committee reports from that Con Con

long as the knot remains, both sides suffer. *Id.* at 221-22. Having a piko (navel, umbilical cord, or "center" that symbolizes connection to others) free of hihia (tangled emotional conflicts) is considered essential for maintaining personal balance, happiness, and healthy engagement in the community. *Id.* at 225; HAWAIIAN DICTIONARY, *supra* note 8, at 328.

137. See Yamamoto & Lyman, *supra* note 19, at 320-23.

138. See *id.* at 335-41; see also Eric K. Yamamoto & Ashley Kaiāo Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 32-33 (2009) (drawing insights from social psychology, theology, political theory, law, economics, and indigenous healing practices to put forth an analytical framework for reparatory initiatives using the "Four Rs": recognition, responsibility, reconstruction, and reparation); Eric K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 ASIAN PAC. AM. L.J. 71 (2012-13); MacKenzie et al., *Environmental Justice for Indigenous Hawaiians*, *supra* note 4, at 37-38 (positing a new type of Maoli "restorative environmental justice" that embraces complex issues of indigenous peoples' spiritual, social, and cultural connections to the land and natural environment and integrates "cultural values, history, socioeconomic power, and group needs and goals in defining environmental problems and fashioning meaningful remedies").

139. See Richard H. Kosaki, *Constitutions and Constitutional Conventions of Hawaii*, 12 HAWAIIAN J. HIST. 120, 129-31 (1978). Importantly, while incumbents and ex-legislators constituted 51 percent of the delegates at the 1968 convention, the number dwindled to only 4 percent at the 1978 Con Con. *Id.* at 131; see also Amy K. Trask, *A History of Revision: The Constitutional Convention Question in Hawai'i, 1950-2008*, 31 U. HAW. L. REV. 291, 308 (2008).

indicate that delegates were concerned that, among other things, “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.”¹⁴⁰ Constitutional provisions regarding Kānaka Maoli rights and practices, therefore, became 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.”¹⁴¹ While the Con Con produced several landmark amendments to Hawai‘i’s State Constitution, none were more indicative of the State’s commitment to restorative justice and reconciliation with Kānaka Maoli than the establishment of the Office of Hawaiian Affairs (“OHA”)¹⁴² and constitutional recognition of and protection for traditional and customary Native Hawaiian practices.¹⁴³

Through the creation of OHA, “Hawai‘i’s citizenry embraced collective responsibility for affording Hawai‘i’s indigenous people a measure of self-determination” as a reparations response to Native Hawaiians’ previous loss of self-governance.¹⁴⁴ Delegates envisioned

Hawai‘i previously held constitutional conventions in 1950 and 1968. *Id.* at 298, 307.

140. Stand. Comm. Rep. No. 57, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978 639 (1980) [hereinafter 1 CONVENTION PRO.].

141. Comm. Whole Rep. No. 12, 1 CONVENTION PRO., *supra* note 140, at 1016.

142. HAW. CONST. art. XII, §§ 4-6. The Office of Hawaiian Affairs, or OHA, was created to better the conditions of Kānaka Maoli. *Establishment of OHA*, OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/content/about> (last visited Aug. 24, 2015). OHA’s six strategic priorities include protecting the ‘āina, preserving Maoli culture, improving economic self-sufficiency, enhancing educational outcomes, facilitating a self-governance process, and improving Native Hawaiian health. *Strategic Plan and Focus*, OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/strategicplan> (last visited Aug. 24, 2015).

143. HAW. CONST. art. XII, § 7. Traditional and customary Native Hawaiian rights are protected by three sources in Hawai‘i law: article XII, section 7 of Hawai‘i’s Constitution, and Hawai‘i Revised Statutes 1-1 and 7-1. *See Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982); David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17. Article XII, section 7 provides broad and expansive protections for traditional and customary practices and requires state and county agencies to protect these rights to the extent feasible. *See infra* note 176. In the context of traditional and customary rights, Hawai‘i Revised Statutes section 1-1 also safeguards the exercise of traditional and customary practices; it extends those rights to the gathering of materials that are essential to a tenants’ lifestyle, such as medicinal plants, and may even protect limited upland subsistence farming as practiced by early Native Hawaiians. *See* HAW. REV. STAT. § 1-1 (2014); *see also* HO‘OHANA AKU, A HO‘OLA AKU, *supra* note 44, at 11. Hawai‘i Revised Statutes section 7-1 specifically protects the right to gather, although that right is limited to items enumerated in the statute, including materials for constructing a house or starting a fire. *See* HAW. REV. STAT. § 7-1 (2014). Importantly, Hawai‘i Revised Statutes sections 1-1 and 7-1 merely codify for the State various acts of the legislature of the Hawaiian Kingdom. *See, e.g.*, HAW. REV. STAT. § 1-1 (1905); *see also* 1892 Haw. Sess. Laws LVII § 5.

144. Eric K. Yamamoto & Sara D. Ayabe, *Courts in the “Age of Reconciliation”*: *Office of*

that OHA would be *the* institution that “provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base” and would have “the power to accept the transfer of reparations money and land.”¹⁴⁵ They also acknowledged the historic injustices that had been perpetuated against the Hawaiian Kingdom, and determined that it was “well past time” for the State to “meet the obligation that we have to do justice for [Kānaka Maoli].”¹⁴⁶ One delegate emphasized that since “our mo‘i wahine Queen Lili‘uokalani was dethroned . . . many injustices have been documented in our history[, which] . . . have caused us now to stand in public and bare our souls once more[.]”¹⁴⁷ Enabling laws enacted by Hawai‘i’s Legislature reaffirmed the State’s “solemn trust obligation and responsibility”¹⁴⁸ to Kānaka Maoli and expressly identified one of OHA’s primary functions as serving “as a receptacle for reparations.”¹⁴⁹

Subsequent state and federal legislation, including measures passed around the centenary of the illegal overthrow of the Hawaiian Kingdom, also “embraced the language of reconciliation and crystallized the State’s commitment” to restorative justice.¹⁵⁰ For example, in the

Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 527 (2011).

145. Standing Comm. Rep. No. 59, 1 CONVENTION PRO., *supra* note 140. Beginning in the early 1970s, the Hawaiian redress movement sought financial compensation and reparations for the Maoli community. Over the years, however, the emphasis has shifted from compensation to a call for reconciliation, recognition, and self-determination. MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 272. During these early stages, the ALOHA Association was instrumental in calling attention to the United States’ involvement in the overthrow of the Hawaiian government. *Id.* at 272 n.39. Although early attempts to obtain federal reparations were unsuccessful, they brought attention to Maoli claims at the national and state levels which spurred a more searching inquiry into the events surrounding the illegal overthrow. *Id.* at 273.

146. Debates in the Comm. of the Whole on Hawaiian Affairs, Comm. Proposal No. 13, 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 460 (1980) [hereinafter 2 CONVENTION PRO.] (statement of Delegate Barr). *See also id.* at 457-58 (“[T]he creation of OHA would address the modern-day problems of Hawaiians which are rooted in as dark and sad a history as will ever mark the annals of time.” (statement of Delegate DeSoto)); *id.* at 459 (“[I]t’s time that native Hawaiians have more impact on their own future, and the transfer to Hawaiians of the responsibilities of self-government is only right and proper.” (statement of Delegate Peterson)).

147. *Id.* at 458 (statement of Delegate DeSoto).

148. 1979 Haw. Sess. Laws 398-99.

149. HAW. REV. STAT. § 10-3(6) (2014).

150. Yamamoto & Ayabe, *supra* note 144, at 528 (noting that related 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”). *See infra* note 153 on Acts 354, 359 and 329; *see also* 1993 Haw. Sess. Laws 803 (recognizing that Kaho‘olawe holds cultural and historical significance and requiring that the island be held in trust and transferred to a sovereign Maoli entity in the future).

landmark 1993 Apology Resolution, the United States Congress “acknowledged the historical significance of” the illegal overthrow of the sovereign Hawaiian nation, “which resulted in the suppression of the inherent sovereignty of the Native Hawaiian People.”¹⁵¹ In addition, Congress “expresse[d] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai‘i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people[.]”¹⁵²

At the state level, Hawai‘i’s legislature similarly recognized the harms imposed by the United States and the need for restorative justice to redress that damage by “acknowledg[ing] that the actions by the United States were illegal and immoral, and pledg[ing] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.”¹⁵³ In 2008,

151. Apology Resolution, *supra* note 47. The Apology Resolution is not the first time Congress envisioned a remedy for the effects of the overthrow of the Hawaiian nation. See Eric K. Yamamoto & Kanoelani Pu‘uohau, *A Modest Proposal for Determining Class Member Damages: Aggregation and Extrapolation in the Kalima v. State Breach of Homelands Trust Class Action*, 34 U. HAW. L. REV. 1, 8 (2012). Congress enacted the Hawaiian Homes Commission Act (“HHCA”) of 1920, 42 Stat. 108 (1921), “to rectify the devastating effects of colonization; to restore the Hawaiians’ severed ties to homelands; and to rehabilitate what Congress called a ‘dying race.’” *Id.* at 7-8 (footnotes omitted). By establishing a homesteading program, Congress sought to facilitate self-sufficiency by returning Hawaiians to the land, providing access to adequate water and other resources, and assisting with farming operations. *Id.* at 8.

152. Apology Resolution, *supra* note 47.

153. 1993 Haw. Sess. Laws 999-1000 (acknowledging that “many native Hawaiians feel there is a valid legal claim for reparations”). With findings similar to the Apology Resolution, the purpose of Act 359 was to “facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.” 1993 Haw. Sess. Laws 1009-1010. In passing Acts 354 and 359, the legislature recognized that “the indigenous people of Hawai‘i were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination [and] their lands,” *id.* at 1010, and contemplated further action by the legislature “to promote the restoration of the rights and dignity of native Hawaiians.” 1993 Haw. Sess. Laws 999. See also Yamamoto & Ayabe, *supra* note 144, at 518-19. In 1997, the legislature enacted Act 329, which attempted, in part, to effectuate article XII, section 6 of the Hawai‘i Constitution. 1997 Haw. Sess. Laws 956-58. Significantly, it conceded:

The legislature recognizes that the lasting reconciliation so desired by all people of Hawai‘i is possible only if it fairly acknowledges the past while moving into Hawai‘i’s future.

The legislature further finds that over the last few decades, the people of Hawai‘i through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation. *Foremost among these achievements have been the creation of the [O]ffice of Hawaiian [A]ffairs[.]* The overriding purpose of this Act is to continue this momentum, through further executive and legislative action in conjunction with the people of Hawai‘i,

the Hawai'i Supreme Court also corroborated the historic injustices committed against Kānaka Maoli and the importance of using restorative justice to right these wrongs.¹⁵⁴

The State Legislature's recent passage of Act 195 is yet another example of Hawai'i's continuing commitment to restorative justice for Kānaka Maoli.¹⁵⁵ Act 195 officially recognizes Kānaka Maoli as Hawai'i's indigenous people, reaffirms the State's support for the development of a reorganized Native Hawaiian government, and establishes a process to enroll and participate in the creation of this government.¹⁵⁶ Act 195's findings acknowledge the ramifications of the overthrow of the Hawaiian Kingdom and the history of reconciliation efforts between Kānaka Maoli and both the state and federal governments; and its substantive provisions provide a path to pursue restorative justice.¹⁵⁷

toward a comprehensive, just, and lasting resolution.

Id. at 956 (emphases added).

154. See Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawaii, 177 P.3d 884, 928 (Haw. 2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). In *Office of Hawaiian Affairs*, the Hawai'i Supreme Court unanimously ruled that the State was prohibited from alienating trust lands until the claims of Kānaka Maoli had been resolved because lands "will be lost and will not be available for the future reconciliation efforts[.]" 177 P.3d at 924. Although the U.S. Supreme Court reversed and vacated this landmark ruling because of its reliance on federal law, this does not "undercut the import of the [Hawai'i Supreme Court] opinion" because "[t]he State, through its three branches of government and voting citizenry, acknowledged the historic injustice and committed the State to reparatory justice through reconciliation[.]" Yamamoto & Ayabe, *supra* note 144, at 509 (concluding that "a state's own commitment to reconciliation to redress the persistent harms of injustice creates, in some situations, legally enforceable obligations").

155. See 2011 Haw. Sess. Laws 646 [hereinafter Act 195], codified as HAW. REV. STAT. § 10H (2014); see also Yamamoto & Pu'uohau, *supra* note 151, at 30 n.174 (noting that "[r]ecent efforts for Native Hawaiian self-recognition include the 2011 ceded lands settlement and the Act 195 Native Hawaiian recognition bill").

156. HAW. REV. STAT. § 10H-1 (2014); 2011 Haw. Sess. Laws 646-48; see also Breann Swann Nu'uhiwa, *Government of the People, By the People, For the People: Cultural Sovereignty, Civil Rights, and Good Native Hawaiian Governance*, 14 ASIAN-PAC. L. & POL'Y J. 57, 58 n.2 (2013).

157. For example, Act 195 acknowledged, "Native Hawaiians have continued to maintain their separate identity as a single, distinctly native political community through cultural, social, and political institutions and have continued to maintain their rights to self-determination, self-governance, and economic self-sufficiency." 2011 Haw. Sess. Laws 647. In addition, the findings highlight that the joint report issued by the U.S. Departments of Justice and the Interior that identified the "reorganization of a Native Hawaiian government" as a top reconciliation priority. U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY (2000); see also MacKenzie, *Native Hawaiians and U.S. Law, in NATIVE HAWAIIAN LAW: A TREATISE*, *supra* note 17, at 317-21. These findings also point to the fact that the U.S. endorsed the United Nations Declaration on the Rights of Indigenous Peoples. 2011 Haw. Sess. Laws 647.

The 1978 Con Con also recognized the important role of restorative justice in beginning to repair the harms of colonialism by safeguarding traditional and customary Native Hawaiian practices. Delegates took specific action to redress that issue and, as a result, Article XII, section 7 now proclaims:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.¹⁵⁸

Article XII, section 7’s framers recognized the historical basis for the ahupua‘a¹⁵⁹ system of resource management and the absence of private ownership in ancient Hawai‘i, noting that “an individual did not own land or water; there was no such thing as private ownership. Hawaiian society was based on the welfare of the community and a sharing of the water and its products.”¹⁶⁰ Specifically, the framers explained how the western system of private land ownership and consolidation displaced Maoli and hindered access to natural and cultural resources: “the large landowners, who basically are 10 to 12 corporations and estates and who own almost 90 percent of all private lands, have intruded upon, interfered with and refused to recognize such rights.”¹⁶¹ The framers highlighted the fact that “[s]ustenance, religious and cultural practices of native Hawaiians are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and

In October 2015, the U.S. District Court for the District of Hawai‘i denied a motion for preliminary injunction sought by plaintiffs to halt the upcoming election of Maoli delegates to a proposed convention to discuss, and perhaps organize, a “Native Hawaiian governing entity.” Order Denying Plaintiffs’ Motion for Preliminary Injunction, *Akina v. State*, Civ. No. 15-00322 JMS-BMK (D. Haw. Oct. 29, 2015). The court called Act 195 a unique law, “both symbolic and remarkable[.]” that was intended to facilitate “an independent process for Native Hawaiians to organize themselves” that should be understood as a “possible mechanism of independent *self*-determination and *self*-governance of Hawaii’s indigenous people.” *Id.* at 41, 63. Appeals were filed in the Ninth Circuit Court of Appeals and the U.S. Supreme Court. See Urgent Motion for Injunction Pending Appeal, *Akina v. State*, Case No. 15-17134 (9th Cir. Oct. 29, 2015); Emergency Application for Injunction Pending Appellate Review, *Akina v. State* (9th Cir. Nov. 23, 2015). Further action is expected from the Ninth Circuit before publication of this article.

158. HAW. CONST. art. XII, § 7.

159. See LUCAS, *supra* note 44 for the definition of ahupua‘a as traditional land divisions.

160. Debates in the Comm. of the Whole on Hawaiian Affairs, Comm. Proposal No. 12, 2 CONVENTION PRO., *supra* note 146, at 426.

161. Comm. Whole Rep. No. 12, 1 CONVENTION PRO., *supra* note 140, at 1016.

value systems.”¹⁶² One delegate observed that “private landowners, large corporations, ranches, large estates, hotels and government entities”¹⁶³ preclude Native Hawaiians from following subsistence practices, which, despite laws protecting gathering rights, has made “Hawaiians strangers in their own homeland.”¹⁶⁴

With this in mind, the framers crafted Article XII, section 7 “to provide the State with the power to protect these rights and prevent any interference with the[ir] exercise[.]” acknowledging the need for regulation and related redress.¹⁶⁵ By doing so, this amendment empowered the State to promote restorative justice in ways that expanded and exceeded the scope of statutory rights for access and gathering.¹⁶⁶ As the committee reports indicate, to ensure the “courts or legislature would not be constrained in their actions[.]” the framers purposefully “eliminate[d] specific categories of rights” and instead sought to include “a provision in the Constitution to encompass all rights of native Hawaiians[.]”¹⁶⁷ Moreover, the framers reinforced the breadth of this provision by emphasizing that “[y]our Committee did not intend to have the section narrowly construed or ignored by the courts.”¹⁶⁸ This conscientious shift from specifically enumerated statutory rights to incipient constitutionally protected obligations reflects the underlying restorative justice framework that permeates this provision and others.¹⁶⁹

Even though the framers declined to expressly reconcile potential tension between Maoli and western concepts of private ownership, they optimistically acknowledged that “[a]lthough the enforcement problems require careful consideration of regulation changes in the area, it is possible, with work, to both protect the rights of private land-owners and

162. *Id.*; see also *Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n, State of Hawai‘i*, 7 P.3d 1068, 1082 (Haw. 2000) (explained in detail *infra* Part III.C).

163. Stand. Comm. Rep. No. 57, 1 CONVENTION PRO., *supra* note 140, at 639.

164. Debates in the Comm. of the Whole on Hawaiian Affairs, Comm. Proposal No. 12, 2 CONVENTION PRO., *supra* note 146, at 426.

165. Stand. Comm. Rep. No. 57, 1 CONVENTION PRO., *supra* note 140, at 639; see also *Ka Pa‘akai O Ka ‘Aina*, 7 P.3d at 1082.

166. See *supra* note 143 (explaining traditional access and gathering rights).

167. Stand. Comm. Rep. No. 57, 1 CONVENTION PRO., *supra* note 140, at 640.

168. *Id.* Further, “[y]our Committee is aware of the courts’ unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.” *Id.*

169. See Yamamoto & Ayabe, *supra* note 144, at 523-24, 533 (discussing the reconstruction and reparation aspects of Social Healing Through Justice as an integral means to facilitate the transformation of redress promises into concrete actions).

allow for the preservation of an aboriginal people.”¹⁷⁰ When viewed as an act of restorative justice in response to the harms of colonialism,¹⁷¹ this acknowledgement is significant because it places traditional and customary Native Hawaiian rights and practices in parity with or even superior to western property rights.¹⁷² At the same time, it recognizes past injustices while looking toward a future, lasting commitment to reconciliation with and self-determination for Kānaka Maoli.¹⁷³

C. *The Evolution of Case Law and Ka Pa‘akai’s Decision-making Framework*

Consistent with this theme of restorative justice for Hawai‘i’s indigenous people, the Hawai‘i Supreme Court began to interpret article XII, section 7. Early decisions, however, focused largely on the scope of traditional and customary Native Hawaiian rights and practices.¹⁷⁴ Later

170. Comm. Whole Rep. No. 12, 1 CONVENTION PRO., *supra* note 140, at 1016.

171. By ratifying the 1978 constitutional amendments, the people of Hawai‘i collectively embraced the Con Con delegates’ recognition of historic injustices and, envisioning future redress, sought to begin to repair the damages of colonization by adopting constitutional provisions committed to reconciliation. *See Yamamoto & Ayabe, supra* note 144, at 526-27. For example, in adopting article XII, sections 4-6 (establishing the basis for OHA), the Con Con’s Committee on Hawaiian Affairs noted “sections 5 and 6, taken together, are of utmost importance for they provide for accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people.” Stand. Comm. Rep. No. 59, 1 CONVENTION PRO., *supra* note 140, at 646.

172. Article XI, section 1 of Hawai‘i’s Constitution proclaims “[a]ll public natural resources are held in trust by the State for the benefit of the people.” HAW. CONST. art. XI, § 1. The constitutional public trust protects traditional and customary Native Hawaiian rights as a public trust purpose. *See In re Waiāhole Ditch Combined Contested Case Hearing*, 9 P.3d 409, 448-50 (Haw. 2000) (holding protected trust purposes include “resource protection, with its numerous derivative public uses, benefits, and values,” as well as the “exercise of Native Hawaiian and traditional and customary rights,” but does not include private commercial uses). The court also held that “summary extinguishment of such rights by the State” will not be allowed merely because rights are deemed inconsistent with “generally understood elements of western doctrine of ‘property.’” *See infra* note 176 (citing *Pub. Access Shoreline Hawai‘i v. Hawai‘i Cnty. Planning Comm’n*, 903 P.2d 1246, 1263-68 (Haw. 1995)).

173. *See Yamamoto & Ayabe, supra* note 144, at 520, 530-31 (discussing how lasting reconciliation can be achieved only if it fairly acknowledges the past, as well as how the courts must identify and preserve those pieces that are key to the restorative process to effectively enforce a lasting commitment to reconciliation).

174. In *Kalipi v. Hawaiian Trust Co.*, the first of several cases concerning traditional and customary Native Hawaiian rights, the Hawai‘i Supreme Court held that lawful residents of an ahupua‘a may, for the purpose of exercising Native Hawaiian customs and traditions, enter undeveloped lands within that ahupua‘a to gather the items enumerated in Hawai‘i Revised Statutes § 7-1. *See* 656 P.2d 745, 749 (Haw. 1982). The plaintiff, William Kalipi, lived in the ahupua‘a of Keawenui on the island of Moloka‘i but occasionally traveled to other ahupua‘a to gather “indigenous agricultural products for use in accordance with traditional Hawaiian practices.” *Id.* at 747. Although the court ruled for the defendants, it acknowledged that pursuant

cases interrogated state and county agencies' kuleana (responsibility and privilege)¹⁷⁵ and what legal duties were applicable to ensure that these rights were adequately protected.¹⁷⁶ In 2000, the Hawai'i Supreme Court decided *Ka Pa'akai O Ka 'Aina v. Land Use Commission (Ka Pa'akai)*, holding that article XII, section 7 of Hawai'i's Constitution "places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies 'the power to protect these rights and to prevent any interference with the exercise of these rights.'"¹⁷⁷ Importantly, it provided a protective and restorative decision-making framework through which courts could determine whether state and county agencies were adequately discharging their duties.¹⁷⁸

Ka Pa'akai involved a decision by the Hawai'i State Land Use

to article XII, section 7, courts are obligated "to preserve and enforce such traditional rights" and "it is this expression of policy which must guide our determinations." *Id.* at 748. The court further noted that despite the possibility of conflict, "any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail." *Id.* at 748.

After *Kalipi*, the court further expanded the scope of traditional and customary rights under article XII, section 7 in *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992). In *Pele*, members of a non-profit corporation challenged the State's decision to exchange "ceded" land for privately owned land on the island of Hawai'i, as a breach of trust. *See Pele Defense Fund*, 837 P.2d at 1253-54 (defining ceded lands as those classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893 then subsequently "ceded" to the United States upon annexation in 1898, and finally transferred to the newly created state of Hawai'i after admittance to the union in 1959). The court went beyond *Kalipi*'s holding by expanding gathering rights to areas "beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner." *Id.* at 1272. Unlike *Kalipi*, where the gathering rights were based on land ownership within the ahupua'a, the court in *Pele* distinguished customary rights based on actual usage and practice. *Id.* at 1271.

175. *See* HAWAIIAN DICTIONARY, *supra* note 8 (defining kuleana).

176. *See Pub. Access Shoreline Hawai'i*, 903 P.2d at 1246; *see also* *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, State of Hawai'i*, 7 P.3d 1068 (Haw. 2000). The plaintiffs in *Public Access Shoreline Hawai'i* challenged the Hawai'i County Planning Commission's ("HCPC's") denial of their request for an administrative trial on a permit application for a proposed development on Hawai'i Island. *See Public Access Shoreline Hawai'i*, 903 P.2d at 1250. The Hawai'i Supreme Court held that article XII, section 7 is binding on county and state agencies and obligates those agencies to "'preserve and protect' native Hawaiian rights to the extent feasible when issuing a SMA permit[.]" and that the Coastal Zone Management Act requires the HCPC to "give the cultural interests asserted by *Public Access Shoreline Hawai'i* 'full consideration.'" *Id.* at 1273. The court also declared that the "western concept of exclusivity is not universally applicable in Hawai'i[.]" and "the regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property.'" *Id.* at 1263-68.

177. *Ka Pa'akai O Ka 'Aina*, 7 P.3d at 1082 (citing Stand. Comm. Rep. No. 57, 1 CONVENTION PRO., *supra* note 140, at 639).

178. *See infra* Part III.C, note 192 (enumerating the three-prong test to fulfill the State's obligation to protect traditional and customary rights).

Commission (“LUC”)¹⁷⁹ to grant a developer’s petition to reclassify approximately 1,000 acres on Hawai‘i Island from a State Land Use “Conservation District”¹⁸⁰ to a State Land Use “Urban District.”¹⁸¹ Hawai‘i’s Third Circuit Court affirmed the LUC’s decision to grant the petition for reclassification.¹⁸² Native Hawaiian groups appealed.¹⁸³

The Hawai‘i Supreme Court held that “the LUC’s findings of fact and conclusions of law are insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians” and, therefore, the LUC “must be deemed, as a matter of law, to have failed to satisfy its statutory and constitutional obligations.”¹⁸⁴ In contextualizing article XII, section 7 as an affirmative duty of state and county agencies, the court cited at length to committee reports from the 1978 Con Con and relied upon the framers’ intent to craft an appropriate decision-making framework for enforcement.¹⁸⁵ Specifically, the court identified article XII, section 7 as a “legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights.”¹⁸⁶

Going a step further, the court acknowledged the affirmative duty of state and county agencies to “not act without independently considering the effect of their actions on Hawaiian traditions and practices[.]”¹⁸⁷ as

179. The LUC is a state agency responsible for managing Hawai‘i’s land classification system, separate from but overlaying county zoning. *See* HAW. REV. STAT. § 205-2 (2014); *see also* DAVID L. CALLIES, *REGULATING PARADISE: LAND USE CONTROLS IN HAWAI‘I* 21 (Univ. of Haw. Press, 2d ed. 2010). The LUC divides land into four use districts: urban, rural, agricultural, and conservation. *See* HAW. REV. STAT. § 205-2(a).

180. The Conservation District includes lands requiring special management and protection, including existing forest and water reserve zones and areas necessary to preserve watersheds and water sources, scenic and historic areas, parks, wilderness, open space, recreational areas, endemic plant habitat, fish and wildlife, and all submerged lands seaward of the shoreline. HAW. REV. STAT. § 205-2(e); *see also* CALLIES, *supra* note 179, at 21.

181. *See Ka Pa‘akai O Ka ‘Aina*, 7 P.3d at 1071. The Urban District includes “activities or uses as provided by ordinances or regulations of the county within which the urban district is situated.” HAW. REV. STAT. § 205-2(b).

182. *Ka Pa‘akai O Ka ‘Aina*, 7 P.3d at 1071. Reclassification is the process by which the LUC amends a land use district boundary from one classification to another. HAW. REV. STAT. § 205-4(a) (2014); *see* HAW. REV. STAT. § 205-2 (describing the four major land use districts).

183. *Ka Pa‘akai O Ka ‘Aina*, 7 P.3d at 1071. Plaintiffs *Ka Pa‘akai O Ka ‘Aina* appealed the Third Circuit Court’s judgment affirming the LUC’s findings of fact, conclusions of law, decision, and order granting Kaupulehu Development’s petition for land use boundary reclassification. *Id.* Specifically, *Ka Pa‘akai* argued that the lower court erred in ruling that the LUC’s findings were supported by “reliable, probative, and substantial evidence[.]” *Id.*

184. *Id.* at 1072.

185. *Id.* at 1082-83.

186. *Id.* at 1082 (internal quotation marks omitted) (citing Stand. Comm. Rep. No. 57, 1 CONVENTION PRO., *supra* note 140, at 640).

187. *Id.* at 1083.

rooted in judicial precedent and a historical basis for “ensuring the protection of traditional and customary Hawaiian rights.”¹⁸⁸ Similar to the manner in which article XII, section 7’s framers recognized the historical injuries that resulted from the imposition of private property and land ownership, the court observed, “the introduction of Western private property concepts profoundly limited native Hawaiians’ traditional system of land tenure and subsistence.”¹⁸⁹

Therefore, in a dual act of reconciliation and restoration, the court established a decision-making framework to “accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other.”¹⁹⁰ The underlying narrative of restorative justice as a response to colonialism is thus accomplished by the court’s efforts to effectuate the State’s obligation to protect native land and culture as a necessary legal requirement.¹⁹¹

The court proffered a three-part test to fulfill the State’s obligation to protect traditional and customary Maoli practices. In any decision, the State must, at a minimum, make specific findings and conclusions on:

- (1) the identity and scope of ‘valued cultural historical, or natural resources’ in the petition area, including the extent to which traditional customary native Hawaiian rights are exercised in the petition area;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.¹⁹²

188. *Id.*

189. *Id.* (citing *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 749 (Haw. 1982)) (discussing the effects of replacing a subsistence economy and access to land and its resources with a mercantile economy); *see also Kalipi*, 656 P.2d at 749; *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1270 (Haw. 1992) (discussing historically exercised access and gathering rights for subsistence, cultural or religious purposes); *Pub. Access Shoreline Hawai‘i v. Hawai‘i Cnty. Planning Comm’n*, 903 P.2d 1246, 1266-68 (Haw. 1995) (concluding that “the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property”).

190. *Ka Pa ‘akai O Ka ‘Aina*, 7 P.3d at 1083.

191. *See Yamamoto & Ayabe*, *supra* note 144, at 532-33 (discussing how reconstruction and reparation inquiries by the court shape the transformation of redress promises into concrete actions).

192. *Ka Pa ‘akai O Ka ‘Aina*, 7 P.3d at 1084.

After applying this three-part test, the court held that the LUC's decision to reclassify land from Conservation to Urban was insufficient to determine whether the LUC had fulfilled its constitutional obligation because it "failed to enter any definitive findings or conclusions as to the extent of the native Hawaiian practitioners' exercise of customary and traditional practices in the subject area."¹⁹³ Moreover, the LUC had a duty to independently assess the impacts of the proposed reclassification on traditional and customary practices.¹⁹⁴

On the surface, the Hawai'i Supreme Court's decision in *Ka Pa'akai* elucidated the State's constitutional obligation to preserve, protect, and restore traditional and customary Maoli rights.¹⁹⁵ At the same time, however, by employing a restorative justice lens, the court embraced the values of cultural integrity, lands and other resources, social welfare, and self-determination—although it did not use those specific terms. In doing so, it formalized a more lasting process for restoration by respecting those rights and practices previously lost as a result of colonialism.¹⁹⁶

IV. RESTORATIVE JUSTICE AS A LYNCHPIN FOR INDIGENOUS PEOPLES' ENVIRONMENTAL JUSTICE

Although *Ka Pa'akai*'s framework for restorative justice for Kānaka Maoli has been in place since the Hawai'i Supreme Court's 2000 decision, it remains unclear for state, county, and other decision-makers what this concept means in practice. There has been no delineation in the laws themselves or even in related court decisions.¹⁹⁷ Despite a multitude of state and federal acts affirming the commitment to restorative justice, decision-makers are unsure of where to look for guidance regarding how restorative justice should be actualized on the

193. *Id.* at 1085. Instead, the LUC granted "blanket authority" to the developer to identify areas where Kānaka Maoli could be expected to exercise gathering and access rights. *Id.* at 1085-86. As a substitute for discharging its duty to protect Maoli rights, "the LUC delegated a non-delegable duty and thereby acted in excess of its authority." *Id.* at 1089.

194. *Id.* at 1088.

195. The Hawai'i Supreme Court decided several cases after *Ka Pa'akai O Ka 'Aina*, although none impacted the court's decision-making framework adopted in this case. *See* *State v. Hanapi*, 970 P.2d 485 (Haw. 1998); *State v. Pratt*, 277 P.3d 300 (Haw. 2012), *amended by* *State v. Pratt*, 277 P.3d 327 (Haw. 2012) (table decision).

196. *See* Yamamoto & Ayabe, *supra* note 144, at 532 (describing how the court's inquiry into Native Hawaiians' historical connection to land played a fundamental role as a meaningful act of reparation in *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawaii*).

197. *See, e.g.*, HAW. CONST. art. XII, § 7; *Ka Pa'akai O Ka 'Aina*, 7 P.3d 1068; *Pratt*, 277 P.3d 300; Forman & Serrano, *Traditional and Customary Access and Gathering Rights*, in *NATIVE HAWAIIAN LAW: A TREATISE*, *supra* note 17.

ground and in Native Hawaiian communities.¹⁹⁸ One starting point is to look at the restorative justice values for native peoples that are embodied in the human rights principles of self-determination.¹⁹⁹ International norms, and the four values in particular, provide firm guidance for indigenous peoples in Hawai'i and beyond regarding how to actualize restorative justice, especially in the face of climate change.²⁰⁰

Scholars have acknowledged the limitations of litigation and encouraged the proactive use of domestic laws such as Hawai'i's constitutional provisions.²⁰¹ With this in mind, one significant general approach to addressing this problem is rooted in indigenous peoples' right to environmental self-determination, as conceptualized by Professor Tsosie.²⁰² This includes indigenous peoples' "right to survive as a distinct people and the right to restrain national governments from undertaking policies that would jeopardize their continued physical or cultural survival."²⁰³ In Hawai'i, the meaning of this right—and its enforceability—is tied to the State's commitment to restorative justice, including legal regimes governing the protection of natural resources and native culture.²⁰⁴

198. Apology Resolution, *supra* note 47; *see* Act 195, *supra* note 155; Acts 354, 359, 329, *supra* note 153; Act 340, *supra* note 150.

199. *See, e.g.*, Anaya, *supra* note 6, at 342-60; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

200. *See* Anaya, *supra* note 6, at 342-60; *see also* Part IV.C, *infra* (explaining the four values). "State courts have a responsibility to consider international human rights norms and other transnational law in rendering state constitutional provisions. This responsibility is drawn from several sources: the nature of federalism, the nature of the international system, and individual states' laws and legal history." Davis, *supra* note 15, at 359 (footnote omitted).

201. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1647-51 (discussing tribal regulatory authority and federal environmental statutes establishing minimum standards for environmental protection on tribal lands); *id.*, at 1661-63 (noting that environmental litigation against multinational corporations and national governments is difficult, and that because the litigation model is of dubious utility in driving international climate policy, the only way to generate international climate policy is to rely on national legislatures to articulate their domestic policies and then build consensus with other nation-states); *see also* Davis, *supra* note 15.

202. *See* Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1.

203. *Id.* at 1665.

204. *See, e.g.*, HAW. CONST. art. XII, § 7; HAW. CONST. art. XI, § 7; HAW. REV. STAT. §§ 1-1, 7-1; *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, State of Hawai'i, 7 P.3d 1068 (2000); Forman & Serrano, *Traditional and Customary Access and Gathering Rights*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 776-823; D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 17, at 522-77.

A. *Deconstructing Tsosie's Indigenous Right to Environmental Self-Determination*

Professor Tsosie explains that an indigenous right to environmental self-determination “impose[s] affirmative requirements on nation-states to engage in a mitigation strategy . . . to avoid catastrophic harm to indigenous peoples.”²⁰⁵ Precisely because climate change is global in nature and the triggering events “are not within the control of native peoples as governments, the discussion in this area must go beyond tribal sovereignty and evaluate the rights of indigenous peoples as unique cultural and political groups.”²⁰⁶ This distinction is crucial: “sovereignty is a substantive legal status while self-determination is a political right that stems from an underlying moral claim.”²⁰⁷

Tsosie recognizes that although some nation-states may disagree, the United Nations Declaration on the Rights of Indigenous Peoples “articulates a basis for recognizing a right of environmental self-determination that preserves the relationship between indigenous peoples and their traditional lands for cultural and moral reasons.”²⁰⁸ She notes that this human rights-based claim is distinct because it does not focus on sovereignty, and instead recognizes that “justice must play a central role in addressing” the consequences of climate change.²⁰⁹

Because the indigenous environmental justice claim is rooted in self-determination rather than sovereignty, this distinctive set of rights arises from indigenous peoples' unique cultural and political status as dispossessed, colonized people now seeking restorative justice.²¹⁰ By doing so, this set of rights enables indigenous peoples to invoke a human rights-based set of norms rather than a domestic sovereignty model to engage local legal regimes to (1) protect traditional resource-based cultural practices regardless of whether they also possess the sovereign

205. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1625. Tsosie takes the position that the current adaptation strategy put forth in international climate negotiations “will prove genocidal for many groups of indigenous people.” *Id.*

206. *Id.* at 1628.

207. *Id.* at 1663.

208. *Id.* at 1665.

209. *Id.* at 1674-75. What constitutes “justice” however, must be crafted individually, depending on the cultures and resources that are at stake. *Id.* at 1676. Although there will be differences, “from an indigenous perspective, justice can only be achieved by an affirmative commitment to protect indigenous peoples within their traditional lands.” *Id.* Tsosie recognizes that although some nation-states may disagree, the United Nations Declaration on the Rights of Indigenous Peoples “articulates a basis for recognizing a right of environmental self-determination that preserves the relationship between indigenous peoples and their traditional lands for cultural and moral reasons.” *Id.* at 1665.

210. *See id.* at 1654-57, 1663-69.

right to govern lands and (2) prevent practices that jeopardize cultural resources.²¹¹

B. Exploring a Developing Framework for the Indigenous Right to Environmental Self-Determination: A Synthesis

This section interrogates whether, as a matter of environmental justice for indigenous peoples, state and local governments have an affirmative restorative justice obligation to redress the caustic impacts of climate change. And, if so, what that obligation looks like.

As detailed in Part IV.A, because self-determination and restorative justice are inextricably linked, it is necessary and appropriate for decision-makers to focus on four realms of self-determination: (1) cultural integrity; (2) lands and other natural resources; (3) social welfare and development; and (4) self-government.²¹² These realms, or values, are a starting point for analysis because they synthesize international human rights notions of self-determination for formerly colonized peoples. Each value is a salient dimension of restorative justice for native peoples and, together, they comprise an analytic framework for the development of remedial measures to redress the consequences of colonization, including climate change.

All of this is central to Native Hawaiian cultural survival today and into the future. By employing this developing framework to assess a proposed action's effects on each of the four realms of self-determination, state, county, and indigenous decision-makers can collectively shape environmental justice for native peoples.²¹³ In short, this approach to guide, and possibly compel, local decision-makers to proactively combat climate change provides a broad template for infusing international human rights norms into local laws and embracing restorative justice to realize the indigenous right to environmental self-determination.

C. Analyzing the Four Indigenous Values Integral to an Indigenous Right to Environmental Self-Determination

The four values of self-determination are an integral aspect of restorative justice for native peoples. Culture cannot exist in a vacuum;

211. *Id.* at 1625.

212. Anaya, *supra* note 6, at 342–60 (identifying four analytical categories that are both customarily significant and key dimensions of restorative justice for indigenous peoples in general and Kānaka Maoli in particular); *see also* Part IV.C, *infra* (detailing the four values).

213. *See, e.g.*, Sproat, *Wai Through Kānāwai*, *supra* note 11; *see also infra* Parts IV.C and V (deconstructing the four values).

its integrity is bound to land and other resources upon which indigenous peoples depend for physical and spiritual survival.²¹⁴ In turn, native communities' social welfare is defined by cultural veracity and access to, and the health of, natural resources.²¹⁵ 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.²¹⁶

International human rights principles of self-determination recognize each of these four realms as important dimensions of restorative justice for indigenous peoples, which are necessary to begin addressing longstanding physical and cultural issues, among other harms. “The notion of respect for cultural determinism has long been a feature of bilateral as well as multilateral treaties.”²¹⁷ In much the same way, indigenous peoples' rights and relationships to ancestral lands and other resources have also been recognized and upheld by a host of international protections, including the Declaration on the Rights of Indigenous Peoples.²¹⁸ Entitlements involving social welfare and development are “also grounded in the U.N. Charter and adjoined to the

214. See Anaya, *supra* note 6, at 346-47.

215. See *id.* at 348-49.

216. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 197 (2001) (“[T]he central challenge of cultural sovereignty is to reach an understanding of sovereignty that is generated from *within* tribal societies and carries a cultural meaning consistent with those traditions.”).

217. Anaya, *supra* note 6, at 343; see also United Nations Educational, Scientific, and Cultural Organization, Declaration of the Principles of International Cultural Cooperation, art. I, 14th Sess. (Nov. 4, 1966) (declaring that “[e]ach culture has a dignity and value which must be respected and preserved”); Convention Against Discrimination in Education, art. 5, Dec. 14, 1960, 429 U.N.T.S. 93, 100 (acknowledging “the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the education policy of each State, the use or the teaching of their own language”); Convention on the Prevention of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (defining genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such”); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 220 U.N.T.S. 232 (upholding rights of freedom of expression, religion, and “association with a national minority”).

218. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 173 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; see also Coffey & Tsosie, *supra* note 216, at 198 (“Emerging principles of international human rights law recognize the distinctive relationship of indigenous peoples to their lands and resources, and attempt to define certain rights to self-government and cultural protection.”).

principle of self-determination.”²¹⁹ “In the particular context of indigenous peoples, notions of democracy (including decentralized government) join with precepts of cultural integrity to create a *sui generis* self-government norm.”²²⁰ This norm “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.”²²¹

V. BRINGING THE INDIGENOUS RIGHT TO ENVIRONMENTAL SELF-DETERMINATION TO LIFE: TWO HAWAI‘I CONTROVERSIES

Although the black letter of Hawai‘i’s constitutional provisions appears helpful, and the legislative history confirms that the provisions were crafted to authorize protective and restorative action, their language is malleable enough to provide decision-makers with a range of choices in any given controversy, each potentially supporting different interests.²²² A narrow interpretation of article XII, section 7 would produce limited results, while a broad one could affect far-reaching cultural and environmental protection for Hawai‘i’s indigenous people and others who rely on the islands’ natural resources for daily living. A systematic approach that accommodates legally and socially recognized values is thus necessary to interpret and apply these provisions in ways that will further the laws’ restorative justice objectives while also empowering decision-makers to take forward-

219. Anaya, *supra* note 6, at 350. See U.N. Charter art. 55 (declaring the U.N.’s support of the proposition that “the creation of conditions of stability and well-being are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”).

220. Anaya, *supra* note 6, at 355. *Sui generis* means “of its own kind or class; unique or peculiar.” BLACK’S LAW DICTIONARY (9th ed. 2009).

221. Anaya, *supra* note 6, at 355; see also Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1174-75 (2008).

222. See, e.g., Stand. Comm. Rep. No. 77, 1 CONVENTION PRO., *supra* note 140, at 686 (explaining that “the language of this section mandates that the State and its political subdivisions provide for the conservation and protection of natural beauty, as contrasted with the previous language which simply empowered the state to ‘conserve and develop its natural beauty’”); Stand. Comm. Rep. No. 57, 1 CONVENTION PRO., *supra* note 140, at 639 (“Aware and concerned about past and present actions by private landowners, large corporations, ranches, large estates, hotels and government entities which preclude native Hawaiians from following subsistence practices traditionally used by their ancestors, your Committee proposed this new section to provide the State with the power to protect these rights and to prevent any interference with the exercise of these rights.”) (emphases added).

looking action.²²³

Two on-going controversies provide opportunities to explore how Kānaka Maoli and Hawai‘i decision-makers together can effectuate the indigenous right to environmental self-determination to proactively respond to the impacts of climate change on Maoli cultural practices. The first, involving access to water from streams for kalo cultivation, is straightforward and demonstrates how political groundwork on local legal regimes can create portals to apply international human rights norms in a domestic context. The second, concerning traditional salt cultivation on the island of Kaua‘i, is more complicated. Although local laws with restorative justice underpinnings do not open a clear door, affirmative government action on climate change nevertheless presents smaller openings to raise restorative justice arguments. Doing so highlights the need for decision-makers to transcend the literal wording or narrow interpretations of local laws—especially when considering *Ka Pa‘akai*’s three-part test—and give primacy to international human rights norms as the basis for decisions.

Together, these controversies illuminate how this developing framework more fully realizes the restorative justice underpinnings of local laws. At the same time, they highlight the framework’s potential to assist decision-makers in partnering with native communities to both better discharge decision-makers’ legal duties while also preserving the resources necessary for indigenous people and culture to thrive.

A. *Kalo Cultivation: The Native Hawaiian Staple*

In addition to being a Native Hawaiian staple, kalo has come to symbolize and become a crucial rallying point for Kānaka Maoli self-determination. As detailed here, the diversion of streams for plantation agriculture has stymied cultivation. This theft of resources has crippled native communities and forced Maoli to adopt a western diet and lifestyle. Because kalo also represents the Hawaiian family,²²⁴ revitalizing its cultivation has become an icon of resistance and restorative justice. For successful cultivation to take place, however, wetland kalo requires a consistent supply of fresh water flowing through

223. See Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1; *In re Waiāhole Ditch Combined Contested Case H’rg*, 9 P.3d 409, 455 (Haw. 2000) (directing decision-makers to “take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process”).

224. The kalo plant itself epitomizes the Maoli family. The primary root or corm is called the mākua (parent) and it is surrounded by ‘ohā (literally, taro shoots), which is also the root of the word ‘ohana (family). HANDY, ET. AL., *supra* note 18, at 22, 289.

the lo'i (wetland kalo patch) to survive and thrive.²²⁵ In many ways, fresh water—or wai—is the lifeblood of Kānaka Maoli culture. Wai retains tremendous significance as a kinolau or physical embodiment of Akua Kāne, one of the four major gods of the Hawaiian pantheon.²²⁶

Today, kalo cultivation remains one of Native Hawaiians' most important cultural practices. Although at one time Maoli farmers tended more than 20,000 acres of kalo, only 500 are in cultivation today, which represents less than one percent of Hawai'i's active agricultural lands.²²⁷ A significant limiting factor is insufficient water flowing in streams and springs.²²⁸

Reduced stream flows and extended droughts directly threaten the future of kalo culture.²²⁹ In addition, rising sea levels and saltwater inundation into coastal plains may foreclose the continued farming of ancient lo'i.²³⁰ These documented impacts of climate change compound the already significant challenges to Native Hawaiians who seek to continue or even expand kalo cultivation as a cultural practice and an exercise of self-determination and resistance.

1. *Understanding the Restorative Justice Underpinnings of Hawai'i's Laws On Kalo Cultivation.*²³¹

In light of Hawai'i's unique history (including the United States' role in the illegal overthrow of the sovereign Hawaiian Kingdom), issues

225. D. KAPUA'ALA SPROAT, *OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI'I* 5 (Ka Huli Ao ed. 2009) [hereinafter *OLA I KA WAI*]. Tengan, *supra* note 109, at 8-9.

226. See HANDY, ET. AL., *supra* note 18, at 63.

227. TARO SECURITY AND PURITY TASK FORCE, LEGISLATIVE REPORT: E OLA HOU KE KALO; HO'I HOU KA 'ĀINA LĒ'IA 31, 42 (2010), http://19of32x2yl33s8o4xza0gfl4.wpengine.netdna-cdn.com/wp-content/uploads/2014/09/NRLC_REPORT_FINAL-web.pdf (citing J. HOLLYER, *TARO MAUKA TO MAKAI: A TARO PRODUCTION AND BUSINESS GUIDE FOR HAWAI'I GROWERS* (revised ed. 2007)).

228. *Id.* at 12, 36-39 (detailing conditions in kalo-growing communities across the state).

229. RICHARD WALLSGROVE & DAVID PENN, CENTER FOR ISLAND CLIMATE ADAPTATION AND POLICY, *WATER RESOURCES AND CLIMATE CHANGE ADAPTATION IN HAWAI'I: ADAPTIVE TOOLS IN THE CURRENT LAW AND POLICY FRAMEWORK* 24 (2012).

230. CODIGA & WAGER, *supra* note 97, at 6. Hawai'i's Pacific neighbors—situated where climate change's impacts are more severe—are already losing their kalo crops, and as a result, their livelihoods. See *Case Study 2-1: Managing vulnerable water resources in atoll nations*, in *CLIMATE CHANGE AND PACIFIC ISLANDS*, *supra* note 14, at 58 (studying the vulnerability of water supplies on small, low-lying atoll islands to droughts and saltwater inundation caused by high tides). In both 2007 and 2008, high water levels flooded several atolls in the Federated States of Micronesia, destroying an estimated 90 percent of all kalo crops on Chuuk, home to 13,000 people, one-fourth of the state population. *Id.* at 60. Hawai'i's kalo culture is similarly vulnerable.

231. Portions of this section previously appeared in Sproat, *Wai Through Kānāwai*, *supra* note 11.

impacting Kānaka Maoli implicate restorative justice principles, including the importance of respecting indigenous rights in partial redress for the harms of American colonialism.²³² In part to further restorative justice goals, Hawai‘i established a comprehensive legal regime for fresh water protection and management, including constitutional provisions, statutes, and other legal tools that have the potential to yield just results.²³³ Although framed generally, much of the legal language appears favorable to both Hawai‘i’s indigenous people²³⁴ and the community at large.²³⁵ Establishing this regime was both its own struggle and a direct response to years of repressive colonial interests that seized native lands and appropriated massive quantities of water for plantation agribusiness, which decimated indigenous communities reliant on free flowing streams.²³⁶

The State’s commitment to reconciliation with Kānaka Maoli is particularly relevant in the context of Hawai‘i’s management of its natural and cultural resources—especially the plantation history of water appropriation.²³⁷ With restorative justice goals in mind, Hawai‘i’s

232. Apology Resolution, *supra* note 47; *see also* Yamamoto & Lyman, *supra* note 19, at 344.

233. *See* HAW. CONST. art. XI, §§ 1, 7; HAW. REV. STAT. § 174C (2014); HAW. ADMIN. R. §§ 13-167-1—13-171-60.

234. *See, e.g.*, HAW. REV. STAT. § 174C-101(c) (“Traditional and customary rights of ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one’s own kuleana and the gathering of h[ī]h[ī]wai, [‘ō]pae, [‘]o‘opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.”); *id.* § 174C-101(d) (“The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or receive a permit under this chapter.”).

235. *See, e.g.*, *In re Wai‘ola O Moloka‘i, Inc.*, 83 P.3d 664, 680 (Haw. 2004) (“The Code mandates consideration of the large variety of public interests. The definition of ‘public interest’ in the Code broadly encompasses the protection of the environment, traditional and customary practices of native Hawaiians, scenic beauty, protection of fish and wildlife, and protection and enhancement of the waters of the State.”).

236. Hawai‘i’s citizens came together in the Con Con and crafted amendments to Hawai‘i’s Constitution to elevate the management of natural and cultural resources to a constitutional mandate while also centralizing management of fresh water under a single state agency to minimize political influence at the county level. *See* HAW. CONST. art. XI, §§ 1, 7. In 1978, Hawai‘i’s voters ratified those amendments and in 1987 Hawai‘i’s State Water Code, Hawai‘i Revised Statutes Chapter 174C, was implemented as a comprehensive management tool for Hawai‘i’s water resources. *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 139-48 (discussing the evolution of Hawai‘i law, including water law, and its roots in Maoli culture).

237. For example, in 1993, the legislature established the Hawaiian Sovereignty Advisory Commission to advise the legislature on how to “facilitate efforts of native Hawaiians to be governed by an indigenous . . . nation of their . . . choosing” since “the indigenous people of Hawai[‘]i were denied the mechanism for expression of their inherent sovereignty . . . and self-

Constitution was amended and the Water Code adopted with directives requiring the Water Commission to take the initiative to protect and preserve the public's interest in fresh water resources, with specific provisions for Maoli rights and interests.²³⁸ Article XI, section 1 of Hawai'i's Constitution provides that "[a]ll public natural resources are held in trust by the State for the benefit of the people."²³⁹ Article XI, section 7 of Hawai'i's Constitution makes explicit reference to water, including the directive "to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people." Significantly, "article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."²⁴⁰

Today, under Hawai'i's Constitution, Water Code, and common law, the "water resources trust" applies to "all water resources without exception or distinction."²⁴¹ The public trust establishes "a dual mandate of (1) protection and (2) maximum reasonable and beneficial use."²⁴² The Water Commission, therefore, has an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."²⁴³

determination, their lands, and their ocean resources." 1993 Haw. Sess. Laws 359, 1009, 1010.

238. In a path-breaking decision, the Hawai'i Supreme Court opined that the State Water Commission "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 the resource at every stage of the planning and decisionmaking process." *In re Waiāhole Ditch Combined Contested Case H'rg*, 9 P.3d 409, 455 (2000) (internal quotations omitted); *see also* HAW. REV. STAT. §§ 174C-63, -101 (2014).

239. HAW. CONST. art. XI, § 1. Some text here and in the next two paragraphs previously appeared in *SPROAT, OLA I KA WAI*, *supra* note 225, at 3-5.

240. *Waiāhole*, 9 P.3d at 444 (citations omitted). Many trace the public trust's origin to English and Roman law. For a detailed analysis of the public trust doctrine in Roman and common law, see Joseph L. Sax, *The Public Trust Doctrine in the Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-76 (1969-1970). Yet, long before the existence of the constitutional provisions described above, cases and laws of the Hawaiian Kingdom, along with Maoli custom and tradition, firmly established the principle that natural resources (including water) were not private property, but were held in trust by the government for the benefit of the people. *See, e.g.*, HAW. CONST. of 1840, *supra* note 40, at 10-11 (noting that the first constitution of the Kingdom of Hawai'i declared that the land and its resources "belonged to the chiefs and people in common, of whom [the King] was the head and had the management of the landed property"); Hawai'i Kingdom Laws of 1839, *reprinted and translated in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 33 (1842), <http://punawaiola.org/> (reprinting an 1839 law respecting water for irrigation, which sought to manage water resources for the common good); *see also* D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. 537 (2011).

241. *Waiāhole*, 9 P.3d at 445.

242. *Id.* at 451.

243. *Id.* at 453 (emphasis removed) (quoting *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.* ("Mono Lake Case"), 658 P.2d 709, 728 (Cal. 1983)).

Thus far, the Hawai'i Supreme Court has identified only a handful of "public trust purposes," including: environmental protection, traditional and customary Kānaka Maoli rights and practices, appurtenant rights, domestic water uses, and reservations for the Department of Hawaiian Home Lands.²⁴⁴ Public trust purposes have priority over private commercial uses, which do not enjoy the same protection.²⁴⁵ Under the public trust, "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."²⁴⁶ Offstream diverters who seek water for their private commercial gain bear the burden of justifying proposed uses in light of protected rights in the resources, including traditional and customary Maoli practices. Many of the Water Code's provisions were purposefully crafted to rectify the monopoly of resources by a handful of business interests (e.g., sugar plantations owned by descendants of American colonists) to ensure that water supplies supported the entire range of public purposes and to prioritize certain uses, including indigenous rights and practices.²⁴⁷

Moreover, as noted previously in Part III.C, additional constitutional and statutory provisions safeguard indigenous rights and practices. Over and above Article XII, section 7 and *Ka Pa'akai's* decision-making

244. *Id.* at 448–50; *In re Wai'ola O Moloka'i, Inc.*, 83 P.3d 664, 694 (Haw. 2004). Appurtenant rights appertain or attach to parcels of land that were cultivated, usually in the traditional staple kalo, at the time of the Māhele. *See Reppun v. Bd. of Water Supply*, 656 P.2d 57, 58, 78 (Haw. 1982). The Department of Hawaiian Home Lands was established by the Hawaiian Homes Commission Act. *See supra* note 151. The HHCA provides "rehabilitation of the native Hawaiian people through a government-sponsored homesteading program" intended to "provide for economic self-sufficiency of native Hawaiians through the provision of land." Hawaiian Homes Commission Act, 1920 (42 Stat. 108), <http://dhhl.hawaii.gov/hhc/laws-and-rules/>.

245. *Waiāhole*, 9 P.3d at 454.

246. *Id.*

247. *See* HAW. REV. STAT. § 174C-2 (2014); *see also Waiāhole*, 9 P.3d at 449-50. In *Waiāhole*, the court explained its position as follows:

[W]e continue to uphold the exercise of Native Hawaiian and traditional customary rights as a public trust purpose. . . . Although its purpose has evolved over time, the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. . . . [I]f the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and *superior to*, the prevailing private interests in the resources at any given time.

Id. (emphasis added); *see also In re Wai'ola O Moloka'i, Inc.*, 83 P.3d at 680 ("The definition of 'public interest' in the Code broadly encompasses the protection of the environment, traditional and customary practices of native Hawaiians, scenic beauty, protection of fish and wildlife, and protection and enhancement of the waters of the State.").

framework,²⁴⁸ Hawai'i Revised Statutes sections 1-1 and 7-1 provide independent protections for traditional and customary Maoli practices, and water rights in particular.²⁴⁹

2. *Confounding Restorative Justice: Failures of the Law in Practice.*

The Water Code's basic structure, however, has not achieved its stated purpose of protecting and restoring Hawai'i's fresh water resources or the cultural practices dependent upon them.²⁵⁰ Despite what appear to be significant protections for Native Hawaiian practices that are reliant upon fresh water—such as kalo cultivation—the Water Commission and other agencies have yet to proactively implement these provisions in a manner that advances restorative justice. The longstanding failure to establish scientifically-based Interim Instream Flow Standards (“IIFSs”) is a poignant example.

An Instream Flow Standard is permanent, whereas an IIFS is temporary.²⁵¹ Both standards are a “quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.”²⁵²

248. HAW. CONST. art. XII, § 7; *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, State of Hawai'i*, 7 P.3d 1068, 1084 (Haw. 2000).

249. HAW. REV. STAT. § 1-1 (noting the common law of England is “declared to be the common law of the State of Hawai[‘i] in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage”). Hawai'i Revised Statutes § 7-1 provides:

[P]eople on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit; further, t]he people shall also have a right to drinking water, and running water, and the right of way.

Id. at § 7-1.

250. Compare HAW. REV. STAT. § 174C-5 (detailing the Water Commission's general powers and duties), with *The Water Commission: An Idea Whose Time Has Passed*, ENV'T HAWAI'I (July 2010), <http://www.environment-hawaii.org/?p=1015> (“If the Legislature had tried to invent a means of paying lip service to streams while leaving status quo diversions intact and flourishing, it would have been hard pressed to come up with a better solution than the water commission.”). Due to space constraints, analysis of this controversy focuses primarily on the Water Code's provisions although the Water Commission must also employ *Ka Pa'akai's* decision-making framework.

251. In establishing an IIFS, the Commission must adhere to many of the same standards established for an Instream Flow Standard. SPROAT, OLA I KA WAI, *supra* note 225, at 22-23.

252. HAW. REV. STAT. § 174C-3. Beneficial instream uses include traditional and

IIFSs are critical tools for water management in Hawai'i because they underpin the entire instream use and protection program. The IIFS process is supposed to be expedited, and the standard is more flexible in terms of how broadly it may be imposed compared to a permanent Instream Flow Standard.²⁵³ The Hawai'i Supreme Court deemed IIFSs “the primary mechanism by which the commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows.”²⁵⁴ Given this vital role, the Water Code requires that the Water Commission set IIFSs “on a stream-by-stream basis whenever necessary to protect the public interest in the waters of the State.”²⁵⁵ These standards are supposed to designate the flows necessary to adequately protect beneficial instream uses of water, including “the protection of traditional and customary Hawaiian rights” such as kalo cultivation.²⁵⁶

The Water Commission outlined an investigation and fact-finding process and directed that any IIFS or Instream Flow Standard “shall be adopted by the commission not later than July 1, 1990.”²⁵⁷ Nevertheless, the Water Commission did not approve standards that were based on the Code's rigorous requirements for scientific analysis and consultation with expert agencies.²⁵⁸ Instead, the Commission simply adopted as IIFSs whatever amount of water, if any, happened to be flowing in a stream on a particular date—prioritizing plantation agriculture over ecological and native needs and turning the restorative justice principles of Hawai'i law on their heads.²⁵⁹ This was done without assigning any

customary Native Hawaiian practices such as kalo cultivation. *Id.*

253. See *Waiāhole*, 9 P.3d at 460.

254. *Id.*

255. HAW. REV. STAT. § 174C-71(1) (overviewing requirements for the protection of instream uses, including the establishment of an IIFS).

256. *Id.* §§ 174C-71(1)(C), 174C-3 (defining beneficial instream uses of water, which include the maintenance of fish and wildlife habitats; outdoor recreational activities; maintenance of ecosystems such as estuaries; conveyance of irrigation and domestic water to downstream points of diversion; and traditional and customary Native Hawaiian rights).

257. HAW. ADMIN. R. § 13-170-2(e). The initial deadline was roughly three years after the Water Code was enacted. Shortly thereafter, administrative rules specified that IIFSs must be set for streams on the various Hawaiian Islands on a schedule ranging from a July 31, 1987 deadline for Windward O'ahu to a December 31, 1988 deadline for West Maui and Leeward O'ahu. *Id.* § 13-169-42 (“The commission shall adopt interim instream flow standards as follows: (1) Windward O'ahu by July 31, 1987; (2) East Maui and Kaua'i by December 31, 1987; (3) Hawai'i and Moloka'i by July 1, 1988; and (4) West Maui and Leeward O'ahu by December 31, 1988.”).

258. See, e.g., HAW. REV. STAT. § 174C-71(1)(E).

259. See, e.g., HAW. ADMIN. R. §§ 13-169-44-49; see also *The Water Commission: An Idea Whose Time Has Passed*, *supra* note 250, at 2 (explaining the process of establishing “non-quantified ‘interim’ flow standards, reflecting the status quo”).

actual numbers to these standards, making them practically impossible to enforce.²⁶⁰

The Water Commission claimed that this satisfied the legal requirement of “protect[ing] the public interest”²⁶¹ by identifying the flows necessary to adequately protect beneficial instream uses,²⁶² while considering the “economic impact”²⁶³ of taking water out of the stream for other “noninstream purposes.”²⁶⁴ These status quo IIFSs, however, left streams and their communities with little to no protection and no immediate prospects of restoration, despite the Water Code’s intent and admonitions to the contrary.²⁶⁵ They also undermine both the Hawai‘i Constitution and Water Code’s commitment to restorative justice, while also wholly failing to remedy the environmental and cultural damage of stream diversions. As the Hawai‘i Supreme Court recognized,

The Commission, obviously, cannot “implement” or “protect” standards that do not exist. For the “instream use protection” regime to fulfill its stated purpose, the Supreme Court directed the Commission to designate instream flow standards as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values.²⁶⁶

In 2016, almost thirty years after the Water Code was passed, the Water Commission has yet to issue even one permanent Instream Flow Standard and the only IIFSs based on some actual information, rather

260. See *The Water Commission: An Idea Whose Time Has Passed*, *supra* note 250, at 2-3.

261. HAW. REV. STAT. § 174C-71(1)(C).

262. *Id.*

263. *Id.* § 174C-71(1)(E).

264. *Id.*

265. See *The Water Commission: An Idea Whose Time Has Passed*, *supra* note 250, at 3 (“Protection and restoration of streams and the customary and traditional uses associated with them are among the commission’s primary purposes, as set forth by law. Over the last two decades, however, the zeal with which it has pursued these goals has undergone a slow transformation.”).

266. *In re Waiāhole Ditch Combined Contested Case H’rg*, 9 P.3d 409, 461 (Haw. 2000) (citations omitted); see also *In re Water Use Permit Applications*, 93 P.3d 643, 654 (Haw. 2004) (admonishing the Commission for the delay in setting instream flow standards). IIFSs and permanent Instream Flow Standards “are the Water Commission’s principal mechanisms to ensure that surface water rights and interests, including resource protection, are adequately considered.” SPROAT, OLA I KA WAI, *supra* note 225, at 22. The Water Code required the establishment and administration of an “instream use protection program” when the Code was passed in 1987; however, the only standards that are based on actual information have been set as a result of litigation, with the first such IIFSs established in *Waiāhole*. See HAW. REV. STAT. § 174C-71 (detailing the requirements of the instream use protection program).

than status-quo diversions, have been established as a result of litigation.²⁶⁷ In those instances, indigenous people and their allies have had to sue before the Water Commission restored water for kalo and other cultural practices.²⁶⁸

3. *Deploying the Four Values to Actualize Restorative Justice.*

Alternatively, if the Water Commission employed a developing analytical framework that embraced principles of restorative justice and self-determination for native peoples, a very different outcome would emerge. In Hawai'i, the four values of cultural integrity, lands and natural resources, social welfare and development, and self-determination are a baseline for the development of remedial measures to redress the impacts of colonization and the appropriation of free flowing streams in particular.²⁶⁹ By broadening and deepening the Commission's analysis, this framework facilitates decisions that are more aligned with the "justice principles" engrained in Hawai'i water law and the constitutional protections for traditional and customary Native Hawaiian practices.

For example, given the significance of flowing streams and kalo cultivation to Kānaka Maoli, assessing cultural impacts should be an obvious starting point for the Water Commission when evaluating an IIFS. The Commission and other decision-makers seeking to use this framework should "explicitly analyze history and socio-economic conditions in the context of cultural integrity and whether actions or decisions support and restore cultural integrity as a partial remedy for past harms, or perpetuate conditions that continue to undermine cultural survival."²⁷⁰ The United Nations affirmed in its Declaration on the Rights of Indigenous Peoples that native peoples retain the right to "practise and revitalize their cultural traditions and customs[,] . . . includ[ing] the right to maintain, protect and develop the past, present and future manifestations of their cultures."²⁷¹ Moreover, as one scholar has noted, "the cultural integrity norm has developed to entitle indigenous groups like the Native Hawaiian people to affirmative

267. See, e.g., Sproat, *Wai Through Kānāwai*, *supra* note 11, at 150-53 (detailing the decades-long process to set IIFSs).

268. *Id.*

269. See, e.g., *id.* at 177-85.

270. *Id.* at 179.

271. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (XI), U.N. Doc. A/RES/61/295 (Sept. 13, 2007); see also Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 BROOK. J. INT'L L. 1105, 1120 (2002) (discussing a draft of the declaration).

measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard.”²⁷²

The impacts of status quo IIFSs in general, and especially the failure to assign numbers to these standards in light of the cultural integrity norm, illustrate how the Water Commission’s actions and inactions perpetuate conditions that undermine Native Hawaiians’ cultural survival. Rather than setting standards that might partially remedy the wholesale diversion of streams for more than a century, current IIFSs prolong conditions that make it difficult if not impossible to cultivate kalo. This becomes especially apparent in the face of global climate change where declining stream flows and ground water supplies threaten coastal plain agriculture such as lo‘i kalo. Further, because the cultural integrity norm empowers the Water Commission to take affirmative steps to support Native Hawaiian cultural survival and guard against the ongoing impacts of climate change, it should do so by, for example, setting IIFSs at higher levels before it is too late.

Second, a developing contextual framework for indigenous peoples seeking to implement a right to environmental self-determination “directly analyze[s] history and current socio-economic considerations with the intent of understanding whether a particular action perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way.”²⁷³ After all, “[t]he importance of lands and resources to the survival of indigenous cultures is widely acknowledged.”²⁷⁴ Moreover, respecting native peoples’ sacred relationship to natural resources—such as fresh water—is a necessary “response to the historical processes that have afflicted indigenous peoples, including the Native Hawaiians, by trampling on their cultural attachment to ancestral lands, disregarding or minimizing their legitimate property interests, and leaving them without adequate means of subsistence.”²⁷⁵

When this second norm is considered in the example of whether

272. Anaya, *supra* note 6, at 345. See generally Comment on the Elimination of Racial Discrimination, Rep., U.N. GAOR, 52d Sess., Supp. No. 18, U.N. Doc. A/52/18, Annex V ¶ 3 (1997) (detailing the measures to be taken to protect indigenous peoples).

273. Sproat, *Wai Through Kānāwai*, *supra* note 11, at 181.

274. Anaya, *supra* note 6, at 346; see also JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD’S INDIGENOUS PEOPLES 13-16 (1987) (detailing indigenous philosophies on land); Coffey & Tsosie, *supra* note 216, at 205 (“This relationship between land and Native people transcends the idea of land as a means of physical survival or subsistence. Land also ensures the cultural survival of Indian people as distinct groups and nations.”).

275. Anaya, *supra* note 6, at 348; see also Lee Swepston, *A New Step in the International Law of Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677, 696-705 (1990) (detailing a concurring analysis of land rights).

IIFSs meet the Water Code's and State Constitution's requirement of protecting traditional and customary Native Hawaiian practices, including kalo cultivation, status quo IIFSs are even more difficult to justify.²⁷⁶ Again, the Water Commission accepted as standards whatever amount of water, if any, happened to be flowing in streams on a particular date—most of which occurred in 1988 or 1989.²⁷⁷ Because those standards were set when stream diversions for industrial agriculture were already in place, doing so “perpetuates the subjugation of ancestral lands, resources, and rights” by allowing offstream diverters to continue taking almost the entire flow of streams regardless of impacts on indigenous self-determination and Native Hawaiian practices, including kalo cultivation. Moreover, those IIFSs fail to fulfill the basic requirement of protecting beneficial instream uses, including Maoli cultural practices such as growing kalo.

Third, a critical aspect for decision-makers seeking to implement an indigenous right to environmental self-determination is whether a decision has “the potential to improve health, education, [] living standards,” and other social welfare conditions.²⁷⁸ Considering social welfare and development helps to “remedy two distinct but related historical phenomena that result in most indigenous communities living in an economically disadvantaged condition”: first, the progressive plundering of indigenous peoples' lands and resources, which has devastated Kānaka Maoli and other native economies and subsistence lifestyles; and second, the patterns of discrimination that have excluded indigenous communities from accessing social welfare benefits available to others.²⁷⁹

When the Commission evaluates this third norm in the context of protecting Maoli cultural practices and kalo cultivation in particular, status quo IIFSs also fail to further restorative justice principles. Rather than remedying the plundering of Native Hawaiian water resources, these standards enable the mass diversion of streams to continue as it has for over a century, effectively frustrating traditional rights and practices such as cultivation of the staple food kalo. Researchers have documented the impacts of climate change on human health and highlighted the injustice of maintaining stream diversions.²⁸⁰ Moreover,

276. See HAW. REV. STAT. §§ 174C-71(1)(C).

277. SPROAT, *OLA I KA WAI*, *supra* note 225, at 24.

278. Sproat, *Wai Through Kānāwai*, *supra* note 11, at 182-83.

279. Anaya, *supra* note 6, at 352-53 (citations omitted); see also Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1760-61 (2003).

280. Anthony Costello et al., *Managing the Health Effects of Climate Change*, 373 THE

social welfare impacts to health in particular “will fall disproportionately on individuals who are already vulnerable, especially for indigenous people and those living in low-resource settings.”²⁸¹ Once impacts to social welfare conditions are factored into the equation, it becomes apparent that status quo IIFSs wholly fail to meet the restorative justice principles that underpin the Water Code and constitutional protections for cultural practices.

Finally, a developing framework to implement the indigenous right to environmental self-determination “must consider whether a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance.”²⁸² Centuries of colonization have left most of the world’s indigenous people, including Kānaka Maoli, politically vulnerable.²⁸³ This is especially true in the climate context, as many native people lack the governmental or other power to impact the decisions of the largest greenhouse gas emitters.²⁸⁴ As a result, “[r]emedial measures to redress the health, educational, and other disparate impacts of colonialism continue to be challenged, circularly, using laws that were specifically crafted to protect historically disadvantaged groups, leaving Maoli physically and politically vulnerable.”²⁸⁵

When the Water Commission’s protection of Native Hawaiian practices and kalo cultivation in particular is evaluated against this fourth norm of self-governance, status quo IIFSs appear especially problematic. As noted earlier, although the United States has yet to acknowledge the inherent sovereignty of Kānaka Maoli, the State of Hawai‘i formally recognized this status via legislative act and continues to seek to redress this issue.²⁸⁶ As an analysis of the previous three

LANCET COMMISSIONS: LANCET AND UNIVERSITY COLLEGE LONDON INSTITUTE FOR GLOBAL HEALTH COMMISSION 1693, 1693-1733 (2009). “More troubling, however, is the way in which water is increasingly being used as a cultural weapon. Diverting water for personal benefit is ancient. But nowadays water has become a powerful way to oppress vulnerable populations.” *Id.* at 1720.

281. Nick Watts et al., *Health and Climate Change: Policy Responses to Protect Public Health*, 386 THE LANCET COMMISSIONS: 2015 LANCET COMMISSION ON HEALTH AND CLIMATE CHANGE 1861 (2015), [http://dx.doi.org/10.1016/S0140-6736\(15\)60854-6](http://dx.doi.org/10.1016/S0140-6736(15)60854-6) (footnotes omitted).

282. Sproat, *Wai Through Kānāwai*, *supra* note 11, at 185.

283. Anaya, *supra* note 6, at 356.

284. Native Hawaiians are at even greater risk because the United States has refused to “federally recognize” Kānaka Maoli’s inherent sovereignty. See Tsosie, *Comparative Models of Sovereignty*, *supra* note 17.

285. Sproat, *Wai Through Kānāwai*, *supra* note 11, at 184.

286. See Act 195, *supra* note 155; *supra* Part III (detailing state and federal restorative justice efforts). In June 2014, the U.S. Department of the Interior (“DOI”) issued an Advance Notice of Proposed Rulemaking to solicit public comments on whether and how DOI should

values illustrates, status quo IIFSs perpetuate the historical conditions imposed by colonizers by enabling the longstanding diversion of streams to continue. Rather than rectifying the loss of self-determination, this failure to set protective IIFSs actively stymies Native Hawaiian cultural sovereignty efforts to exercise indigenous norms and values related to kalo cultivation and other traditional practices reliant upon flowing streams.²⁸⁷ Given the already documented impacts of climate change in Hawai‘i (such as decreased stream flows and prolonged drought), proactive action is needed now for the Water Commission to respect Native Hawaiians’ right to environmental self-determination. As the Hawai‘i Supreme Court admonished, this Commission “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 the resource at every stage of the planning and decisionmaking process.”²⁸⁸

As the above analysis demonstrates, even though the language of Hawai‘i’s constitutional and statutory provisions promote stream restoration and the protection of traditional Kānaka Maoli practices such as kalo cultivation, the Water Commission’s decisions—such as status quo IIFSs—actually disserve the intended accommodation of indigenous interests and values. When the Commission’s actions, such as status quo IIFSs, are assessed against the four values of cultural integrity, land and other resources, social welfare and development, and self-governance, the inquiry reveals the true impact of these decisions on Native Hawaiians in general and kalo cultivation in particular.

Although it calls into question the propriety of status quo IIFSs, this analysis also provides an important opportunity for the Water Commission and other local decision-makers to implement the restorative justice goals embodied in Hawai‘i’s Constitution and Water

facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community, which garnered more than 5,000 written responses. Press Release, U.S. Dep’t of the Interior, Interior Proposes Path for Re-Establishing Government-to-Government Relationship with Native Hawaiian Community (Sept. 29, 2015), <https://www.doi.gov/pressreleases/interior-department-proposes-pathway-re-establishing-government-government>. In September 2015, DOI announced a Notice of Proposed Rulemaking, a proposal to create an administrative procedure and criteria that the Secretary of the Interior would apply if the Native Hawaiian community forms a government that then seeks a formal government-to-government relationship with the United States. *Id.* DOI will accept public comments for a ninety-day period and will hold a series of teleconferences on the proposed rule. *Id.*

287. See Tsosie, *Comparative Models of Sovereignty*, *supra* note 17, at 82 (explaining cultural sovereignty).

288. *In re Waiāhole Ditch Combined Contested Case* H’rg, 9 P.3d 409, 455 (Haw. 2000) (internal quotation omitted).

Code. By broadening and deepening the Commission's analysis, this framework facilitates decisions that are more aligned with the "justice principles" engrained in Hawai'i water law and the constitutional protections for traditional and customary Native Hawaiian practices. In other words, by judging the impacts of proposed decisions in light of the four norms, decision-makers can both effectuate the indigenous right to environmental self-determination and achieve more just results for Kānaka Maoli by taking the initiative to amend upwards IIFSs and restore stream flows throughout Hawai'i.

B. *Pa'akai: Traditional Salt Cultivation*

When compared to the first controversy, the traditional art of making pa'akai or sea salt raises many more complexities because it lacks the extensive protections that kalo cultivation enjoys.²⁸⁹ In this way, pa'akai typifies the struggle that many indigenous practices face in Hawai'i: although broad constitutional protections apply, the local legal regime lacks specific directives for state and county agencies to meaningfully implement the law's restorative justice objectives. This underscores the need for decision-makers to transcend the literal wording of local laws and give primacy to international human rights norms as the key basis for protective and restorative action.

As explained in Part II.C, rising sea levels have significantly shortened the time period within which practitioners can make salt, and in some years cultivation has not been possible at all due to flooding.²⁹⁰ Today, the cultural tradition of making pa'akai continues on only one small sliver of coastal land in Hanapēpē on the island of Kaua'i's southwestern coast.²⁹¹ The area is managed by a core group of families who each cultivate their own lo'i (salt pan(s), usually on irrigated terraces) and the process is valued as much as, if not more, than the

289. Unlike in the case of kalo cultivation, the developing analytical framework does not suggest a straightforward approach to combat climate change's impacts on Maoli salt cultivation. The framework does, however, reveal the impacts of proposed actions on these indigenous practices in a more meaningful way than currently exists. Among other things, it elevates public discourse about the impacts of both proposed projects and climate change on vital indigenous resources and practices.

290. Interview with Malia Nobrega-Olivera, Director of Strategic Partnerships, LAMA Center for Island Climate Adaptation & Policy, University of Hawai'i at Mānoa, in Honolulu, Haw. (June 24, 2013).

291. *Id.* See also Léo Azambuja, *Preserving Kaua'i's Culture in Pa'akai*, FOR KAUA'I, <http://www.forkauaionline.com/preserving-kauais-culture-in-paakai-wvideo/> (last visited July 15, 2015). Pu'uhoŋua o Honaunau on Hawai'i Island is the only other remaining area where natural sea salt harvesting persists in this form.

product itself.²⁹² When mixed with ‘alaea (a medicinal red dirt), this salt is used to heal and cleanse the spirit.²⁹³ It is also vital to preserve food, for cooking and ceremonial blessings, and to ward off negative energy.²⁹⁴ If these lo‘i can no longer be tended as they have been for over a millennium, future generations may never have the opportunity to perpetuate this important cultural art, or experience the healing properties of pa‘akai itself.

The nature of salt-making and Hanapēpē’s unique topography render this indigenous tradition especially susceptible to sea level rise.²⁹⁵ A salt bed is comprised of one puna (spring of water) where ocean water wells up, multiple wai kū (smaller sources of brackish water) where saltwater is transferred after coming through the puna, and several lo‘i from which salt is ultimately harvested.²⁹⁶ Preparing a salt shelf and its components can take weeks.²⁹⁷ The summer must be hot and dry for conventional salt harvests.²⁹⁸ Families historically started preparations in March or April, but shifting seasons likely caused by climate change have resulted in shorter set-up and harvesting periods.²⁹⁹ In some years, including 2014 and 2015, families were unable to cultivate salt at all due to changes in climate and rising seas.³⁰⁰ Although it is common for the ocean to inundate the ponds in the winter, flooding never occurred to the degree and for the duration that it does now.³⁰¹ These changes drastically affect whether this practice can continue and, if it does, how much pa‘akai ‘ohana can harvest, use for cultural purposes, and share with

292. Interview with Malia Nobrega-Olivera, Director of Strategic Partnerships, LAMA Center for Island Climate Adaptation & Policy, University of Hawai‘i at Mānoa, in Honolulu, Haw. (June 24, 2013).

293. *Id.* For example, pa‘akai is used to heal swollen limbs and remedy symptoms such as sore throats and stiff muscles. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* An especially productive summer can yield five harvests, at one hundred five-gallon buckets each. *Id.*

299. *Id.*

300. *Id.* In both 2014 and 2015, for example, the Nobrega ‘ohana was not able to harvest even one bucket of salt because the area remained flooded throughout the entire summer. Email from Malia Nobrega-Olivera, Director of Strategic Partnerships and Community Engagement, Hawai‘inuiākea School of Hawaiian Knowledge, to Mahina Tuteur, Post-JD Fellow, Ka Huli Ao Center for Excellence in Native Hawaiian Law (Nov. 7, 2015, 12:20 HST) (on file with author).

301. Interview with Malia Nobrega-Olivera, Director of Strategic Partnerships, LAMA Center for Island Climate Adaptation & Policy, University of Hawai‘i at Mānoa, in Honolulu, Haw. (June 24, 2013).

others.³⁰²

Given the significance of this place-based indigenous practice, Hanapēpē's salt pans were added to Hawai'i's Register of Historic Places in September 1988.³⁰³ Doing so acknowledged "that the preservation and maintenance of the property is contributing to the State's and nation's historic patrimony, and is thus serving the public."³⁰⁴ It also invoked multiple layers of protection, including a historic preservation review whenever a proposed project requires approval from a state agency.³⁰⁵ Consultation with the State Office of Hawaiian Affairs, other Native Hawaiian organizations, and individual Native Hawaiians on potential developments is also mandatory given the salt pans' "important value to the native Hawaiian people."³⁰⁶ Moreover, the area's inclusion on the State Register triggers Hawai'i Revised Statutes Chapter 343, which compels the preparation of an environmental assessment for future uses that may impact historic sites.³⁰⁷

302. *See id.* (explaining the multiple stressors that have impacted Hanapēpē over the years).

303. NATIONAL AND STATE REGISTER OF HISTORIC PLACES: KAUA'I, <http://files.hawaii.gov/dlnr/shpd/architecture/regkauai-1304.pdf> (last visited Aug. 26, 2015).

304. HAW. ADMIN. R. § 13-198-9.

305. HAW. ADMIN. R. § 13-284. Once added to Hawai'i's Register of Historic Places, the salt ponds are designated a "significant historic property," which triggers the historic preservation review process. HAW. ADMIN. R. § 13-275-2 (defining "significant historic property"). Pursuant to this requirement, the State Historic Preservation Division ("SHPD") must "make comments to state and county agencies on permits, licenses, certificates, land use changes, subdivisions, or other entitlements for use which may affect historic properties[.]" HAW. ADMIN. R. § 13-284-1. Initially, the action agency must determine whether the historic property will be impacted and, if so, what mitigation is necessary. HAW. ADMIN. R. § 13-284-7. Additional requirements are imposed on state and county projects (as opposed to private projects seeking state approval). *See* HAW. ADMIN. R. § 13-275. *See also* HO'I HOU I KA IWIKUAMO'O, *supra* note 119, at 23-51 (providing more information on the historic preservation review process).

306. HAW. ADMIN. R. § 13-284-8(a)(2). Additional consultation is triggered by the fact that cultural practices continue in the area. *Id.* ("If properties with cultural significance . . . are involved, the person shall initiate a consultation process with one or both of the following on the proposed form(s) of mitigation, so their concerns can be considered: (A) Ethnic organizations, such as native Hawaiian organizations, for whom the historic properties are of cultural significance; or (B) In the case of a traditional cultural place, members of the ethnic community who have knowledge of the traditional cultural property.")

307. HAW. REV. STAT. § 343-5(a)(4) (2014). *But see* Jordan J. Kimura, *The Environmental Assessment: Issues Surrounding the Exclusion of Projects Significantly Affecting Hawaii's Fragile Environment*, 10 ASIAN-PAC. L. & POL'Y J. 168 (2008) (arguing that the Hawai'i Environmental Policy Act's narrow interpretation of "action" limits the environmental assessment ("EA") requirement and undermine the law's purpose). The location of the salt pans in the shoreline area and conservation district would also trigger environmental review under Chapter 343. HAW. REV. STAT. §§ 343-5(a)(2-3); *see also* Kimura, *supra* at 173 (noting that "an action may trigger an EA if it proposes a use within a conservation district, shoreline area, or historic area"). For a discussion of additional protections for properties in the conservation district, *see* Denise E.

Both environmental and historic preservation reviews are subject to *Ka Pa‘akai*’s decision-making framework, which effectuates the State’s constitutional obligation to protect and restore traditional and customary Native Hawaiian rights and practices.³⁰⁸ As set forth in Part III, these provisions were purposefully crafted to safeguard indigenous resources and traditions, such as salt-making, while also formalizing a process to begin to repair colonization’s longstanding cultural and other harms.

In many ways, the threats³⁰⁹ to salt-making in Hanapēpē illuminate challenges to Maoli cultural survival throughout Hawai‘i where a myriad of state and county laws fail to sufficiently protect vibrant place-based practices. Fifteen years after the Hawai‘i Supreme Court issued *Ka Pa‘akai* and its decision-making framework, native resources and practices remain under siege and many local lawmakers are still grappling with how to actualize restorative justice on the ground in Native Hawaiian communities. Some of the greatest hazards are not imposed by new projects, but are the result of a warming planet. If local decision-makers, however, work in partnership with indigenous communities to make assessments (such as the required environmental and historic preservation reviews) in light of the four values of cultural integrity, land and natural resources, social welfare and development, and self-determination, outcomes would be more aligned with the restorative justice principles engrained in Hawai‘i law while also realizing the indigenous right to environmental self-determination.

For example, given that Hanapēpē is the only area left on Kaua‘i and one of only two remaining in the entire archipelago where pa‘akai can still be cultivated in a traditional manner, considering “whether actions or decisions support and restore cultural integrity as a partial remedy for past harms or perpetuate conditions that continue to undermine cultural survival” is a critical starting point for any environmental or historic preservation review.³¹⁰ Second, in deploying the framework, local decision-makers assess “whether a particular action perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to

Antolini, *The Moon Court’s Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation*, 33 U. HAW. L. REV. 581 (2011).

308. See *supra* Part III.C (detailing *Ka Pa‘akai*’s three-part test and how it employed a restorative justice lens to formalize lasting processes to begin repairing the cultural harms imposed by colonialism).

309. In addition to sea level rise, other threats include the development of an airfield runway nearby, a heavily used beach park, a road cutting through the salt beds, a makeshift beach access route blocking drainage, the razing of a nearby forest (which provides evapotranspiration), and polluted runoff from neighboring agricultural operations and a highway. H.C.R. No. 117 (2008).

310. Sproat, *Wai Through Kānāwai*, *supra* note 11, at 179.

redress historical injustices in a significant way.”³¹¹ Third, a significant component of any meaningful environmental or historic preservation review is whether a decision-maker’s recommendation has “the potential to improve health, education, [] living standards,” and other social welfare conditions.³¹² Fourth, in the context of Hanapēpē’s salt ponds, a developing framework to implement the indigenous right to environmental self-determination would evaluate “whether a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance.”³¹³

These four values are vital to both interrogate potential impacts of a proposed airfield runway or road cutting through the lo‘i on Maoli salt-making, for instance, and achieve the laws’ restorative justice objectives.³¹⁴ Although these values help to illuminate and contextualize threats from potential projects, the immediate danger of sea level rise, for example, is more difficult to address as it is not directly traceable to a new project and both environmental and historic preservation reviews (and, thus, *Ka Pa‘akai*’s protections) are triggered by such proposals.³¹⁵ Additionally, even if sea level rise was attributed to a specific action, it is unclear whether mitigation is available to redress it.³¹⁶

Local laws grounded in restorative justice principles are an essential starting point that will shape the utility of this developing framework. Some provisions can be strategically deployed to proactively redress the impacts of climate change on indigenous people and culture (e.g., kalo cultivation). While applying the four values to other practices (e.g., salt-making) may be more complex, this exercise nevertheless provides openings for compelling arguments, even though more traditional legal analysis may be less apt to accommodate them. That process itself, however, exposes the shortcomings of local laws and the need for

311. *Id.* at 181.

312. *Id.* at 182-83.

313. *Id.* at 185.

314. *See supra* note 309 and accompanying text.

315. *See, e.g.,* Kimura, *supra* note 307, at 188 (proposing a broader definition of “action” to include all actions significantly affecting the environment in order to prevent irreparable harm to the environment).

316. Burkett, *Just Solutions to Climate Change*, *supra* note 23, at 194 n.103 (explaining that unavoidable warming will occur with even the most aggressive mitigation and there are, therefore, “some impacts for which adaptation is the only available and appropriate response”) (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 19 (M.L. Parry et al. eds., 2007)); *see also* Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1644 (noting that the problems of climate change cannot be resolved through recognition of native sovereignty because environmental harms largely occur beyond the boundaries of indigenous lands).

decision-makers to work with native communities to amend them. Alternatively, decision-makers can craft political or other solutions that are at least partially shaped by indigenous concerns, as opposed to purely legal issues. At bottom, analysis grounded in the four values can inspire integrated action (decision-makers in partnership with native communities) that transcends local laws and gives primacy to international human rights norms as the key basis for decisions.

Although Hawai‘i is deeply committed to restorative justice for its indigenous people, many more conflicts can and will arise, especially as climate change’s impacts manifest. The developing framework has tremendous potential to realize the indigenous right to environmental self-determination, but is not a cure-all or simple template. It does, however, illuminate the importance of organizing and other groundwork necessary to ensure that local legal regimes reflect restorative justice principles, even in a general way. The four values create opportunities to inform and inspire integrated action to preserve indigenous resources and practices. Doing so is vital to aid local actors in better understanding the threats to indigenous cultural survival while also highlighting the compelling need for proactive action now to combat the devastation of climate change.

VI. CONCLUSION

Roughly two hundred years ago, kahuna (high priests) stood atop the walls of Pāku‘i Heiau and chanted this wānana (prophecy).³¹⁷

Hā‘ule ka lālā lewa i ka lani

The suspended branches of the heavens shall fall

Hā‘ule ka lā

The day shall fall

Hā‘ule ka pō

The night shall fall

Hā‘ule ka lani

The chiefs shall fall

Hā‘ule ka nī‘au

The highborn shall fall

Hā‘ule‘ule ka lewa i ka lālā

The high genealogies shall fall

317. Ā MAU Ā MAU, *supra* note 42. See also HAWAIIAN DICTIONARY, *supra* note 8, at 114, 382 (defining kahuna and wānana).

Hā'ule'ule ka noho ā lani ka lālā lewa
All the high branches resting in the heavens shall fall
Hō'ale ka lepo pōpolo
The dirt-stained commoner shall rise
Hō'ale ka lepo pōpolo
The dirt-stained commoner shall rise
Hō'ale'ale ka lepo i ka lani i noho lā
The low born shall rise and rest in the heavens
Hō'ale'ale ke kua ha'a ka lepo ka lani i noho lā
The crooked-backs shall rise and rest in the heavens
Huli a Moloka'i
Moloka'i shall be overturned
Moloka'i nui a Hina
*Great Moloka'i of Hina*³¹⁸

These kahuna foresaw the “burning death” and “heavy downpour” of rain that would overcome the Island of Moloka'i, Hawai'i.³¹⁹ They prognosticated the onslaught of tremendous devastation, including the annihilation of traditional Hawaiian society.³²⁰ But they were also confident that from this destruction the people of the land, deeply rooted in the lepo pōpolo (the earth's dark soil), would eventually rise up like a great wave and branch out into the heavens to take control.³²¹ That time has come.³²²

As foreseen by the wānana, there is now scientific documentation for the continuing impacts of climate change, which threaten people's ability to continue living in their native lands, including Hawai'i.³²³

318. PĀKU'I (unpublished oli, 1819) (translation by Kumu Hula John Kaimikaua, on file with author). Only the final verses of the wānana are reproduced here. *Id.*

319. *Id.* (“Puni i ka mauli a Moloka'i, Puni i ka make 'ā'ā Moloka'i, Lana uli a 'ōpaepae i ka Uhilawekūloku, Kūlokuloku ā loku ā puni. *Overcome is the spirit of Moloka'i, Overcome by burning death is Moloka'i, Drifting in layers are the clouds of Uhilawekūloku, Heavy downpour of rain upon the whole land.*”). See also Ā MAU Ā MAU, *supra* note 42.

320. PĀKU'I, *supra* note 318; see also Ā MAU Ā MAU, *supra* note 42.

321. PĀKU'I, *supra* note 318; see also Ā MAU Ā MAU, *supra* note 42.

322. See Ā MAU Ā MAU, *supra* note 42 (explaining that half of the prophecy has been fulfilled, and the second half—when hō'ale ka lepo pōpolo, the people of the earth rise up like a wave—is taking place now as Kānaka Maoli reclaim their cultural heritage and resources).

323. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 72 (Susan Solomon et al. eds., 2007) (“Warming of the climate system is unequivocal.”); CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at vii-x (documenting the impacts of climate change in Hawai'i and its residents); Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1 (interrogating the impact of climate change on native peoples, including climate migration).

Some have the option of moving; others do not.³²⁴ For the Kānaka Maoli, who are inextricably bound to the Hawaiian Islands, climate change imperils both their traditional homelands and their identity as indigenous people.³²⁵

In the face of this grave threat, Kānaka Maoli and other indigenous people around the world continue to rise up in the struggle for environmental and cultural justice. Targeted advocacy—similar to what took place in Hawai‘i—has been critical in crafting portals for introducing international human rights norms of self-determination into local legal regimes. This strategic jurisprudential approach requires more development, but can and should comprise the next wave of human rights scholarship and advocacy for indigenous peoples.

324. See Tsosie, *Indigenous People and Environmental Justice*, *supra* note 1, at 1625-46.

325. See generally CLIMATE CHANGE AND PACIFIC ISLANDS, *supra* note 14, at xi (detailing climate change impacts in Hawai‘i).