The Duty to Aloha ‘Āina:
Indigenous Values as a Legal Foundation for Hawai‘i’s Public Trust

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I. Introduction

Hawaiian language newspapers (nüpepa) were a vital forum for public discourse and cultural expression, especially in the wake of the illegal overthrow of the sovereign Kingdom of Hawai‘i in 1893.1 As the social media of their era, nüpepa now provide invaluable insight into Native Hawaiian² life, culture, values, and more.³ An 1895 article deconstructed the cultural tenet of aloha ‘āina, describing it as the “magnetic pull within the hearts of a people, compelling them to live sovereignly in their own homeland.”⁴ Another article highlighted the power of aloha ‘āina, detailing how, in the same way that objects can become magnetized, people “imbued with aloha for their land can pass on their aloha” to others.⁵ They “can introduce people,
their children, and their families until they too are imbued with the Magnet-ism of Aloha ‘āina.’

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

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

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6 Id. (“Pēlā nō nā kānaka i pīha i ke aloha no ko lākou ‘āina hānau pono’ī. Ua hiki iā lākou ke ho’olauma mai i nā kānaka a me nā keiki a me nā ‘ōhana o lākou a [lilo’] mai iā lākou i leko o ka ‘ume Māgēneti o ke Aloha ‘āina.”) (diacriticals added).
8 Both the lower court and the Hawai’i Supreme Court recognized a “duty to ‘malama ‘āina,” which the court translated as ‘to care for the land.” *Ching,* 449 P.3d at 1160. The term “mālama ‘āina” is relatively new and is likely a product of the 1960s or 1970s. Because Kānaka articulated and perpetuated this practice as aloha ‘āina, this Article will also use that.
9 See *HAWAIIAN DICTIONARY,* supra note 2, at 1.
10 See id.; see also *GOODYEAR-KA’OPUA,* supra note 7, at 31–33.
11 See *HAWAIIAN DICTIONARY,* supra note 2, at 15; see also infra Part II.
12 See *HAWAIIAN DICTIONARY,* supra note 2, at 179; see also Beamer, *Tūtū’s Aloha ‘āina Grace,* supra note 7, at 2, 15 (“Aloha requires one to speak and act out in the face of injustice.
And now, because of the *Ching* decision, aloha ‘āina is also a legal duty imposed on state and local decisionmakers as fiduciaries of the Public Trust and Public Land Trust that is available for enforcement by beneficiaries of those trusts, including Native Hawaiians.¹³ Yet this legal victory raises an important question: how, if at all, will aloha ‘āina as legal duty impact the larger struggle of Native Hawaiians and other historically underrepresented communities—who have been a training ground for the U.S. military—to combat resource dispossession?

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

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

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

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¹³ *See Ching*, 449 P.3d 1146.
¹⁴ *Id.* at 1150; *see* Admission Act of March 18, 1959, § 5(f), Pub. L. No. 86-3, 73 Stat 4.
¹⁵ ROBERT H. HORWITZ, JUDITH B. FINN, LOUIS A. VARGHA & JAMES W. CEASER, LEGIS. REFERENCE BUREAU, REP. NO. 5, PUBLIC LAND POLICY IN HAWAI‘I: AN HISTORICAL ANALYSIS 76 tbl.9(B) (1969); *Ching*, 449 P.3d at 1150.
¹⁶ First Amended Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 1, 56–62, Ching v. Case, No. 14-1-1085-04 GWBC, 2018 WL 11225507 (Haw. Cir. Ct. Apr. 3, 2018) [hereinafter First Amended Complaint]. Uncle Kū and Aunty Maxine named three defendants in this case: Suzanne Case in her capacity as the Chair of the Board of Land and Natural Resources and State Historic Preservation Officer; the Board of Land and Natural Resources; and the Department of Land and Natural Resources. *Id.* ¶¶ 3–5. This Article will collectively refer to these defendants as “DLNR.”
¹⁷ *Id.* ¶ 1, 56–62.
ancestral land was better stewarded.\textsuperscript{18} This deep commitment to place and practice magnetized others, and the court then imbued DLNR with the duty to aloha ‘āina. This Article delves into this incipient legal duty and its potential to further magnetize Hawai‘i law and the Public Trust Doctrine in particular.

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

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

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

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

\textsuperscript{18} Zoom Interview with Clarence Kū Ching, Named Plaintiff, \textit{Ching v. Case} (July 10, 2021) \textit{[hereinafter Ching Interview]}. Consistent with Native Hawaiian custom and tradition, this Article refers to revered elders as “Uncle” or “Aunty.”
II. CULTURAL AND HISTORICAL CONTEXT FOR THE DUTY TO ALOHA ‘ĀINA

A. Understanding and Embracing Aloha ‘Āina

In the wake of *Ching v. Case*’s imposition of a duty to aloha ‘āina, we ponder: ke aloha ‘āina; he aha ia’ Aloha ‘āina, what is it, really?19 For Kānaka, aloha ‘āina “escapes translation”20 because it is something that we are born with and that is encoded in our genes. It can be described, albeit insufficiently, as a worldview and familial relationship with Hawai‘i’s islands and all of their resources.21 Contemporary scholars also describe aloha ‘āina as a lolo no‘ono‘o or “guiding philosophy”22 that is “grounded in an ancestral worldview that considers the environment as kin,” and as “a system of values perpetuated over generations.”23

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

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19 See *Ke Aloha Aina: Heaha Ia’*, supra note 4, at 7.
21 See, e.g., GOODYEAR-KA‘OPUA, supra note 7, at 32 (“Kānaka ‘Ōiwi, like many Indigenous peoples throughout the world recognize all beings—birds, rocks, insects, plants, winds, waters—as familial relations. All are part of interrelated, living systems.”); see also CANDACE FUJIKANE, *MAPPING ABUNDANCE FOR A PLANETARY FUTURE: KANAKA MAOLI AND CRITICAL SETTLER CARTOGRAPHIES IN HAWAI‘I* 28 (2021) (“Kanahele uses the word ‘attunement’ to describe the intimate relationship between Kānaka and ‘āina, similar to conceptions of a kupuna [elder] vibration and an alignment with akua. It is the pilina (connectedness) of all life-forms that governs these ecological systems.”).
24 NOENOEO K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* 11 (2004). Aloha ‘āina was also synonymous with an independence movement and political parties opposing the U.S. occupation of Hawai‘i during the late 1800s and into the 1900s, although it “encompasses more than nationalism and is not an exact fit with the English word ‘patriotism,’ the usual translation.” *Id.*; see also OSORIO, supra note 20, at 9–14 (problematizing the association of aloha ‘āina and western patriotism or nationalism); GOODYEAR-KA‘OPUA, supra note 7, at 32–39 (same).
25 OSORIO, supra note 20, at 13.
26 Ke Aloha Aina; Heaha Ia’, supra note 4, at 7. For a full translation, see supra note 4.
netic force: it creates pilina (intimacy or connection) between place and community.27 Another nüpepa article explained that “aloha ‘āina also results in a pilina between Kānaka,” as po’e “aloha ‘āina [aloha ‘āina actors] are able to recognize the aloha ‘āina in each other and are bound in intimacy together because of our shared intimacy and connection to our land.”28 Dr. Osorio’s research illustrates that “aloha ‘āina is an internal love for place and community so strong that it cannot be overcome” and is “a natural and imbedded Kanaka Maoli practice of relation to one’s home.”29 Aloha ‘āina, then, “is that pull to place, that internal compass orienting Kānaka Maoli toward intimacy and self-governance simultaneously.”30

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

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

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

“the range of our intimate relationships with land shifts across time and place. Sometimes the love is for a mother or grandmother, for Papa, the earth, and yet at other times aloha ‘āina is a lover’s passion for a place, as Poli‘ahu’s cinder cones are embraced by Kūkāuku‘ula’s pink glow at sunrise and sunset on Mauna a Wākea, or it is the tender love for a child, as the love that Protect Kaho‘olawe ‘Ohana activists felt for Kaho‘olawe, an island bombed for decades by the US military for target practice . . . . This entanglement in desire for land is rooted in the kilo (observations) of one who has lived in a place until deeply well-versed in the expressions of the land.

Fujikane, supra note 21, at 24–25.

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

30 Osorio, supra note 20, at 13.

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

32 Osorio, supra note 20, at 13.


34 See Osorio, supra note 20, at 9–14.
This commitment is rooted in the reciprocal relationship between Kānaka and the Hawaiian archipelago that arises from Native Hawaiians’ shared moʻokūʻauhau (genealogy) with our ʻāina. The Kumulipo—a cosmogonic chant—and other historical works trace the birth of Native Hawaiians to the beginning of time in Hawaiʻi. In this genealogy, the “relationship between ʻāina (land, or literally, that which feeds us) and kānaka (humanity) is defined as one of reciprocity between an elder and younger sibling; the kuleana (responsibility) of the elder sibling is to sustain, love, and protect the younger, who in turn loves, serves, and honors the elder.” For Kānaka, our biocultural resources are our ancestors, part of the extended family, and the physical embodiment of different akua (gods or ancestors). Understanding the genealogical connection between people, natural systems, and resources “enabled the development of philosophies such as aloha ʻāina, which focused on the relationships humans must maintain to live in balance with the natural world.” “At its root, Aloha ʻāina has a tenet that the land is the religion and the culture.” Dr. Kamanamaikalani Beamer explains that “‘āina” describes land that is cultivated—absent a relationship with humans, land has a different name. Aloha ʻāina, therefore, shapes both resources and their caretakers. Dr. Noa Emmett Aluli expands on this pilina (relationship): “[i]n our daily activities, we develop a partnership with the land so as to know when to plant, fish, or heal our minds and bodies according to the ever changing weather, seasons and moons.” This intimacy is “[s]o close . . . that we acknowledge the ‘aumakua and akua, the ancestral spirits and gods of special areas.” In this way, “[w]e learn the many personalities of the land, their form, character and resources; and we love the land personally[].” Historically, aloha ʻāina took many forms and was implicit in all aspects of a functioning Native Hawaiian society. Aloha ʻāina was the foundation for society as a whole and the individual kānaka interactions with natural and cultural resources. For example, at the individual level, aloha ʻāina
takes familial relationships with akua, [nature’s] elemental forms, as a premise, and cultural practices are grounded in chants and practices that ask the akua for their consent. There are protocols in place for asking permission to enter into a place and to gather. The elemental forms respond to these requests and recognize us through hō’ailona (signs). Sometimes the signs are elemental: a sudden rush of wind, the flick of a fish tail, a flock of nānā c. flying overhead, or the mists that kolo (creep) in to hide a place from our eyes. At other times, kūpuna [elders] explain that they feel in their na’au (seat of knowledge or visceral core) whether their actions are pono (morally right, just, balanced). But even to know how to ask for permission or to read hō’ailona, it is important to trace kilo practices of observation back to genealogical relationships.

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

This fundamental connection between Kānaka and nature was infused into norms and protocols from the earliest governance by individual aliʻi (chiefs) and ‘aha aliʻi (councils of chiefs) to the evolution of the institution of mōʻi (the sovereign or single supreme leader) and other “indigenous Hawaiian statecraft,” including a system of bounding lands and resources under chiefly authority. An example of this iteration of aloha ʻāina through law is Māʻilikūkahi’s establishment of land divisions and management systems for Oʻahu’s resources and people in the fifteenth century. Prior to Māʻilikūkahi’s reign, “the land was in a state of confusion. It was not clearly understood what was an ahupuaʻa [similar to a watershed] and what was an ʻili kū ʻāina” (a smaller land division) and who was responsible for what. Māʻilikūkahi established a network of nested land districts across the entire island as well as resource managers at each level to direct the cultivation of ocean- and land-based resources. He also distributed ʻāina to various classes of people, including makaʻānana (people of the land), and issued edicts focused on the wellbeing of the land and its people. Māʻilikūkahi’s reforms were maintained for hundreds of years, and the land divisions wereulti-
mately mapped during the 1800s.\textsuperscript{51} Other leaders embraced aloha ‘āina by, for example, prohibiting overfishing, requiring the rotation of harvests, and limiting the collection of marine life during spawning seasons.\textsuperscript{52} In this way, aloha ‘āina guided Native Hawaiian life at every level from the individual to the larger community.

B. Aloha ‘āina’s Legal Evolution and Inscription

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

\begin{itemize}
\item \textsuperscript{51} See Beamer, No Makou Ka Mana, \textit{supra} note 46, at 35–36.
\item \textsuperscript{52} See, e.g., Moke Manu & Others, \textit{Hawaiian Fishing Traditions} xii–xiii (1992).
\item \textsuperscript{53} See, e.g., Beamer, No Makou Ka Mana, \textit{supra} note 46, at 34–35.
\item \textsuperscript{54} See Melody Kapilialoha MacKenzie, \textit{Historical Background, in Native Hawaiian Law: A Treatise} 2, 10–12 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter MacKenzie, \textit{Historical Background}].
\item Beamer, Selective Appropriation, \textit{supra} note 1, at 151.
\item Beamer et al., \textit{Reflections on Sustainability Concepts, supra} note 23, at 5.
\item \textsuperscript{55} See, e.g., Beamer, No Makou Ka Mana, \textit{supra} note 46, at 104.
\item \textsuperscript{56} Id. (“Law was understood by the Ali‘i and appropriated selectively to further their own ends.”).
\item \textsuperscript{57} Beamer, Selective Appropriation, \textit{supra} note 1, at 151.
\end{itemize}
Hawai‘i’s 1839 Kānāwai and 1840 Constitution exemplify how ali‘i inscribed Kānaka values and praxes, including aloha ‘āina, into law.60 In 1839, Kauikeaouli promulgated the Hawaiian Kingdom’s “first formal body of written laws.”61 The 1839 Kānāwai has two parts: “Kumu Kānāwai (Source of Law, or Constitution) and Ke Kānāwai Ho‘oponopono Waiwai (Law Regulating Taxation, Property, and the Rights of Classes).62 The first is often called the Declaration of Rights, given the translation of Kumu Kānāwai as “source of law.”63 Laws under the second heading include thirteen sections and seven subsections that outline a range of rights, duties, and taxes that largely sought to protect maka‘āinana “from abuses of power[,]” especially from ali‘i who might overburden them.64

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

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

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60 See, e.g., Beamer, No Mākou Ka Mana, supra note 46, at 116. Although the 1839 laws have two headings—Kumu Kānāwai (Source of Law, or Constitution) and Ke Kānāwai Ho‘oponopono Waiwai (Law Regulating Taxation, Property, and the Rights of Classes)—this Article collectively refers to both as the “1839 Kānāwai.” Id. In addition to the 1839 Kānāwai, the Hawai‘i Supreme Court also looked to the Māhele process (beginning around 1845) as a basis for Hawai‘i’s Public Trust. See In re Waialae Ditch Combined Contested Case Hearing (Waialae), 9 P.3d 409, 440–41, 443, 449 (Haw. 2000).

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

62 Beamer, No Mākou Ka Mana, supra note 46, at 116; see also He Kumu Kawawai, A Me Ke Kanaawai Hooponopono Waiwai, no ko Hawai‘i Nei Pae Aina Na Kamahameha III, at 1–4 [hereinafter 1839 Kumu Kānāwai].

63 Beamer, No Mākou Ka Mana, supra note 46, at 116.

64 Id., at 122.

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

66 Beamer, No Mākou Ka Mana, supra note 46, at 124.

67 Beamer, Selective Appropriation, supra note 1, at 149.
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aka, and between people and place.\textsuperscript{68} Kauikeaouli’s acknowledgement that all Kānaka have an interest in the ‘āina reflected the “reciprocal recognition” that a functional and healthy Native Hawaiian society required all classes of people and the ‘āina to live and work in balance.\textsuperscript{69} Such recognition “locates Indigenous peoples in broader governing systems based on laws of the natural world that transcend human laws.”\textsuperscript{70}

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

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

\begin{quote}
Eia ke ano o ka noho ana o na’ili a me ka hoomono‘ono ana i ka aina. O Kamehameha I, oia ke poo o keia aupuni, a nona no na aina a pau mai Hawaii a Niihau, aole nae nona pono, no na kanaka no, a me na’ili, a o Kamehameha no ko lakou poo nana e olelo i ka aina.
\end{quote}

The origin of the present government, and system of polity, is as follows. Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had management of the landed property.\textsuperscript{74}

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

\textsuperscript{68} Osorio, \textit{supra} note 20, at 12–13.
\textsuperscript{69} Fujikane, \textit{supra} note 21, at 23.
\textsuperscript{70} Id.
\textsuperscript{71} 1839 \textit{Kīmu Kānāwai}, \textit{supra} note 62, at 120 (“E hā’awi like i ka wai no nā ‘āina a pau oia wahi i ho’onele’a mamua i ka wai”) (translation by Devin Forrest, diacriticals added).
\textsuperscript{72} Id. at 121.
\textsuperscript{73} See generally MacKenzie, \textit{Historical Background}, \textit{supra} note 54, at 11–12.
\textsuperscript{74} Beamer, \textit{No Mākou Ka Mana}, \textit{supra} note 46, at 124 (translation by Dr. Beamer).
for generations yet unborn.75 In this way, Hawai‘i’s first constitution reflects Native Hawaiian cultural approaches to resource management, which must inform both the interpretation of Hawai‘i’s Public Trust and the kuleana or cultural duty associated with resource management and protection.

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

Although the ali‘i’s ultimate goal of continued independence was not realized, their values and laws, including aloha ‘āina, are embedded in Hawai‘i’s constitution,80 statutes,81 and common law82 today. Aloha ‘āina was and remains a central foundation for Native Hawaiian society, fundamental basis for Indigenous knowledge and governance systems, and personification of Native Hawaiian custom and usage. Not relegated to the past, aloha ‘āina also holds a key to a more just future: it brings together “culture and the environment to achieve social, cultural, and ecological justice in Hawai‘i in an effort to integrate the knowledge and practices of traditional systems into the contemporary management of land and people.”83

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

75 Goodyear-Ka‘ōpua, supra note 7, at 31–33.
76 See, e.g., Beamer, Selective Appropriation, supra note 1, at 150 (“Clearly, the Ali‘i were truly creating law—cautiously determining the appropriate content, designing the laws to reflect their own considerations and account for their reservations, and ultimately, to produce a pono state for society.”).
77 Beamer, No Mākou Ka Mana, supra note 46, at 129.
78 Id.
79 Silva, supra note 24, at 11.
80 See infra Part III.A–B and note 342.
82 See infra note 343.
83 Beamer et al., Reflections on Sustainability Concepts, supra note 23, at 5.
84 Beamer, Tūtū’s Aloha ‘āina Grace, supra note 7, at 13.
of kinship and as something that must be seen as inseparable and integral for
our existence." Hawai‘i’s decisionmakers thus must respect the “diverse
and vibrant collection of multibodied relationships between Kānaka Maoli,
our ancestors, peers, descendants, and the environment[.]” Without Kānaka,
our culture, and our self-determination, the ‘āina that delights and in-
spires so many will cease to exist.

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

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

A. Exploring Hawai‘i’s Constitutional Public Trust and Public Land
Trust

Hawai‘i’s 1978 Constitutional Convention (“ConCon”) proved critical
in grounding Hawai‘i’s legal regime in both restorative justice and Native
Hawaiian values. Dubbed the “People’s ConCon,” it differed from previous
conventions because there were more and younger delegates, including more
women, fewer established politicians, and participants who better reflected Hawai‘i’s racial and ethnic diversity. These younger Kānaka and environmentally- and socially-conscious delegates and staff acknowledged the threats to natural resources, Native Hawaiian cultural practices, and the harm imposed by the seizure of ‘āina. After significant debate, committee reports reflected delegates’ concern that “past and present actions by private landowners, large corporations, ranches, large estates, hotels and government entities . . . preclude native Hawaiians from following subsistence practices traditionally used by their ancestors.” Constitutional amendments were seen as a restorative tool “in preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State.” Delegates sought to safeguard Indigenous culture and resources through “the recognition and reaffirmation of native Hawaiian rights by constitutional amendment.” Moreover, they aimed to “balance [ ] the use of our natural resources, which is necessary, and their preservation[,]” while being mindful that “our obligations include the welfare of future generations[.]” Delegates acknowledged the important role of aloha ‘āina in preserving Native culture and resources: “historically and presently, native Hawaiians have a deep love and respect for the land, called aloha aina, [and] reasonable regulation is necessary to prevent possible abuse as well as interference with” Native rights and interests.

ConCon delegates crafted amendments that were later ratified by Hawai‘i’s voters to enshrine resource protection, Native Hawaiian practices, and the Public Land Trust as constitutional mandates. Other constitutional provisions, legislation, and state and federal actions similarly reflect a commitment to restorative justice for Native Hawaiians. See, e.g., Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of

95 Debates in Committee of the Whole on Hawaiian Affairs, in 2 CONVENTION PRO., supra note 92, at 426 (statement by Delegate De Soto).
96 Debates in Committee of the Whole on Conservation, Control and Development of Resources, in 2 CONVENTION PRO., supra note 92, at 857 (statement by Delegate Hoe).
98 See Sproat, Environmental Self-Determination, supra note 88, at 183–90. ConCon delegates crafted over one hundred changes to Hawai‘i’s Constitution, which resulted in thirty four amendments that voters ratified at the November 1978 General Election. See Trask, supra note 91, at 312.
99 Other constitutional provisions, legislation, and state and federal actions similarly reflect a commitment to restorative justice for Native Hawaiians. See, e.g., Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of
1. Hawai‘i’s Public Trust Reflects Native Hawaiian Precepts, Including Aloha ‘āina

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

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.100

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

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

100 HAW. CONST. art. XI, § 1.
101 Id. art. XI, § 7 (‘okina added).
102 Wai‘ahole, 9 P.3d 409, 444 (Haw. 2000).
104 See supra Part II, Caselaw and laws from the Kingdom of Hawai‘i, along with Maoli custom and tradition, firmly established that natural resources, including water, were not pri-
duties of actively caring for a resource to preserve the health of our natural world. Case law supplements these constitutional provisions in elucidating the contours of Hawai‘i’s unique legal regime.

a. Insights from Wai‘ahole

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

Hawai‘i’s unique history played an important role in the strong affirmation of the public nature of trust resources. The court reached back to the Hawaiian Kingdom as the origin of the Public Trust, highlighting
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Kauikeaouli’s creation of a water resources trust during the Māhele, which established Hawai‘i’s hybridized property system. The court also pointed to Kauikeaouli’s commitment to aloha ‘āina, his resources, and his people, as reflected in the 1839 Kānāwai and 1840 Constitution. Kauikeaouli purposefully designed and promulgated the laws at issue to encourage use of “his lands in ways consistent with the chiefs of old” and “ultimately, to produce a pono state for society.” In this way, the duty to aloha ‘āina is both a precept and a necessary component of Hawai‘i’s Public Trust applicable to fresh water, ‘āina, and other resources.

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

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

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

110 Waiahole, 9 P.3d 409, 440–41 (Haw. 2000); see supra Part III.A.1.a (detailing the origin of Hawai‘i’s Public Trust); Part III.A.2 (summarizing the Māhele process); Lilikalā Kame‘eleihiwa, Native Land and Foreign Desires: Puea La e Pono A‘i ‘How Shall We Live in Harmony? 8–16 (1992) (deconstructing the Māhele).
111 Compare Waiahole, 9 P.3d at 440–41 (examining the origin of the public trust during the Hawaiian Kingdom) with Part II, supra (detailing the aloha ‘āina precepts reflected in the 1839 Kānāwai and 1840 Constitution).
112 Beamer, Selective Appropriation, supra note 1, at 150.
113 Waiahole, 9 P.3d at 443.
114 Haw. Const. art. XVI, § 16; Waiahole, 9 P.3d at 444–45; In re Wai‘ola o Moloka‘i, 83 P.3d 664, 692 (Haw. 2004); see also Ching v. Case, 449 P.3d 1146, 1176 (2019) (“The State’s constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty.”).
115 Waiahole, 9 P.3d at 445.
116 Id.
117 Id. at 447.
118 Id. at 445, 448–56.
purtenant rights; and domestic water uses. A later decision added water reservations for the Department of Hawaiian Home Lands as a fifth purpose. These trust purposes have priority over private commercial uses, which do not enjoy the same protection. Importantly, in determining which uses should have priority, the court again looked to the “trust’s ‘original intent.’” It emphasized that “review of the early law of the kingdom reveals the specific objective of preserving the rights of native tenants during the transition to a western system of private property.” Relying on court decisions and other Kingdom and contemporary laws, the Hawai‘i Supreme Court upheld Native Hawaiian rights, customs, and practices as a protected Public Trust purpose. Aloha ‘āina is thus both a protected Public Trust purpose and a duty of trustees charged with managing the trust.

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

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

119 Id. at 448–50, 454. Appurtenant rights appertain or attach to parcels of land that were cultivated, usually with the traditional staple kalo, at the time of the Māhele and have some of the highest protection in Hawai‘i water law. See Reppun v. Bd. of Water Supply, 656 P.2d 57, 78 (Haw. 1982); HAW. REV. STAT. §§ 174C-63, -101. Domestic water uses include individual household needs, not the aggregate household and other uses of collective entities or populations, which are considered municipal. HAW. REV. STAT. § 174C-3 (2009).
120 See In re Wai‘o‘a o Moloka‘i, 83 P.3d 664, 694 (Haw. 2004). The Department of Hawaiian Home Lands was established by the Hawaiian Homes Commission Act, 42 Stat. 108 (1921).
121 Wai‘ihole, 9 P.3d at 448–50, 454.
122 Id. at 449.
123 Id.
124 Id.
125 Id. at 454.
126 Id.
127 The court noted that the Public Trust duty “may not readily translate into substantive results,” id. at 453 (emphasis added), but it left open the potential for the Public Trust to operate as a substantive mandate, recognizing constitutional history that the Public Trust “implies that the disposition and use of these resources must be done with procedural fairness, for purposes that are justifiable and with results that are consistent with the protection and perpetuation of the resource.” Id. at 454 n.40 (quoting Debates in Committee of the Whole on Conservation, Control and Development of Resources, in 2 CONVENTION PRO., supra note 92, at 866–87 (1980)) (emphasis by the court).
the resource at every stage of the planning and decisionmaking process.”\(^ {128}\)

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

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

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

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\(^{128}\) Id. at 455 (citation omitted).

\(^{129}\) Id.

\(^{130}\) See Osorio, supra note 20, at 13; Goodyear-Ka‘ōpua, supra note 7, at 32.

\(^{131}\) See Beamer et al., Reflections on Sustainability Concepts, supra note 23, at 4.

\(^{132}\) *Wai‘ahole*, 9 P.3d at 455.

\(^{133}\) Id. at 456.

\(^{134}\) See, e.g., 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) (discussing the influences on judges and other decisionmakers in high-stakes legal battles) [hereinafter Sproat, *Wai Through Kānāwai*]; Sproat, *Question of Wai*, supra note 106 (detailing the politics and other influences at play in controversial cases, which are most cases implicating Native Hawaiian rights).

\(^{135}\) *Wai‘ahole*, 9 P.3d at 466 (citation omitted).

\(^{136}\) Id. (quoting the Commission’s decision) (noting that the “lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation”).

\(^{137}\) Id. (quoting the Commission’s decision).
feasible.” \(138\) The court also recognized that the principle will evolve over time, but nevertheless agreed with what it considered its “quintessential form: at minimum, the absence of firm scientific proof should not tie the decisionmaker’s hands in adopting reasonable measures designed to further the public interest.” \(139\)

\(\text{Waih} \text{ole}\) illustrated how Hawai’i’s Public Trust embraces Native Hawaiian precepts, including aloha ‘āina, by referencing the trust’s origin in Hawaiian Kingdom law and its “original intent” of preserving the rights of Native tenants. \(140\) It clarified the scope and substance of the Trust while also demonstrating the contours of its process-based protections, many of which coincide perfectly with, and already effectuate, the duty to aloha ‘āina.

\(b. \) \(\text{Kau} \text{aì Springs’ Analytic Framework Operationalizes Hawai’i’s Public Trust}\)

Although \(\text{Waih} \text{ole}\) elucidated the contours of the Public Trust, decisionmakers and courts continue to struggle with implementation. Despite the Hawai’i Supreme Court’s strong pronouncements, its “process mandate” has vested administrative officials and judges with significant discretion, which has proved challenging in controversial cases including \(\text{Ching v. Case}\). \(141\) In 2014, the Hawai’i Supreme Court crafted an analytic framework in \(\text{Kauaì Springs}\) to “assist agencies” in discharging their Public Trust duties, largely as articulated in \(\text{Waih} \text{ole}\). \(142\)

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

\(138\) \text{Id.}

\(139\) \text{Id. at 467.}

\(140\) \text{Id. at 449.}

\(141\) See \text{infra} Parts IV, V (deconstructing \text{Ching v. Case}).

\(142\) \text{Kauaì Springs, Inc. v. Plan. Comm’n, 324 P.3d 951, 984–85 (Haw. 2014).}

\(143\) \text{Id. at 956–57.}

\(144\) \text{Id. at 984.}

\(145\) \text{Id.}
poses and also articulated a four-part test for applicants. Ultimately, the court clarified that Hawai‘i’s Public Trust imposes obligations on administrative agencies to be proactive in protecting natural resources and to both examine the criteria relevant to their decisions and articulate their rationale.

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

2. Understanding Hawai‘i’s Public Land Trust

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

As discussed in Part II.A, Kānaka are genealogically connected to—and intimately a part of—our ancestral ʻāina, engendering a kuleana (responsibility and privilege) of kinship to care for Hawai‘i. Prior to western contact in 1778, Kānaka manifested this kuleana in part by managing all biocultural resources in the Hawaiian archipelago “as a public trust for present and future generations.”
But the arrival of westerners in 1778 radically altered Native Hawaiians’ cultural and political systems, ultimately resulting in the loss of land and self-governance. Faced with interrelated pressures from foreign capitalists, imperialism in the Pacific, and the rapid decline of the Maoli population, Kauikeaouli transitioned the Hawaiian Kingdom to a private property regime in 1848 through a process known as the Māhele (division or share) to “preserve a land base for all Hawaiian people, regardless of social or political status” in the face of haole (foreign) colonization.

Kauikeaouli, his western advisors, and the ali‘i (chiefs) adopted a plan to divide—and thus privatize—land interests, so that one-third of the ʻāina would remain in the mōʻī’s care, one-third would go to the ali‘i and konohiki (land managers), and the final third would go to the makaʻāinana (common people). Kauikeaouli first identified the lands he personally wished to reserve, then he and the ali‘i divided out their interests in the remaining lands. Kauikeaouli soon thereafter deeded 1,500,000 acres of his personal lands to the government “forever . . . unto his Chiefs and People.” At the end of the Māhele process, Kauikeaouli personally held 984,000 acres (23.8% of land in the nation), the government held 1,523,000 acres (37%), and the ali‘i held 1,619,000 acres (39.2%). The acres Kauikeaouli retained are now known as Crown Lands, and those he gave...
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to the government are known as Government Lands.\textsuperscript{167} The Māhele did not, however, sever the undivided interests of the maka‘āinana in any land in the Kingdom.\textsuperscript{168}

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

\textsuperscript{167} E.g., Kamanamaikalani Beamer & N. Wahine‘aihoku Tong, The Māhele Did What? Native Interest Remains, 10 HULILI 125, 130 (2016).
\textsuperscript{168} See same Inalienable (1865), reprinted in LAWS OF HIS MAJESTY KAMEHAMEHA V, KING OF THE HAWAIIAN ISLANDS 69 (1864–65). For clarity, this Article refers only to the Crown Lands.
\textsuperscript{174} See \textit{Silva}, supra note 24, at 157–59.
Both the Joint Resolution of Annexation and Hawai‘i’s Organic Act, which established a U.S. territorial government, recognized the special trust status of the Crown and Government Lands and also stipulated that revenue from the lands must be used to benefit residents of the islands. The Joint Resolution and the Organic Act, however, also enabled the federal government to appropriate land for its own use. Under these provisions, the federal government set aside 432,725.91 acres of Crown and Government Lands by 1959, including the entire island of Kaho‘olawe for the U.S. Navy to use for live-fire training.

When Hawai‘i entered the Union in 1959, Section 5(b) of its Admission Act transferred title to approximately 1,400,000 of the 1,800,000 acres of the Crown and Government Lands from the United States to the newly-formed State of Hawai‘i. The Admission Act explicitly recognized the trust status of the acreage and partially acknowledged the special relationship between Kānaka and the ‘āina. Section 5(f) of the Admission Act declared that the State hold the lands in a public trust and use acreage for five enumerated purposes, including “the betterment of the conditions of native referred to as “ceded lands.” The Native Hawaiian people, however, never “ceded” the Crown and Government Lands to the United States. Instead, the “self-proclaimed” Republic of Hawai‘i (comprised of those who illegally overthrew the Kingdom) ceded the stolen acreage to the United States. Eric K. Yamamoto, Carrie Ann Y. Shiroti & Jayna Kanani Kim, Indigenous Peoples’ Human Rights in U.S. Courts, in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 246, 247 (Juan F. Perea, Richard Delgado, Angela P. Harris, Jean Ann Stefancic & Stephanie M. Wildman eds., 3rd ed. 2015); see also Williamson B. C. Chang, Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress, 16 ASIAN-PAC. L. & POL’Y J. 70 (2015) (arguing that the United States did not properly annex Hawai‘i and, therefore, has no jurisdiction over Hawai‘i today).


177 MacKenzie, Historical Background, supra note 54, at 28.

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


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

181 MacKenzie, Ke Ala Loa, supra note 175, at 630.
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Hawaiians.” Through Section 5(d) and other provisions, however, the federal government retained 373,719.58 acres for national parks and military bases, including acreage that is now used for the Mākua Military Reservation on O‘ahu and the Pōhakuloa Training Area on Hawai‘i Island. Section 5(d) also allowed Congress or the President to take any of the land returned to the State for federal use within five years of admission.

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

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


\[185\] See HAW. CONST. art. XII, § 4 (Public Land Trust); id. art. XII, §§ 1–3 (Hawaiian Home Lands Trust).

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

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


\[189\] Id.

\[190\] OFF. OF HAWAIIAN AFFS. v. HOUS. & CMTY. DEV. CORP., 177 P.3d 844, 901–02, 926 (Haw. 2008), rev’d and remanded sub nom. HAWAII v. OFF. OF HAWAIIAN AFFS., 556 U.S. 163 (2009); MacKenzie, Ke Ala Loa, supra note 175, at 635.

\[191\] Pele Def. Fund v. Pata, 837 P.2d 1247, 1263 n.18 (Haw. 1992) (quoting Ahuna v. Dep’t of Hawaiian Homes Lands, 640 P.2d 1161, 1169–70 (Haw. 1982)).

preserve and maintain the trust lands.”\textsuperscript{194} Many Kānaka believe Public Land Trust acreage should form the basis of a future sovereign Hawaiian nation, consistent with Kauikeaouli’s intent for the Crown and Government Lands, to preserve a land base for the Native Hawaiian people and secure ‘Ōiwi lifeways.\textsuperscript{195}

\textbf{B. Contextual Legal Analysis Is Vital to Actualize Restorative Justice and the Duty to Aloha ‘āina}

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

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

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\textsuperscript{196} Sproat, \textit{Water Law}, supra note 107, at 155.
\textsuperscript{198} Farber, \textit{supra} note 197, at 91, 95.
\textsuperscript{199} Brian Z. Tamanaha, \textit{Understanding Legal Realism}, 87 TEX. L. REV. 731, 731 (2009) (internal quotations omitted) (citation omitted) [hereinafter Tamanaha, \textit{Understanding Legal Realism}].
\textsuperscript{200} Tuteur, \textit{supra} note 153, at 4–5.
\textsuperscript{202} Tamanaha, \textit{Understanding Legal Realism}, \textit{supra} note 199, at 136.
\end{flushleft}
by their own personal perspectives, as well as those of their peers.\textsuperscript{203} With this empirical work revealing how the law actually operates, it is accepted that “[w]e are all realists now.”\textsuperscript{204}

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

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


\textsuperscript{204} Tamanaha, \textit{Understanding Legal Realism}, \textit{supra note 199}, at 67.


\textsuperscript{206} 21 U.S. (8 Wheat.) 543 (1823).

\textsuperscript{207} \textit{Id.} at 571–72.

\textsuperscript{208} \textit{Id.} at 573, 590.

\textsuperscript{209} \textit{Id.} at 584.


\textsuperscript{211} Sproat, \textit{Wai Through Kānāwai}, \textit{supra note 134}, at 172–77.
IV. THE LEGAL DUTY TO ALOHA `ĀINA: CHING V. CASE IN CONTEXT

_Ching v. Case_ highlighted DLNR’s lack of response to the U.S. military’s obliteration of Pōhakuloa, a sacred region on Hawai‘i Island.212 Too often descriptions of the damage inflicted on one place by one branch of the military are geographically and temporally isolated. This narrow framing obscures the military’s decades-long pattern and practice of exploiting Pacific Islands for strategic gain213 and reproduces settler colonial narratives that cast Oceania as an uninhabited wasteland to legitimize militarization.214 This framing also constrains legal and political dialogues about the nature of the harm and the possibilities for repair.215 Thus, this Part situates DLNR’s inaction in response to the military’s obliteration of Pōhakuloa—the issue at the heart of _Ching_—within the mo’okū‘auhau (genealogy) of militarization in Hawai‘i, partially exemplified by the military’s destruction and neglect of Kaho‘olawe, Waikāne Valley, and Mākua.

A. Partial Mo‘okū‘auhau of U.S. Military Destruction in Hawai‘i

1. Kaho‘olawe

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

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

214 See id. at 52.
217 Id. at 243.
218 Id. at 235.
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Reminiscent of the catastrophic environmental crisis at Kapūkāki today, the Navy cracked Kaho‘olawe’s freshwater lens by detonating a series of explosions on the island’s surface in 1965. Salt water subsequently contaminated most of the island’s freshwater resources, which continues to limit restoration potential today.

After decades-long protests and strategic litigation led by Protect Kaho‘olawe ‘Ohana and other groups, President George H. W. Bush halted the bombing in 1990. But the island was “uninhabitable,” and “mostly inaccessible” when title was transferred back to Hawai‘i in 1994. Kaho‘olawe is the first ‘āina returned to Kānaka and is held in the Public Land Trust for a future, sovereign Native Hawaiian nation. As contemplated by federal legislation, the Navy promised to clear the entire island’s surface and 30% of the subsurface of unexploded ordnance but reneged on its commitment. By 2004, only 75% of the surface had been cleared and only 10% had been cleared to a depth of four feet. As of 2022, the Kaho‘olawe Island Reserve Commission, Protect Kaho‘olawe ‘ohana, and volunteers continue to restore the island. The United States nevertheless re-

224 See id.
225 The Protect Kaho‘olawe ‘Ohana (“PKO”) is an ‘Oiwi “grassroots organization dedicated to the island of Kaho‘olawe and the principles of Aloha ‘āina throughout Hawai‘i.” PROTECT KAHO‘OLAWE ‘OHANA, http://www.protectkahoolaweohana.org/ (last visited July 11, 2022), archived at https://perma.cc/BU5G-PACG. The group was founded in the 1970s to stop the bombing of Kaho‘olawe and reclaim the island for Kānaka. Id. For a discussion of PKO, see MacKenzie et al., supra note 210, at 42.
228 See HAW. REV. STAT. § 6K-9.
232 KAHO‘OLAWE ISLAND RSRV. COMM’N, Kaho‘olawe Island Reserve FY20 Year-In-Review 24 (2020).
tains legal responsibility in perpetuity for removing all unexploded ordnance.\textsuperscript{233}

2. Waikānē Valley

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

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

\begin{footnotes}
\item[235] He Moolelo Kaako No Hiiakaikapoliopele, KA HOKU O HAWAII, Jan. 12, 1926; SITES OF OAHU, supra note 187.
\item[236] He Moolelo Kaako No Hiiakaikapoliopele, supra note 235; SITES OF OAHU, supra note 187 at 187.
\item[238] Dawson, supra note 237.
\item[240] See Transformation of Waikānē, supra note 239.
\item[241] Dawson, supra note 237.
\item[242] Id.
\item[243] Id.
\item[244] Id.
\end{footnotes}
Believing their ‘āina was safe, the Kamakas lived and farmed on their land until 1983 when heavy rainfall exposed thousands of unexploded rounds of ammunition. A subsequent military investigation found an additional 480 rockets. Instead of cleaning the land as contractually obligated, the United States moved to condemn the nearly 200 acres for a mere $735,000, persuading a federal judge that the land was so contaminated with unexploded ordnance that restoration was impractical and too costly. In 2002, the Marines announced that it would begin jungle warfare training on the Kamaka’s ‘āina, despite clearing none of the explosives that purportedly made the land so unsafe that it warranted condemnation. The Marines abandoned this plan after widespread community opposition and are still investigating how to restore this sacred ‘āina.

### 3. Mākua

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

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245 Id.
246 This is an absurdly low sum for nearly 200 acres in Hawaiʻi, even with the contamination. Restoration was estimated to cost over $7,000,000. Id. While Raymond Kamaka did not settle, the final settlement agreement reached between some members of the Kamaka ‘ohana and the Navy enables the Kamakas to regain title if Congress appropriates funding to clear the land, and the Navy follows through with restoration. Id.
247 Id.
250 See generally MĀKUA - TO HEAL A NATION (NĀ MĀKA O KA ‘ĀINA, 1996).
253 Niheu, supra note 251, at 161–78.
the ocean for nourishment. After a protracted legal battle for access to and protection of more than one hundred cultural sites in the valley, the Maoli-led nonprofit Mālama Mākuā secured an injunction in 2001 barring live-fire training there. Unexploded ordnance and debris have yet to be removed, even though the military is contractually obligated to do so.

4. Pōhakuloa

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

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258 Id. at 61–62. Hoʻohokukalani named Hāloa after his older sibling, Hāloanakalaukapalili, who was stillborn. Hoʻohokukalani buried his body outside, and the kalo plant grew from his grave.
259 Id. at 61.
260 KEEP MALY & ONAONA MALY, KUMU PONO ASSOC., HiWAIAI-111202, He Wa‘ah Mo‘olelo No Ka ‘Āina A Me Nā ‘Ohana O Waikī‘i Ma Waikoloa (Kala‘ana O Waimia, Kohala), A Me Ka ‘Āina Mauna: A Collection of Traditions and Historical Accounts of the Lands and Families of Waikī‘i at Waikoloa (Waimia Region, South Kohala), and the Mountain Lands, Island of Hawai‘i’s 16 (2002).
is part of the wao akua, an “inland realm” traditionally “uninhabited by humans because of [its] habitation by the gods.”262 The wao akua is distinguished from the wao kanaka, the human realm where people live and go about their day-to-day lives.263 These different realms, ‘Ōiwi cultural practitioner Kealoha Pisciotta explains, “differentiate our state of being. In the wao akua, one must be in ceremony all the time and recultivating their relationship with the ‘āina and akua.”264

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

This region is also environmentally significant, containing “one of the highest concentrations of rare species on earth” with “a combination of plant communities and habitats that can no longer be found elsewhere.”270 At least three endangered species—the ‘akē‘akē (Hawaiian storm petrel),271 ‘ōpe‘ape‘a (Hawaiian hoary bat),272 and nēnē (Hawaiian goose)273—also call it home.274 Ten thousand-year-old pāhoehoe and ‘ā lava flows cover most of Pōhakuloa.275 Archaeologists continue to find centuries-old artifacts in the
lava tube systems beneath Pāhakuloa,276 further confirming that the region was a corridor for adze makers, feather collectors, and Kānaka traveling across Hawai‘i Island.277

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

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

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277 Ching Interview, supra note 18.
278 Pisciotta Interview, supra note 264.
279 Id.
280 Ching Interview, supra note 18.
281 U.S. ARMY GARRISON-PĀHAKULOA, AN INTEGRATED CULTURAL RESOURCES MANAGEMENT PLAN 44 (2018) [hereinafter ICRMP].
282 As of 2018, USAG-Pāhakuloa has only surveyed 20% of the ordnance impact area and 50% of the rest of PTA. Id. at 47. PTA is about 132,820 acres total, the impact area is about 51,000 acres, and the remaining complex is about 81,820 acres. See HHF PLANNERS, REAL PROPERTY MASTER PLAN: POHAKULOA TRAINING AREA DRAFT FINAL 2 (2020). Twenty percent of 51,000 acres is 10,200 acres, and fifty percent of 81,820 acres is 40,910 acres. Thus, only 38.5% (51,110 acres) was surveyed as of 2018.
283 See 16 U.S.C. § 470bb(1) (defining “archeological site,” as a place where “any material remains of past human life or activities which are of archaeological interest” and are at least 100 years old are found). The military affords some protections from arbitrary removal for sites that meet this definition, but sites are not protected when found within proposed construction areas unless they come under the purview of other preservation laws. ICRMP, supra note 281, at 42.
284 Id.
285 Ching v. Case, 449 P.3d 1146, 1150 n.2 (Haw. 2019); HHF PLANNERS, supra note 282, at 6.
and leased land for PTA in 1964 at the same time as the Mākua set-aside and lease. The Pōhakuloa lease gives the United States "unrestricted control and use" of 22,900 acres for only $1.00 for 65 years and vests the federal and state governments with specific duties to protect the land, including a requirement that the United States clean up after each training exercise and remove all debris when the lease expires, if economically feasible.

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

Because Kānaka are genealogically related to Hawai‘i, the annihilation of Kaho‘olawe, Waikane, Mākua, and Pōhakuloa physically tears families apart. But Kānaka are rising, pulled by the magnetism of aloha ‘āina, to challenge colonial conditions. Given “all we have endured, and all the ways our intimacy between each other has been straightened and damaged, possibility and our many practices of aloha are revolutionary.”

Defending
‘āina, Uncle Kū explains, “is largely based on readiness, and we’re coming to those times where we, as Hawaiians, are ready.”

B. Deconstructing Ching v. Case

Uncle Kū and Aunty Maxine, the plaintiffs in Ching v. Case, witnessed the military’s exploitation of Kaho‘olawe, Waikāne, Mākuʻa, and Pōhakuloa, and have fought to protect Maunakea for decades. These kūpuna (elders) have magnetized successive movements to resist colonial subordination in pursuit of a self-determined future for the lāhui (Native Hawaiian nation and/or people). “The wao akua,” ʻŌiwi cultural practitioner Kealoha Pisciotta explains, “calls to Aunty Maxine and Uncle Kū,” and, in turn, “they call out to us,” magnetizing others to resist subjugation. In this way, Uncle Kū and Aunty Maxine embody and imbue aloha ‘āina.

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

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

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298 Ching Interview, supra note 18.
300 “Wao akua” can mean “the realm of the gods.” See supra notes 262–64 and accompanying text.
301 Pisciotta Interview, supra note 246.
302 Ching Interview, supra note 18.
304 Id.
305 First Amended Complaint, supra note 16, ¶ 1.
306 Ching, 449 P.3d at 1151 n.3, 1151 n.4, 1151 n.5.
307 Id. at 1178–79.
were “grossly inadequate.” The first inspection was done entirely on foot by one person over the course of a single day in 1984. The second report was not signed and contained no findings. The third report was initiated, not surprisingly, only after Uncle Kū and Aunty Maxine filed suit and found that the land was in “unsatisfactory” condition. Third-party reports, some of which were prepared by federal agencies, revealed that the military was not in compliance with the terms of the lease and that unexploded ordnance, junk cars, and trash littered PTA. DLNR, however, never followed up with the military about these reports or the land’s decrepit condition.

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

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

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

310 Id. at 1158.

311 Id. at 1178–79.

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

313 Id. at 1180.

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

315 Id. at 1180, 1184.

316 Id. at 1175–76.

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

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

319 Id. (citing United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)) (internal quotations omitted).
age, leaving beneficiaries powerless to prevent damage before it occurs.” DLNR thus cannot “passively allow” land “to fall into ruin,” and instead “must take an active role in preserving trust property.”

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

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

I. Public Land Trust Acreage is a Public Trust Resource

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

320 Id. (citing Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1011 (Haw. 2006)).
321 Id. at 1175 (citing White Mountain Apache Tribe, 537 U.S. at 475).
322 Id.
323 Id. at 1175–76.
324 Id. at 1180.
325 Id. at 1150, 1175. For an explanation of Hawai’i’s Public Trust and Public Land Trust, see Part III.A.
331 See, e.g., Reppun v. Bd. of Water Supply, 656 P.2d 57, 66–67 (Haw. 1982); Wai‘ihole, 9 P.3d 409, 444 (Haw. 2000); In re Wai‘ola o Moloka‘i, 83 P.3d 664, 694 (Haw. 2004); In re Kukui (Moloka‘i) Inc., 174 P.3d 320 (Haw. 2007); Kelly v. 1250 Oceanside Partners, 140 P.3d 985 (Haw. 2006).
332 In re Contested Case Hearing re Conservation Dist. Use Application HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve (In re TMT), 431 P.3d 752, 773 (Haw. 2018). Conservation districts are areas specially designated for protection under a Hawai‘i-wide land district classification system that overlays county zoning schemes. Hawai‘i Supreme
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In *Ching*, the court unanimously confirmed that Public Land Trust acreage is also a Public Trust resource.³³³ Prior to *Ching*, the State had strong fiduciary duties relating to Public Land Trust acreage,³³⁴ but these duties did not include the broad array of protections afforded to Public Trust resources through the balancing requirement, presumption in favor of trust purposes, precautionary principle, and other trust mandates established in *Waia̱hole*, *Kauaʻi Springs*, and other seminal cases.³³⁵

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

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

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³³⁴ *E.g.*, *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1263 n.18 (Haw. 1992) (quoting *Ahuna v. Dep’t of Hawaiian Home Lands*, 640 P.2d 1161, 1169–70 (Haw. 1982)) (declaring that the State has a fiduciary duty under Hawaiʻi’s Constitution to administer the Public Land Trust “solely in the interest of the beneficiaries,” use “reasonable skill and care to make trust property productive,” and act “impartially” in situations involving more than one beneficiary).
³³⁵ See *supra* Part III.A.1 for a discussion of Public Trust protections, *Waia̱hole*, and *Kauaʻi Springs*.
³³⁶ *Apology Resolution*, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (“[T]he indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum . . . . [T]he health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land[,]”).
³³⁷ For a discussion of these cases, see *supra* Part III.A.1.
2. Duty to Aloha ‘āina

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

Unfortunately, however, the Hawai‘i Supreme Court did not fully describe this emergent duty or how decisionmakers should operationalize it—the court merely affirmed Judge Chang’s imposition of the duty to aloha ‘āina. This raised questions about the efficacy of any duty to aloha ‘āina.

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


340 Ibid. at *8.


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


344 Traditional “Hawaiian usage” is incorporated into state law. See HAW. REV. STAT. § 1-1 (2009); see also HAW. REV. STAT. § 5-7.5 (2009) (defining “Aloha Spirit” and directing Hawai‘i officials to “give consideration” to it).

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

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

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

346 Id. at 1184.
348 Id. at 3–5.
349 Id. PTA is 134,000 acres in total, and about 23,000 acres are leased trust lands. Ching, 449 P.3d at 1150, 1150 n.2.
352 Id. at 6.
354 The Ching court ordered DLNR to establish a procedure for “reasonable transparency” with Kānaka and other beneficiaries, ensuring the plan’s “effectiveness through public oversight.” Ching, 449 P.3d at 1181, 1184.
before agency approval, as well as the ability to participate in ongoing public meetings with opportunities to testify. The Plan’s lack of meaningful transparency not only runs afoul of Ching, but also state legislation, the second Restatement of Trusts, the Public Land Trust, and the Public Trust Doctrine. In sum, despite Hawai‘i’s commitment to restorative justice, favorable legal language, and trust principles, the Plan ultimately fell far short of DLNR’s duty to aloha ‘āina PTA as a Public Trust resource for present and future generations. The Plan thus poignantly illustrates how formalist approaches are insufficient for adjudicating Native Peoples’ claims, even with myriad legal provisions advancing restorative justice.

V. OPERATIONALIZING THE DUTY TO ALOHA ‘ĀINA THROUGH THE FOUR VALUES OF RESTORATIVE JUSTICE FOR NATIVE PEOPLES

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

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

355 Plaintiffs’ Request the Court Reject Defendants’ Submission of Court-Ordered DLNR Management Plan for Leased Lands at Pōhakuloa, supra note 353, at 8.
357 The Restatement (Second) of Trusts, to which the Hawai‘i Supreme Court tethered DLNR’s trust duties, provides that beneficiaries are “always entitled” to information “reasonably necessary” for them “to enforce [their] rights under the trust or to prevent or redress a breach of trust.” RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (Am. L. Inst. 1979).
358 DLNR also has a fiduciary Public Land Trust duty to inform beneficiaries of material facts affecting their interests in the trust property, even absent a specific information request. Off. of Hawaiian Affs. v. State, 133 P.3d 767, 784 (Haw. 2006).
359 The Hawai‘i Supreme Court emphasized that agencies should operate with a “level of openness” when fulfilling Public Trust duties. Waiāhole, 9 P.3d 409, 455 (Haw. 2000).
360 Sproat, Wai Through Kānāwai, supra note 134, at 155. For an in-depth discussion of legal formalism, see Singer, supra note 197; Farber, supra note 197, at 91, 95.
362 See supra Part III.B.
363 Sproat, Wai Through Kānāwai, supra note 134, at 162 (citation omitted).
The Duty to Aloha ʻĀina

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

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

A. The Four Values of Restorative Justice for Native Peoples

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

364 Id. at 172; see also Yamamoto & Lyman, supra note 210, at 344.
366 Sproat, Wai Through Kānāwai, supra note 134, at 173 (citing Anaya, supra note 365, at 342–60); Sproat, Environmental Self-Determination, supra note 88, at 197.
The Hawai‘i Supreme Court has long acknowledged the importance of analytic frameworks in operationalizing constitutional mandates on the ground. In *Ka Pa‘akai O Ka ‘āina v. Land Use Commission*, a seminal case interpreting article XII, section 7 protections for traditional and customary Native Hawaiian practices, the court recognized that Native Hawaiians’ rights “must be enforceable” if they are “to be meaningfully preserved and protected.”368 For the “rights to be enforceable, an appropriate analytical framework for enforcement” was necessary.369 The court declared that this “analytical framework must endeavor to accommodate the competing interests of protecting [N]ative Hawaiian culture and rights, on the one hand, and economic development and security, on the other.”370

The court later took these general points of critical inquiry and gave them specificity for particular resources and communities.371 For example, to operationalize agencies’ constitutional,372 statutory,373 and common law374 obligations to protect traditional and customary Native Hawaiian practices, the *Ka Pa‘akai* court declared that Hawai‘i’s Land Use Commission must apply a three-part analytic framework when reviewing petitions to reclassify land district boundaries.375 The *Ka Pa‘akai* framework tasks the agency with making “specific findings and conclusions” as to “(1) the identity and scope” of “cultural, historical, or natural resources[,]” including traditional and customary Native Hawaiian rights practiced in the area; “(2) the extent to which those resources—including traditional and customary [N]ative Hawaiian rights—will be affected or impaired by the proposed action;” and “(3) the feasible action” the agency should take to “reasonably protect [N]ative Hawaiian rights.”376

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

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368 7 P.3d 1068, 1083 (Haw. 2000).
369 Id.
370 Id.
375 *Ka Pa‘akai*, 7 P.3d at 1084. All Hawai‘i decisionmakers must utilize *Ka Pa‘akai*’s framework because it helps “effectuate” the State’s affirmative constitutional duty to protect and preserve traditional and customary Native Hawaiian rights, but *Ka Pa‘akai* was specifically about the Land Use Commission. *See id.*
376 Id.
377 See 324 P.3d 951, 984–85 (Haw. 2014); *supra* Part III.A.1.b (describing the analytic framework).
378 *Kaua‘i Springs*, 324 P.3d at 984–85.
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For Hawai‘i decisionmakers, the Four Values should not supplant analytic frameworks established in *Ka Pa‘akai*,379 *Kaau‘i Springs*,380 and other cases, though these frameworks still require refinement and interpretation to ensure that Native Hawaiian rights are “meaningfully preserved,” “protected,” and “enforceable.”381 The Four Values, rather, are tools of contextual inquiry for decisionmakers to use when evaluating proposed actions under established frameworks to expand analyses beyond formalist constraints and get at “what is really going on” and “what is really at stake” within the historical, social, and political context of settler colonialism.382 The Four Values, moreover, can retroactively examine whether justice was actually served in specific decisions and help shape reconciliatory initiatives.

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

1. Mo’omeheu: Cultural Integrity

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

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379 *Ka Pa‘akai*, 7 P.3d at 1083–84.
380 *Kaau‘i Springs*, 324 P.3d at 984–85.
381 *Ka Pa‘akai*, 7 P.3d at 1083.
383 See generally Sproat, *Environmental Self-Determination*, supra note 88 (proffering a restorative justice framework emanating from local legal regimes to more fully claim and realize the Indigenous right to environmental self-determination in the context of global warming. More specifically, the framework examines Kānaka’s potential deployment of Hawai‘i law that embodies restorative justice principles to fashion meaningful remedies for colonialism’s longstanding environmental and cultural damage as one model for how other Indigenous Peoples can do the same in their own communities).
384 Sproat, *Wai Through Kānāwai*, supra note 134, at 179 (citations omitted); see also KAME‘ELEHA‘IWI, supra note 110, at 2–3 (explaining the importance of centering Maoli worldviews in Native Hawaiian scholarship).
harms, or perpetuate[s] conditions that continue to undermine cultural survival.”  

2. ‘āina: Land and Natural Resources  

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

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

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

4. Ea: Self-Determination  

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

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385 Sproat, Wai Through Kānāwai, supra note 134, at 179 (citations omitted).  
387 Id. at 17.  
388 Id.  
389 Sproat, Wai Through Kānāwai, supra note 134, at 181.  
390 Id. at 183.  
391 Anaya, supra note 365, at 315–16 (citation omitted).  
392 Id. at 317–18.  
eignty. This value examines whether an action perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-determination.

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

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

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

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

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394 Sproat, Environmental Self-Determination, supra note 88, at 198.
395 Anaya, supra note 365, at 355.
396 Sproat, Wai Through Kānāwai, supra note 134, at 185.
397 Sproat, Environmental Self-Determination, supra note 88, at 197–98 (citations omitted).
398 Id.
399 Id.
400 See supra Part IV.B.
duties. The court could contextualize its analysis by noting that Kānaka have repeatedly called on DLNR to meaningfully consider the sacred nature of Pōhakuloa’s ‘āina mauna (mountain lands) and our genealogical connection to the region prior to signing off on exploitative land uses. But time and time again, DLNR and other agencies ignore Kānaka or downplay our concerns in favor of economic, political, or private ventures. Thus, to support cultural integrity, the court could require DLNR to facilitate meaningful Native Hawaiian involvement in crafting, executing, and assessing the Plan. There are no people better suited than Kānaka, who hold traditional ecological knowledge passed down over centuries of biocultural resource stewardship, to help agencies fulfill their duty to aloha ‘āina. Cultural monitors have already compiled comprehensive recommendations for protecting and preserving Pōhakuloa. To be sure, DLNR’s trust duties are non-delegable, and the agency could not pass its obligations to Kānaka communities. At a minimum, however, the court could order DLNR to comply with laws requiring that agency decisions be made at public meetings, so Kānaka could have had an opportunity to review the Plan and offer suggestions.

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

401 See supra Part V.A.1.
402 For example, Kānaka have repeatedly explained that the summit of Maunakea, a mountain on Hawai‘i Island overlooking Pohakuloa, is one of the most sacred places. Despite widespread opposition, DLNR has allowed thirteen telescopes to be built on Maunakea and has attempted to permit another, the Thirty Meter Telescope (“TMT”). Kānaka-led protests and strategic litigation halted TMT’s construction until the Hawai‘i Supreme Court declared that the project could proceed in In Re TMT, 431 P.3d 752, 757 (Haw. 2018). For a discussion of this decision, see Terina Kamailelauli‘i Fa‘agau, Comment, Reclaiming the Past for Mauna a Wākea’s Future: The Battle Over Collective Memory and Hawai‘i’s Most Sacred Mountain, 22 ASIAN-PAC. L. & POL‘Y J. 1, 37–64 (2021).
403 Though this Article focuses on Hawai‘i law, consultation with Native communities is a fundamental part of Indigenous Peoples’ right to free, prior, and informed consent under international law. See United Nations Declaration on the Rights of Indigenous Peoples, supra note 367, arts. 10, 11, 19, 28, 29.
404 Ching v. Case, 449 P.3d 1146, 1179 (Haw. 2019) (“An affirmative duty of the State to protect and preserve constitutional rights is by its very nature non-delegable.”).
405 The Plan was never approved at an open meeting, and there was no opportunity for public review or comment, as required by law. Plaintiffs Request the Court Reject Defendants’ Submission of Court-Ordered DLNR Management Plan for Leased Lands at Pohakuloa, supra note 353, at 8–10.
406 Ching, 449 P.3d at 1179 (quoting Ka Pa‘akai O Ka‘ a‘īna v. Land Use Com’n, 7 P.3d 1068, 1083 (Haw. 2000)) (internal quotations omitted).
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stage of the planning and decisionmaking process” with a “a global, long-
term perspective.”

For the second value, ‘āina, the court would analyze how the Plan could
attempt to redress historical injustices in a significant way. Though there
are a multitude of persisting injustices related to Hawai‘i Island’s ‘āina
mauna, the court could focus on redressing DLNR’s failure to monitor the
trust land for nearly sixty years by requiring the agency to inspect a mini-
mum number of acres annually and spend a minimum amount of time on
each inspection. DLNR argued that such minimum requirements would “go far beyond” the trial court’s original order. According to Native Hawaiian
Legal Corporation, however, the Plan’s reliance on voluntary recommenda-
tions rather than mandatory requirements “allows DLNR to continue to act
with impunity.”

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

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

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408 Waiāhole, 9 P.3d 409, 455 (Haw. 2000).
409 See supra Part V.A.2.
410 See, e.g., Fa’agau, supra note 402 (detailing “the incomplete ‘history’ of injustices”
relied upon by decisionmakers in complex decisions impacting Maunakea).
411 Defendants’ Position Statement Re: Court-Ordered DLNR Management Plan for
(No. 14-1-1085-04 GWBC).
412 Plaintiffs’ Objections to the Defendants’ Post-Remand Management Plan for Leased
Lands at Pōhakuloa Filed November 8, 2019 at 6, Ching v. Case, 449 P.3d 1146 (Haw. Cir. Ct.
413 Id.
415 See supra Part V.A.3.
416 White phosphorus is a toxic substance used by the military as an incendiary agent
because it catches fire when it contacts air and produces smoke clouds. White Phosphorus:
Systemic Agent, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/niosh/
ershdb/emergencyresponsecard_29750025.html (last visited June 7, 2022), archived at https://
perma.cc/M2LE-3WBM. White phosphorus is controversial under international law. E.g.,
Thomas Gibbons-Neff, U.S.-Led Forces Appear to be Using White Phosphorus in Populated
checkpoint/wp/2017/06/09/u-s-led-forces-appear-to-be-using-white-phosphorous-in-popu-
lated-areas-in-iraq-and-syria/, archived at https://perma.cc/5DJN-VBEV.
417 DU, a byproduct of the uranium enrichment process, is used in tank armor and muni-
devastating and physically endanger everyone in the region.\textsuperscript{418} Moreover, the risks associated with these toxic substances are not confined to the ‘\textipa{\text{`aina}} mauna: Pohakuloa’s ‘auwai akua channel water down to the ocean, and Pohakuloa’s groundwater is linked to Maunakea’s aquifer, a crucial source of freshwater for all of Hawai‘i Island. The extent of the environmental contamination from toxic substances is unknown. The military concedes that training activities have caused a variety of health and safety hazards at PTA, including contamination from lead, asbestos, polychlorinated biphenyls, and other chemicals.\textsuperscript{419}

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

For the final value, ea, the court would analyze how the Plan could attempt to redress the continued denial of self-determination.\textsuperscript{424} Kanaka have sought to restore control over biocultural resources as a measure of self-
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determination since the illegal overthrow in 1893.\textsuperscript{425} To try to protect and preserve a land base for a future Native Hawaiian nation, the court could have required DLNR to attempt to ensure—not merely attempt to assess—U.S. compliance with the lease.\textsuperscript{426} Indeed, the Hawai‘i Supreme Court has recognized the importance of DLNR’s Public Land Trust obligations to Native Hawaiian self-determination and acknowledged that trust acreage is “the foundation (or starting point) for reconciliation” between the State and Kānaka.\textsuperscript{427} The court anticipated that this reconciliation would include the settlement of Kānaka’s “unrelinquished claims” to land.\textsuperscript{428} Thus, at a minimum, to fulfill the final value, the court could recognize that Pōhakuloa is not only culturally and environmentally sacred, but it is also a vital land base for self-determination. The court would also need to consider the military’s annihilation of Kaho‘olawe, Waikāne, and Mākua, as well as DLNR’s willingness to passively allow the United States to obliterate Pōhakuloa. This cultural and historical context reveals that ensuring—rather than merely assessing—U.S. compliance is necessary.

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

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


\textsuperscript{428} Id.

\textsuperscript{429} See Ching, 449 P.3d at 1183.
ing—will continue to struggle with what restorative justice and the duty to aloha ‘āina means in practice, and Kānaka communities will remain in colonization’s shadow.

VI. Conclusion

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

430 Ka Mana o Ka Mageneti, supra note 5, at 7 (“Ua hiki i nā mākuʻa i piha i ke aloha i ka ‘āina e ‘ānaʻi aku i ka ‘ume e ke aloha i ka ‘āina iʻoko o kā lākou mau keiki a lilo kēlā mau keiki i mau keiki kaulana no ko lākou ‘āina makuahine.”).