University of Hawai‘i
Law Review

Volume 45 / Number 1 / Winter 2022

INTRODUCTION

TRIBUTE

ARTICLES

NOTE

ISSN: 1942-9223

Preface

Suhyeon Burns and Sarah Anne Mau*

It is our great privilege and honor to welcome Volume 45's first Issue. Like many of our predecessors, we embraced the opportunity to publish articles advocating for social, restorative, and reparative justice.

We are very fortunate to be able to publish articles written by world-renowned thought-leaders, and esteemed and established members of the local legal community. It is also our great pleasure to publish select student pieces and articles written by young lawyers. All of these articles address critical issues that affect our island home, and also issues beyond our shores that have national and international impact.

We are especially pleased to have made the transition to a fully online journal, thereby increasing accessibility to the scholarship. Our endeavor to be a digital publication has been a long-standing vision in an effort to be more environmentally sustainable and aware.

Our board is also proud to announce the launch of the University of Hawai‘i Law Review's first official podcast, Hawai‘i Law. Hawai‘i Law discusses legal issues facing our state with guest speakers from all backgrounds. This podcast endeavors to keep the community updated on the current legal tides.

Finally, we would like to offer our heartfelt gratitude to our advisors, Associate Dean Nicholas A. Mirkay and Professor Justin D. Levinson, and our Law School Dean, Camille A. Nelson, for their continued institutional support and guidance to make this Issue possible; a special mahalo to our Faculty Support Specialist Julie Suenaga as we could not have done this without her steadfast support behind the scenes; and we extend our deepest appreciation to the Volume 45 Editorial Board and Staff Writers for their generous time and efforts.

Mahalo for supporting the Law Review. We hope that you enjoy our very first digital Issue.

* Editors-in-Chief, University of Hawai‘i Law Review, Volume 45 (2022-2023).

Wewelo Ke Aloha ʻŌpū Aliʻi: Chief Justice Moon's Legacy of Public Service

Ashley K. Obrey*

Much has been written about the late Chief Justice ("CJ") Ronald T.Y. Moon and his profound commitment to public service and deep aloha for the people of Hawaiʻi. CJ Moon would often say, "Public service is the rent you pay for the space you occupy here on Earth."[1] Consistent with those words, his long list of contributions to the state's legal system and Hawaiʻi common law during his twenty-eight years on the bench is a testament to the fact that he took his kuleana to serve Hawaiʻi's people seriously.

As the first Korean-American to lead a state supreme court,[2] CJ Moon was devoted to the advancement of justice through a judicial system that was accessible, fair, and inspired public trust. Under his leadership, the judiciary established innovative programs allowing for more just outcomes, including a drug court,[3] girls court,[4] mental health court,[5] and a court interpreter

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Mahalo e Devin Kamealoha Forrest who provided the ʻōlelo Hawaiʻi for the title to capture CJ Moon's legacy of public service: Wewelo ke aloha ʻōpū aliʻi. Love for charity flies prominently. In Hawaiian thinking, to have an ʻōpū aliʻi, or the "heart of a chief," means to possess a chief's benevolent character. Another big mahalo to Susan DeGuzman, CJ Moon's legal secretary of 36 years (and one of his closest friends!), who made this Article possible by providing information and valuable feedback to ensure that this Article would do him justice. I appreciate you.

[1] *Statement on the Passing of Chief Justice Ronald T.Y. Moon*, HAW. STATE JUDICIARY (July 5, 2022), https://www.courts.state.hi.us/news_and_reports/2022/07/statement-on-the-passing-of-chief-justice-ronald-t-y-moon.

[2] *Id.*

[3] Established in 1996, Hawaiʻi's drug court is an 18-month program offering a more economic and effective alternative to incarceration for substance-abuse related crime. *See Drug Court Graduation in the Pandemic Era*, HAW. STATE JUDICIARY (June 23, 2020), http://www.courts.state.hi.us/news_and_reports/2020/06/drug-court-graduation-in-the-pandemic-era.

[4] Girls Court was established in 2004 to help "prevent or reduce female juvenile delinquency by encouraging healthy attitudes, behaviors, and lifestyles as well as promoting self-control and responsibility." *See Girls Court*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/special_projects/girls_court (last visited Nov. 29, 2022).

[5] Established in 2005, Mental Health Court is a specialty court redirecting offenders from jail to community-based treatment to deal with public safety issues and support recovery of defendants with severe mental illness. *See Mental Health Court*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/special_projects/mental_health_court_oahu (last visited Nov.

certification program to help court proceedings function efficiently and effectively.[6] He chaired the Access to Justice committee of the Conference of Chief Justices and Conference of State Court Administrators for fifteen years[7] and also worked closely with the legislature to secure funding to build four new courthouses in Hilo, Līhu'e, Kāne'ohe, as well as in Kapolei, which was named the "Ronald T.Y. Moon Judiciary Complex" in his honor.[8]

The Moon Court's jurisprudence—and CJ Moon's own written opinions—also reflects his public interest-focused mindset that upholds, and even expands, the rights of Hawai'i's people.[9] For example, during those seventeen years as chief justice, the Moon Court: recognized the unconstitutionality of banning same-sex marriage;[10] acknowledged the public's interest in protecting Native Hawaiian traditional and customary rights;[11] broadly construed article XII section 7 protections beyond access and gathering (including the protection of iwi kūpuna);[12] tackled legal issues dealing with the public trust doctrine, water management in Hawai'i,[13] and Native Hawaiians' connection to these resources;[14] and upheld important

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29, 2022).

[6] *Statement on the Passing of Chief Justice Ronald T.Y. Moon*, *supra* note 1.

[7] *NCSC Statement on the Passing of Chief Justice Ronald Moon of Hawaii*, NAT'L CTR. FOR STATE CTS. (July 6, 2022), https://www.ncsc.org/newsroom/news-releases/2022/chief-justice-ronald-moon-passes-away.

[8] *See Statement on the Passing of Chief Justice Ronald T.Y. Moon*, *supra* note 1.

[9] *See* Aviam Soifer, *A Moon Court Overview: Rent for Space on Earth*, 33 U. HAW. L. REV. 441 (2011).

[10] *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

[11] *See, e.g.*, Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000).

[12] *See* Kaleikini v. Thielen, 124 Hawai'i 1, 237 P.3d 1067 (2010); *see also* Melody K. Mackenzie, *Ke Ala Pono – The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447 (2011).

[13] *See* Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt., 83 Hawai'i 484, 927 P.2d 1367 (1996); *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 9 P.3d 409 (2000); *In re* Water Use Permit Applications (*Waiāhole II*), 105 Hawai'i 1, 93 P.3d 643 (2004); *In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 83 P.3d 664 (2004); *In re* Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Moloka'i), Inc., 116 Hawai'i 481, 174 P.3d 320 (2007); *see also* D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. 537 (2011).

[14] *See Waiāhole I*, 94 Hawai'i at 137 & n.34, 9 P.3d at 449 & n.34; *In re* Kukui (Moloka'i), Inc., 116 Hawai'i at 486, 174 P.3d at 325; Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp., 121 Hawai'i 324, 333, 219 P.3d 1111, 1120 (2009) (acknowledging the "cultural importance of land to Native Hawaiians" and recognizing the 'āina's intrinsic connection to the culture, religion, economic self-sufficiency, health and well-being of Kanaka Maoli); Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp., 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008) (citing the State's commitment to reconciliation with Native Hawaiians as primary reason for prohibiting the sale of former native lands now held in trust); *see also* Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation":* Office of Hawaiian

procedural protections for the environment and natural resources, which are held in trust for the public.[15]

As a law clerk to CJ Moon during his last year on the bench, I would be remiss not to share that it was his focus on public service and reputation for fairness that drew me to pursue a judicial clerkship with him after I graduated law school. Unlike many of my classmates who I assume always knew that they wanted to be a lawyer, I chose law school as a path to a career in public service to address the injustices for Native Hawaiians and to ensure that Hawaiʻi's culture and natural resources would be protected for future generations. Whether I would actually practice law was never a certainty. However, I knew that a law degree would be a step in the right direction toward serving my community in a meaningful way.

Working with CJ Moon was a year-long lesson not only in the inner workings of the court system, the substance of the law, and the crafting of clear judicial opinions with sound legal analyses, but also in ensuring fair decision-making and adherence to the rules. As a mentor, CJ held his law clerks to the highest standards but did so with great warmth and respect. He put great trust in his law clerks' review, research, and resulting legal analyses, thereby inspiring our confidence as a result. However, his own attention to detail, knack for clarity in his written decisions, and commitment to justice meant that he also put in his own work to ensure that he upheld the court's integrity in rendering decisions on Hawaiʻi's most significant and complex cases. As a chief justice, he acted with an abiding respect for the opinions of his judicial colleagues and held all court staff in high regard.

And for a legal hero who I once made untouchable in my own head, CJ Moon was extremely down-to-earth, humble, friendly, and kind. An exceedingly busy man, he always made time to poke his head into our office to say hello, tell a joke, or "talk story," not about a case, but just about life in general. And he stayed true to who he was—content with his routine breakfasts at the Ground Floor on Richards Street (where they knew him by name), celebratory meals almost always at the Hungry Lion, and wearing slippers when the occasion called for them. CJ also never shied away from cracking jokes behind what could have been a professional poker face. I remember vividly when he called me into his office early into my clerkship and asked—with a stoic face that matched his no-nonsense tone—how I felt I performed on the bar exam. I managed to nervously squeak out something along the lines of how "I thought I did okay but wasn't sure" before being

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

[15] *See* Unite Here! Loc. 5 v. City & County of Honolulu, 123 Hawaiʻi 150, 231 P.3d 423 (2010) (requiring a supplemental environmental impact statement when an EIS is based on outdated information); *see also* Denise E. Antolini, *The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation*, 33 U. HAW. L. REV. 581 (2001); *see* HAW. CONST. art. XI § 1.

met with a dramatic silent pause and then a burst of happy CJ laughter congratulating me because I had, indeed, passed. He said that the bar results were being posted on the front door of the clerk's office downstairs as we spoke, and that I should run down there just to see my name "in print" on the list.

Working for CJ Moon as he performed daily tasks both as a justice and administrator of the judiciary showed me that public service comes in various forms and, consequently, inspired me to find my place to continue that legacy and follow in his footsteps. I am proud to say that I am one of approximately one-third of CJ Moon's Supreme Court law clerks (there are thirty-six of us)[16] who did just that.

Three of my law clerk predecessors became judges—one currently on the bench (The Honorable Karin L. Holma, District Court of the First Circuit of Hawai'i) and two recently retired (The Honorables Glenn J. Kim, Circuit Court of the First Circuit of Hawai'i and Hilary B. Gangnes, District Court of the First Circuit of Hawai'i). Others of us have worked in various positions in the public sector here in Hawai'i (including the Department of the Attorney General, Hawaiian Electric Company, and as a full-time clerk for a federal judge), led non-profit organizations, and lectured at the William S. Richardson School of Law (not surprisingly, my former co-clerk is a lecturer on legal writing). Three clerks who returned to the mainland after their clerkships are all currently in federal public service positions on the East Coast. I am privileged to have spent my legal career as an attorney at the Native Hawaiian Legal Corporation, a public interest firm dedicated to justice for Native Hawaiians and the protection of their identity, culture, and resources. Overall, I think it's fair to say that *all* of CJ's law clerks have gone on to impressive careers, applying their respective clerkship experiences and CJ's values to whatever jobs they have chosen.

CJ Moon has paid rent for his space here on Earth many times over. While he is known for his legacy of public service and positive influence on Hawai'i's legal system, he should also be remembered for the profound impact he made on forty-five law clerks who were shaped by the lessons learned working alongside him. CJ Moon lives on not only through his myriad accomplishments and written opinions, but also through the work we all do in our own communities.

It is an absolute honor to be a part of his legacy.

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[16] *See* Emails from Susan DeGuzman (Dec. 6 & 7, 2022) (on file with author). CJ Moon had a total of forty-five law clerks during his judicial career: nine as a circuit court judge, seven as an associate justice, and twenty-nine as chief justice.

Apology & Reparation: The Jeju Tragedy Retrials and the Japanese American Coram Nobis Cases as Catalysts for Reparative Justice

Eric K. Yamamoto* and Suhyeon Burns**

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I. INTRODUCTION

In a rare intersecting moment of law and history, Judge Jegal Chang of the Jeju District Court in South Korea rendered an extraordinary ruling sweeping away seventy years of injustice.[1] In January 2019 Judge Chang expunged the

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decades-old criminal records of the eighteen wrongfully convicted survivors of the Jeju April Third (4.3) Tragedy.[2] Euphemistically called "an incident,"[3] and marked by widespread violence and immense suffering, the 4.3 Tragedy swept across an entire island of villagers during the supposed "peacetime" between World War II and the Korean War.[4] Initiated by the U.S. Military Government and then overseen by U.S. Military officials, South Korean armed forces killed an estimated 30,000 island villagers, detained and tortured thousands more and burned down nearly all seaside villages.[5] All fueled by the mischaracterization of Jeju as an "island of reds."[6]

Government military tribunals also summarily "convicted" over 2,500 residents en masse in 1948-1949, leading to many executions and harsh indefinite imprisonment for alleged "rebellion," "aiding and contacting the [Communist] enemy" and "espionage."[7] Seventy years passed without rectification of the injustice. Finally, in 2017, eighteen of those convicted petitioned the Jeju court to vacate their military convictions and remove the groundless stain of disloyalty from their family records. The survivors' petition served as an integral part of South Korea's started-stalled-rejuvenated twenty-year initiative to heal the Tragedy's persisting wounds.[8]

Recognizing the national significance of the petitions, Judge Chang asked

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[1] *See* Jaegal Chang et al., *Korea Jeju District Court Second Criminal Department: The Decision*, 9 WORLD ENV'T & ISLAND STUD. 97 (Jin ju Moon, Chang hoon Ko & Michael Saxton trans., 2019) [hereinafter *2019 Order Dismissing Indictments*].

[2] *See id.*; Chang Hoon Ko & Yunyi Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases in 2018 from Consequences of 1984 Korematsu Coram Nobis Case Decisions and Civil Liberties Act of 1988*, 8 WORLD ENV'T & ISLAND STUD. 31 (2018) [hereinafter Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*].

[3] While "The Jeju April 3 Incident" is the official name of the series of related events, other descriptors include "Jeju 4.3 Tragedy" or "Grand Massacre." *See generally* THE NAT'L COMM. FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APR. 3 INCIDENT, THE JEJU APRIL 3 INCIDENT INVESTIGATION REPORT (Jeju Apr. 4.3 Peace Found. trans., 2014) (2003) [hereinafter 4.3 INVESTIGATION REPORT].

[4] ERIC K. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY 9–10 (2021) [hereinafter YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE].

[5] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 469–70, 647–52.

[6] *See id.* at 274–79; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 111–17.

[7] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 185; *see* 4.3 INVESTIGATION REPORT, *supra* note 3, at 549–64 (detailing the 1948-1949 military tribunals summarily convicting over 2,500 Jeju residents).

[8] *See* discussion *infra* Part III.A.

petitioners' supporters to search for global precedent for reopening decades-old manifestly unjust criminal convictions – all as a part of a larger societal reparative justice effort.[9] Supporters provided a translated legal-historical account[10] of the U.S. courts' coram nobis cases from the mid-1980s.[11] Those American cases reopened the U.S. Supreme Court's World War II rulings upholding the presidential and military orders precipitating the curfew for and forced removal of West Coast Japanese Americans.[12] More specifically, the federal courts' coram nobis rulings wiped away the forty-year-old convictions of resistors Fred Korematsu, Gordon Hirabayashi and Minoru Yasui and effectively cleared the names of all 120,000 Japanese Americans forcefully removed and incarcerated on the basis of falsified government claims of group threats to national security.[13] The courts' rulings in those coram nobis proceedings, along with the Supreme Court's earlier *Endo* decision,[14] laid the judicial cornerstone for the 1988 U.S. Civil Liberties Act's presidential apology, government reparations and public education projects – an acceptance of American responsibility for its past civil and

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[9] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 32–33; *see also* Min-kyung Kim, *Court Weighs Question of Granting Retrials for Those Imprisoned During 1948 Jeju Uprising*, HANKYOREH (Mar. 25, 2018, 8:21 AM), https://english.hani.co.kr/arti/english_edition/e_national/837522.html (describing legal complications in reopening the survivor-petitioners' seventy-year-old convictions).

[10] See ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2nd ed. 2013) [hereinafter YAMAMOTO, CHON, IZUMI, KANG & WU, LAW AND THE JAPANESE AMERICAN INTERNMENT], for the original version.

[11] *See generally* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating Fred Korematsu's conviction); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (vacating Gordon Hirabayashi's conviction); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985) (vacating Minoru Yasui's conviction).

[12] *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (upholding the United States mass racial exclusion of mostly American citizens during World War II pursuant to Executive Order 9066 and implementing military orders); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding the racial curfew); Yasui v. United States, 320 U.S. 115 (1943) (upholding the racial curfew).

[13] *See Korematsu*, 584 F. Supp. at 1420; *Hirabayashi*, 828 F.2d at 628; *Yasui*, 772 F.2d at 1498–500; Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 32–33.

[14] Mitsuye Endo challenged the Word War II mass racial incarceration and, unlike Korematsu, Hirabayashi and Yasui, succeeded at the War's end. *Ex parte* Endo, 323 U.S. 283, 297–304 (1944) (invalidating continuing detention of a concededly loyal citizen because the governing statute did not authorize the War Relocation authority to do so – notably implying that Executive Order 9066 and its initial implementing military orders were constitutionally acceptable).

human rights transgressions.[15]

After accepting the translated account of the coram nobis reopenings and taking preliminary testimony by the eighteen 4.3 survivors-petitioners, Judge Chang issued a startling order setting aside the convictions and initiating new trials.[16] The retrials quickly commenced in late 2018, with the Korean nation watching. In a moment worthy of the best Netflix drama, the prosecution itself uplifted the petitioners' contention that their military convictions were a sham, an integral part of the Jeju 4.3 injustice marked by the deaths and horrible suffering of tens of thousands of ordinary villagers. The government prosecutor asked the court to dismiss the indictments and clear the petitioners' names.[17] He hoped that this judicial ruling would help heal the persisting wounds by, in his words, recognizing and "sharing in some small way in the bitter suffering of these people, and in the suffering of history and [of] the Korean nation, and to bring the truth of what happened then to light" now.[18] The national government prosecutor spoke the language not of criminal procedure but of *social healing through justice*.

In an eloquent order-opinion, Judge Chang then formally dismissed the indictments in January 2019, clearing away the convictions and also effectively absolving the 2,500 other Jeju residents wrongly convicted en masse by the military tribunals.[19] A landmark criminal procedure and human

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[15] ERIC K. YAMAMOTO, LORRAINE J. BANNAI & MARGARET CHON, RACE, RIGHTS, AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION 339–47 (3rd ed. 2021) [hereinafter YAMAMOTO, BANNAI & CHON, LAW AND THE JAPANESE AMERICAN INCARCERATION].

[16] Je-gal Chang, *Each Retrial Shall be Initiated for the Decision to be Re-judged: Decision About Case: 2017 Inventory Hab-4*, 8 WORLD ENV'T & ISLAND STUD. 117, 118 (Chang Hoon Ko & Michael Saxton trans., 2018) [hereinafter *2018 Order Reopening 4.3 Mass Convictions*]; *see also* Eric K. Yamamoto, Katya Katano, Rachel Oyama & William N. K. Crowell, *Human Rights and Reparative Justice: The 2018 Reopening of the Jeju 4.3 Mass Convictions Through the Lens of the Coram Nobis Japanese American WWII Incarceration Cases*, 8 WORLD ENV'T & ISLAND STUD. 167, 177 (2018) [hereinafter Yamamoto, Katano, Oyama & Crowell, *2018 Reopening of the Jeju 4.3 Mass Convictions Through the Lens of the Coram Nobis Japanese American WWII Incarceration Cases*].

[17] Min-Kyoung Kim, *Prosecutors Request Dismissal of Indictments Against Defendants Connected with Jeju Uprising*, HANKYOREH (Dec. 18, 2018, 5:09 PM) [hereinafter Kim, *Prosecutors Request Dismissal of Indictments Against Defendants Connected with Jeju Uprising*], https://english.hani.co.kr/arti/english_edition/e_national/874894.html.

[18] *Id.*

[19] *See 2019 Order Dismissing Indictments*, *supra* note 1, at 97, 100; Suh-yoon Lee, *Jeju Massacre Victims Get Their Names Cleared in Court*, KOREA TIMES (Jan. 18, 2019, 11:13 AM) [hereinafter Lee, *Jeju Massacre Victims Get Their Names Cleared in Court*],

rights ruling for South Korean courts.[20] In one survivor's words, "The red mark [of April 3rd] has been erased from our names, and all the stigma of having been in prison has been lifted."[21] For decades, survivors and their families lived ostracized as second-class citizens and untouchables.[22] "I endured life in prison without the kind of trial we saw today. That left me with bitterness in my heart, and now I have been acquitted. I don't [know] what else to say."[23]

As developed in Part III, the Jeju court's ruling exonerated those eighteen 4.3 survivors persecuted seventy years earlier, declaring their convictions "invalid in violation of legal regulations."[24] Technically, the court found the mass convictions unlawful because the government failed to properly charge the survivors with crimes or present any evidence of guilt.[25] More broadly, the court situated the mass convictions amidst the carnage of the Jeju 4.3 Tragedy[26] – later crafting a compensation award in light of the case's

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https://www.koreatimes.co.kr/www/nation/2019/01/251_262242.html#:~:text=The%20Jeju%20District%20Court%20overturned,April%203%20Uprising%20and%20Massacre.

[20] *See, e.g.*, Sang-Soo Hur, *Historical Significances of Opening Decision for Retrial by Jeju District Court of Jeju April 3rd Events' Survivors Under Illegal Martial Law Court (1948-1949)*, 9 WORLD ENV'T & ISLAND STUD. 127, 129 (2019) [hereinafter Hur, *Historical Significances of Opening Decision for Retrial*] (observing how the decision "surpris[ed] and shock[ed]" South Korean lawmakers and "will serve as a major leverage" for Jeju 4.3 reparations).

[21] Han-sol Ko, *Jeju Court Rules to Erase Red Mark on Jeju Uprising Prisoners*, HANKYOREH (Jan. 18, 2019, 4:58 PM) [hereinafter Ko, *Jeju Court Rules to Erase Red Mark on Jeju Uprising Prisoners*], http://english.hani.co.kr/arti/english_edition/e_national/878973.html.

[22] Dong-choon Kim & Mark Selden, *South Korea's Embattled Truth and Reconciliation Commission*, 8 ASIA-PAC. J. 1, 5 (2010) [hereinafter Kim & Selden, *South Korea's Embattled Truth and Reconciliation Commission*]; Darryl Coote, *Exonerated Jeju Massacre Prisoners Fight to Right Korean History*, UNITED PRESS INT'L (Oct. 15, 2019, 3:00 AM) [hereinafter Coote, *Exonerated Jeju Massacre Prisoners Fight to Right Korean History*], https://www.upi.com/Top_News/World-News/2019/10/15/Exonerated-Jeju-Massacre-prisoners-fight-to-right-Korean-history/9431569816973/ (survivors describing how life after prison was worse due to the social stigma).

[23] Ko, *Jeju Court Rules to Erase Red Mark on Jeju Uprising Prisoners*, *supra* note 21.

[24] *2019 Order Dismissing Indictments*, *supra* note 1, at 100.

[25] *Id.*

[26] Survivor testimonies revealed that even for those who received something vaguely resembling a "trial" in 1948 or 1949, the military tribunals convicted them in groups of 50 to 300 people without individual charges or presenting evidence. *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 124. One survivor recalled a man in plain clothes casually stating, "[y]ou're getting three years in prison because you're guilty of espionage," unaware of the charges or any wrongdoing during sentencing. *Id.* The Jeju court thus declared it "impossible to conclude that preliminary investigations and indictment delivery procedures were properly observed" when the military commissions summarily convicted over 2,500 Jeju residents in such a "short time frame." Ko, *Jeju Court Rules to Erase Red Mark on Jeju*

"historical significance."[27]

Yet, as described in Part IV, even building upon the national government's earlier apology, 4.3 Museum and 4.3 Memorial and Gravesite,[28] the Jeju court's monumental rulings did not bring full closure to the protracted reconciliation initiative. These rulings did not generate a resonant sense of *4.3 justice finally and fully done.* In 2021, while acknowledging significant recent progress toward 4.3 reparative justice, including the Jeju court's rulings, Professor Eric K. Yamamoto spotlighted continuing "notable gaps and shortfalls" in economic justice for 4.3 survivors, families and communities – collectively impeding "comprehensive and enduring Jeju 4.3 *social healing through justice*."[29] For over seventy years, survivors and their families across generations suffered far more than the trauma of killings, torture and wrongful imprisonment. They sustained enormous financial losses – the destruction of homes and personal property and the devastation of village economic life.[30] They also suffered from the guilt-by-association system that deprived survivors and extended family members of access to government jobs, business opportunities, top universities and full participation in the island economy.[31] Past legislative and executive efforts to close the economic justice gap failed in the face of continuing political resistance.

The Jeju court's 2019 landmark decisions expunging the convictions of

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Uprising Prisoners, *supra* note 21; *see* Min-Kyung Kim, *Former Prisoners Request Retrial in Jeju Uprising Cases*, HANKYOREH (Mar. 25, 2018, 8:18 AM) [hereinafter Kim, *Former Prisoners Request Retrial*], http://english.hani.co.kr/arti/english_edition/e_national/837521.html.

[27] Elizabeth Shim, *South Korea Jeju Massacre Victims Awarded $4M in Damages*, UNITED PRESS INT'L (Aug. 21, 2019, 9:38 AM) [hereinafter Shim, *South Korea Jeju Massacre Victims Awarded $4M in Damages*], https://www.upi.com/Top_News/World-News/2019/08/21/South-Korea-Jeju-Massacre-victims-awarded-4M-in-damages/5291566394271/?upi_ss=Jeju.

[28] Following the National 4.3 Committee's 2003 recommendations, the South Korean government issued a presidential apology and constructed an impressive government-sponsored museum and an extensive public memorial and gravesite in Jeju. The government also created the Jeju 4.3 Peace Foundation to support additional fact clarification on Jeju 4.3 to restore the honor of victims and families. Many initially viewed these steps as salutary. *See infra* Part II.D.

[29] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 180.

[30] *See infra* notes 166–99, 410–20 and accompanying text; 4.3 INVESTIGATION REPORT, *supra* note 3, at 622–24.

[31] 4.3 INVESTIGATION REPORT, *supra* note 3, at 607–21.

the eighteen survivors and awarding substantial monetary damages were significant practically and symbolically. Yet, the decisions ironically underscored the glaring void in the larger 4.3 reparative initiative. The enduring *han* ("deepest pain") of the tens of thousands of other Jeju 4.3 survivors, families and communities persisted in the face of continuing political opposition to broadscale reparations and other forms of economic justice.[32]

In February 2021, the Korean National Assembly again excluded economic justice from its much-anticipated revision of the Jeju 4.3 Special Act.[33] Originally passed in 1999,[34] the Special Act marked South Korea's path-forging acknowledgment of the historic injustice and efforts to repair the damage to its own citizens. Twenty years of political infighting, though, continually obstructed economic redress for 4.3 survivors and families. The Special Act's February 2021 revision established a Jeju 4.3 Trauma Healing Center and authorized minimal medical support and welfare for a limited number of survivors.[35] But it declined to confer general reparations.[36] For thousands who suffered directly and indirectly from the 4.3 "scorched earth" carnage, reconciliation efforts remained starkly incomplete.[37]

In response to mounting political pressure and public education – including follow-up research, journalists' stories and scholars' assessments – the National Assembly finally approved a ground-breaking amendment to the Special Act in December 2021. It authorized government payment of $76,000 (90 million won) to each of the 10,101 designated victims of the 4.3 Tragedy for a collective sum of $767,676,000 (909 billion won).[38] That legislative commitment to reparative action commencing in 2022, backed by President Moon's outgoing administration, amounted to the largest

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[32] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 189–90.

[33] Special Act on Discovering the Truth on the Jeju 4·3 Incident and the Restoration of Honor of Victims, Act. No. 17963, Mar. 23, 2021, *amended by* Act. No. 18745, Jan. 11, 2022 (S. Kor.) [hereinafter 2021 Jeju 4.3 Special Act], https://www.law.go.kr (search required).

[34] See *infra* Part V.A, for more discussion on the Jeju 4.3 Special Act.

[35] *See* 2021 Jeju 4.3 Special Act, *supra* note 33, art. 23.

[36] *See, e.g.*, Ho-joon Huh, *[Interview] Family Members of Jeju April 3 Victims Demand Amendment of Special Act in Ntl. Assembly*, HANKYOREH (Oct. 29, 2019, 5:04 PM) [hereinafter Huh, *Family Members of Jeju April 3 Victims Demand Amendment of Special Act*], http://english.hani.co.kr/arti/english_edition/e_national/915026.html.

[37] Ho-joon Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*, JEJU 4·3 PEACE FOUND. (Oct. 5, 2021) [hereinafter Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*], http://jeju43peace.org/revised-jeju-4%c2%b73-special-act-now-effective-but-with-what-improvements/.

[38] The amendment authorized payments over the following five years. See *infra* Part V.C, for a discussion on the December 2021-2022 Special Act Revision.

compensation[39] award by the Korean government to victims of a singular past injustice.[40] And it promised to overcome a major impediment to comprehensive and enduring 4.3 social healing – filling the gap in long delayed economic justice.

Still more remained. The 2021-2022 Special Act's approval of individual monetary payments erected technical eligibility barriers for thousands of family members.[41] It also overlooked "capacity-building" or other forms of community-based economic justice for the survivors and communities harshly impacted through generations.[42] And the voices of women survivors of widespread 4.3 sexual violence remained largely absent – both from the reparative discourse as well as tailored remedial measures.[43] Finally, and potentially most important, the South Korean government again refrained from calling on the United States to acknowledge and accept responsibility for its partial yet pivotal role in the 4.3 Tragedy and to participate in next – and perhaps final – reparative steps.[44]

This article first examines the eighteen survivors' monumental Jeju court petitions to clear away their wrongful 4.3 mass military convictions, linking them to the Japanese American resistors' coram nobis challenges to the Supreme Court's World War II rulings. In making that linkage, it teases out similarities and differences, tracking the impacts of those judicial rulings in galvanizing key aspects of the political push for legislative reparations in South Korea and the United States, respectively.

Drawing upon human rights precepts of reparative justice[45] and

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[39] The National Assembly uses the term "compensation" to characterize this reparative measure.

[40] *See infra* notes 336–48 and accompanying text.

[41] *See* discussion *infra* Parts V.C, VI.B.1.

[42] *See* discussion *infra* Part VI.B.2.

[43] *See* discussion *infra* Part VI.B.3.

[44] *See* discussion *infra* Part VI.B.4.

[45] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 237–40 (describing international human rights norms of reparative justice, particularly the International Covenant on Civil and Political Rights mandating effective remedy for human rights violations, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law); *see* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); Commission on Human Rights Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005).

multidisciplinary insights into social healing,[46] the article then uplifts remarkable recent progress in the Jeju 4.3 social healing initiative, highlighting the Jeju court's rulings[47] and the National Assembly's 2021-2022 Special Act revisions.[48] It also identifies critical gaps in the 2021-2022 Act's eligibility requirements;[49] underscores the continuing need for economic justice in the form of tailored group capacity-building to empower Jeju communities;[50] and uplifts the importance of further reparative action to address the unique suffering of Jeju women subjected to widespread 4.3 sexual violence.[51]

In the concluding section, through the lens of reparative justice, this article synthesizes assessments about what recently advanced and what still impedes *comprehensive* and *enduring* Jeju 4.3 *social healing*, acknowledging the prolonged absence of the United States from reparative initiative. A companion article – titled "*Apology & Reparation II: United States Engagement with Final Stages of Jeju 4.3 Social Healing*" – then evaluates the propriety and impact of America's refusal to engage along with intensifying calls by 4.3 justice advocates, scholars and human rights organizations for the United States to step up and take its place at the 4.3 reconciliation table.[52] Linking the two articles together, the companion piece suggests a reparative path forward that may well benefit the United States, South Korea and, most important, the people of Jeju.

II. THE JEJU 4.3 "INCIDENT" AND INITIAL REPARATIVE STEPS

After World War II, emerging Cold War tensions between the United States and the Soviet Union set the stage for the "peacetime" U.S. military occupation of South Korea, including Jeju Island.[53] Some Jeju residents protested restrictive U.S. food policies, police brutality and extortion.[54] Police killed several at one protest, triggering community work stoppages and one group's attack on the police station.[55] In reaction, the U.S. Military

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[46] *See infra* Part VI. For a more robust discussion on human rights precepts of reparative justice, see Chapters 3, 4 and 12 in YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

[47] *See infra* Parts III and IV.

[48] *See infra* Part V.C.

[49] *See* discussion *infra* Parts V.C, VI.B.1.

[50] *See* discussion *infra* Parts V.B, VI.B.2.

[51] *See* discussion *infra* Part VI.B.3.

[52] Eric K. Yamamoto, Suhyeon Burns & Taylor Takeuchi, *Apology & Reparation II: United States Engagement with Final Stages of Jeju 4.3 Social Healing*, 45 U. HAW. L. REV. 81 (2022) [hereinafter Yamamoto, Burns & Takeuchi, *Apology & Reparation II*].

[53] 4.3 INVESTIGATION REPORT, *supra* note 3, at 363–64.

[54] *Id.* at 119–22.

[55] *Id.* at 132–34, 139–44, 213–19.

Government (as United Nations designated Trustee) and later the Republic of Korea (under United States oversight) carried out a "scorched earth" Jeju 4.3 "suppression operation," indefinitely detaining and torturing thousands of Jeju residents, then summarily trying and executing many wrongly presumed to be communists or communist supporters.[56] More far-reaching, government forces killed and maimed thousands of others in villages, fields and mountain hideouts, even though the villagers lacked unlawful links to communism or resistance activities.[57] By 1949, the violence of the Tragedy left "one in every five or six islanders" dead and "more than half the villages . . . destroyed."[58]

Government-sponsored violence continued through the following decades.[59] Authoritarian regimes shrouded 4.3 events in silence, detaining and torturing those who spoke or wrote about it.[60] The 1980s' fierce nationwide Democracy Movement pressured government leaders to sanction South Korea's first democratic election in 1987. With a new President and revelations of recent government oppression, Jeju 4.3 justice advocates launched the Tragedy into public consciousness.[61]

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[56] *See id.* at 144, 469, 549–64, 640–45. After Japan surrendered, the United States occupied Korea, south of the 38th parallel. It established the United States Army Military Government in Korea (USAMGIK) in September 1945, which functioned as the sole legal authority and gave the United States more control than a simple trusteeship. *See id.* at 92–97; *see also* OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1945, THE BRITISH COMMONWEALTH, THE FAR EAST, VOLUME VI (Oct. 1945), https://history.state.gov/historicaldocuments/frus1945v06/d802 (noting the United Nations' formal designation of the United States as trustee).

[57] *See* YAMAMOTO, *The Historical Setting: The Jeju 4.3 Tragedy and the United States' Role*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

[58] BRUCE CUMINGS, THE KOREAN WAR: A HISTORY 130 (2010) [hereinafter CUMINGS, THE KOREAN WAR]; *see also* 4.3 INVESTIGATION REPORT, *supra* note 3, at 451–55, 466–68.

[59] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 421–49. The Korean War started in June 1950. *Id.* at 421. In 1951, the Korean Army also established a secret special operations force as part of their anti-guerrilla expeditions – the unit was "specially trained for five months in Hawaii." *Id.* at 441. A labor and student-led "April Revolution" in 1960 sought regime change in South Korea, but anticommunist military dictatorship rose to power in 1961. Dong-Choon Kim, *The Long Road Toward Truth and Reconciliation: Unwavering Attempts to Achieve Justice in South Korea*, 42 CRITICAL ASIAN STUD. 525, 531–33 (2010) [hereinafter Kim, *The Long Road Toward Truth and Reconciliation*]. Subsequent authoritarian regimes continued to detain and torture those protesting government repression. *See* discussion *infra* Part II.C.

[60] *See* Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 532–33.

[61] HunJoon Kim, *Seeking Truth After 50 Years: The National Committee for Investigation of the Truth About the Jeju 4.3 Events*, 3 INT'L J. TRANSITIONAL JUST. 406, 412–15 (2009)

In the wake of South Africa's 1990s Truth and Reconciliation process, intense public education and political lobbying culminated in the Special Act of 2000.[62] Through the Act, the Korean National Assembly established a nationwide investigative committee, akin to a truth and reconciliation commission, to ascertain 4.3 historical facts and causes and to recommend appropriate reparative measures.[63] The 2003 report of that National 4.3 Investigative Committee initially led to substantial government reparative actions. With the ascension of conservative political leaders in 2007 and an economic downturn, however, progress halted and then regressed. From around 2010, grassroots justice advocates, educators, artists, politicians, journalists and scholars coalesced to rejuvenate and sustain 4.3 justice advocacy. The petitions of the eighteen survivors filed in the Jeju court in 2017 and the ensuing 2021-2022 revisions to the Special Act were integral to this revival.

A. *Mischaracterization of Jeju as an "Island of Reds"*

After World War II's end, like many throughout South Korea, Jeju residents organized peoples' committees to promote stability and peace, fearing continuation of oppressive Japanese colonial policies.[64] According to

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[hereinafter Kim, *Seeking Truth After 50 Years*]; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 145–46.

[62] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 4, 38–40. Following South Korea's transition to democracy, global reparative justice initiatives in the 1990s spurred South Korea to embark on a truth and reconciliation process to investigate its past human rights violations. South Africa's Truth and Reconciliation Commission, in particular, served as a monumental reconciliation model for countries seeking to heal the wounds of historic injustice. *See id.* at 38–40 (comparing South Africa's Truth and Reconciliation Commission's success and limitations to South Korea's Truth and Reconciliation Commission). *See generally* Dong-Choon Kim, *Korea's Truth and Reconciliation Commission: An Overview and Assessment*, 19 BUFF. HUM. RTS. L. REV. 97, 102 (2012); Hun Joon Kim, *Trial and Error in Transitional Justice: Learning from South Korea's Truth Commissions*, 19 BUFF. HUM. RTS. L. REV. 125, 163 (2012).

[63] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 4, 17–18. The "National Committee for Investigation of the Truth About the Jeju April 3 Incident" (National 4.3 Committee) "ascertained historical facts, examined responsibility and made recommendations." *Id.* at 4. Immediately after the release of the 2003 investigative report, "President Roh Moo-Hyun visited Jeju and apologized to survivors and their families. The national government also took active steps toward social healing." *Id.* The democracy movement, 2000 Special Act and the steps taken during that time toward (and resistance to) 4.3 reconciliation are discussed in depth in subsections C, D and E.

[64] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 83–85, 96–101. Cold War concerns gave rise to U.S. containment policies meant to prevent the spread of communism. Those policies also raised fears among South Koreans of a possible continuation of oppressive Japanese policies and diminished hopes for a future independent Korean peninsula. *See id.* at 96–101. In efforts to build political, education and cultural stability, Jeju islanders

the National 4.3 Investigative Committee's 2003 report, these diverse groups included a Labor Party led by a small number of communist members from mainland South Korea.[65] Those members of the Labor Party sought to eliminate oppressive practices. They also sought to gather support for communism in the South.[66] At a 1947 gathering organized in part by the Labor Party and in part by organizations unconnected with communism, Jeju residents gathered to commemorate Independence Movement Day and to demonstrate against harsh government policies and abusive officials' practices.[67] Police, "under the control of the US military, opened fire . . . killing . . . six" and severely injuring others.[68] This provoked general strikes and work stoppages by many Jeju groups.[69]

U.S. military intelligence determined that the main cause of the Jeju resident strikes was opposition to police brutality and extortion, not an incitement to communism.[70] Military investigators found relatively few communists among Jeju residents and ascertained many of the active resistors to be, at most, "moderate leftists."[71] The U.S. military commander

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"systematized the building of the Autonomous People's Council." Chang-Hoon Ko, *US Government Responsibility in the Jeju April Third Uprising and Grand Massacre: Islanders' Perspective*, 8 LOC. GOV'T STUD. 123, 126 (2004) [hereinafter Ko, *US Government Responsibility in the Jeju April Third Uprising and Grand Massacre*].

[65] 4.3 INVESTIGATION REPORT, *supra* note 3, at 258. The committee quoted a 1948 news article from the *Daedong Shinmun*, reporting that "the riot was caused by a few communists who came from outside of Jeju . . . and Jeju was peaceful in general." *Id.*

[66] *See id.* at 111–14 (describing the activities of the Labor Party and attempts to gather new members to become a "mass party").

[67] *Id.* at 123–30. Independence Movement Day ("Samil Jeol" for "March 1st") is a South Korean national holiday to commemorate March 1, 1919, which marks one of the earliest public displays of Korean resistance against Japan's occupancy and the people's persistent struggles to regain independence. Korean leaders announced the Declaration of Independence in March 1919, and the independence movement "spread to the Koreans resisting in Manchuria, the Maritime Provinces of Siberia, the United States, Europe, and even to Japan." *Independence Movement*, KOREA.NET, https://www.korea.net/AboutKorea/History/Independence-Movement (last visited Oct. 16, 2022).

[68] Kim, *Seeking Truth After 50 Years*, *supra* note 61, at 409–10; *see* 4.3 INVESTIGATION REPORT, *supra* note 3, at 132–33.

[69] 4.3 INVESTIGATION REPORT, *supra* note 3, at 139–44.

[70] *Id.* at 271–72.

[71] *Id.* at 169–72. Findings from U.S. investigators' extensive audit in 1947-1948 show that Jeju residents were not communists and described U.S.-supported Jeju Provincial Governor Yoo as an "ultra rightist" and "any intelligent person would reject" his government administration. *Id.* at 169–70. These investigations concluded that Yoo was "very dictatorial"

nevertheless described the strikes and resistance as a broadscale communist uprising.[72] The U.S. military leaders on Jeju and the Korean national police – the main security force along with the constabulary – began to characterize Jeju as an "island of Reds."[73]

B. *"Scorched Earth" Violence and Mass 4.3 Convictions*

On April 3, 1948, approximately 300 Jeju residents armed with bamboo spears, farm tools and a few guns confronted police and government officials in efforts to stop police brutality and protest upcoming elections.[74] Those armed "rebel fighters" attacked police stations and later election officials and some uninvolved families.[75] According to the 4.3 National Committee's report, the U.S. Military Government then sent in substantial national police and right-wing paramilitary forces.[76] It also deployed U.S. warships and designated a U.S. military officer as commander in charge of the "suppression" operations.[77] U.S. military leaders also emphasized that "the

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and branded anyone who did not completely agree with him as a communist. *Id.* at 170. The investigation recommended that "Governor Yoo . . . be replaced" but U.S. Military Governor Dean disapproved. *Id.* at 172. The Jeju 4.3 Tragedy occurred against this backdrop. *Id*.

[72] *Id.* at 272 (citing a letter from Rothwell H. Brown, Commander of the 20th Infantry Regiment, to Orlando Ward, Commander of the 6th Infantry Division (July 2, 1948) (on file with The Rothwell H. Brown Papers, Box 3, US Army Military History Institute, Pennsylvania, U.S.A.)). Colonel Brown described Jeju people as "Communist sympathizers" and "Communist agitators." *Id.*

[73] *Id*. at 272, 274–79; *see* CUMINGS, THE KOREAN WAR, *supra* note 58, at 123. *See generally* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 111–17 (discussing Jeju's branding as an "island of Reds").

[74] 4.3 INVESTIGATION REPORT, *supra* note 3, at 203, 211; *see* Tae-Ung Baik, *Justice Incomplete: The Remedies for the Victims of the Jeju April Third Incidents*, *in* RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA: THE KOREAN EXPERIENCE 94, 96 (Gi-Wook Shin, Soon-Won Park & Daqing Yang eds., 2007) [hereinafter Baik, *Justice Incomplete*]. Other accounts indicated that the Worker's Party leaders trained a limited number of islanders. *See* Baik, *Justice Incomplete*, *supra* note 74, at 96.

[75] *See* ASS'N OF BEREAVED FAMILIES OF VICTIMS OF THE JEJU APR. 3RD UPRISING FOR HIST. TRUTH, WHO ARE THE TRUE VICTIMS OF THE JEJU APRIL 3RD UPRISING? 1–53 (2013) (reporting that the Worker's Party trained a modest number of islanders as armed "rebel fighters").

[76] 4.3 INVESTIGATION REPORT, *supra* note 3, at 327–33, 335–47. President Syng-man Rhee and the U.S. Military, at varying times, deployed outside private organizations as de facto police security forces to brutalize Jeju residents. *Id.* U.S. military intelligence reported that the government mobilized and sent approximately 8,200 civilian men from the mainland through "secret induction" – most of whom "did not know about the actual circumstances of Jeju," received only days of training, and were illiterate. *Id.* at 336–38. For example, the Northwest Youth Corps, later classified by the U.S. as a terror organization, was recruited as paramilitary to "control and reorient leftists." CUMINGS, THE KOREAN WAR, *supra* note 58, at 123.

[77] 4.3 INVESTIGATION REPORT, *supra* note 3, at 269–73.

only way to settle the Jeju 4.3 Incident quickly was a scorched earth strategy."[78]

Amid "suppression operations," the Republic of Korea emerged in August 1948, with U.S. military officials, through a formal advisory group, continuing to exert operational control over the actions of South Korean armed forces.[79] The U.S. military government, which initially authorized the forceful actions against protesters by the South Korean constabulary and police, later oversaw scorched earth operational orders to clear the island of guerillas.[80] The new Rhee government, supported by the United States, declared martial law in November 1948.[81]

Briefly recounted, the security forces killed and maimed many residents in their seaside villages. Many villagers quickly relocated away from the shore. Security forces were then ordered to kill all residents found to be more than five kilometers from shore.[82] Later, to lure villagers out of mountain hideouts, security forces promised amnesty.[83] That promise was quickly broken. The forces killed many innocent villagers en route, arrested thousands of others and sent them to overcrowded jails,[84] wrongly characterizing them as "communists or enemy sympathizers."[85] For those who survived, military tribunal trials en masse followed.[86]

These military tribunals summarily convicted several thousand Jeju residents in December 1948 and June and July 1949 "without legitimate justification, proper hearings, or trial."[87] The harsh sentences for those 2,530

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[78] *Id.* at 333.

[79] *Id.* at 314–15. The U.S. military held operational control over the "Security Forces of the Republic of Korea" following the "Executive Agreement between Korea and US Concerning Interim Military and Security Matters" signed between the South Korean president and the U.S. Military commander. *Id.* (citing Article 1 of the "Executive Agreement" setting forth this provision).

[80] *See id.* at 386–400 (detailing the three-stage military operation in Jeju to "annihilate the enemy").

[81] *Id.* at 347. Martial law created military tribunals that operated at times without individual charges, evidence, trial or impartial decisionmakers. *Id.* at 549–54 (distinguishing the tribunals from "courts").

[82] *Id.* at 649 (citing the directive that "any pedestrians through the mountainous area more than 5km inward from the coastal line would be assumed to be a mob and would be shot to death").

[83] *Id.* at 564 (security forces promising residents "you can live if you come down").

[84] *Id.*

[85] Baik, *Justice Incomplete*, *supra* note 74, at 97.

[86] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 549–65.

[87] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 33.

civilian villagers ranged from one year, to five years, to fifteen years, to life imprisonment, to execution.[88] One news report described these military tribunals as having been "carried out by brute force and with a disregard to legal protocol . . . pinning responsibility for the uprising on civilian residents."[89]

C. *The Democracy Movement and Growing Acknowledgment of the 4.3 Tragedy*

The 4.3 carnage left "one in every five or six islanders" dead and "more than half the villages" destroyed.[90] Even after the killing stopped, the trauma and material damage persisted.[91] New authoritarian governing regimes suppressed all efforts to speak or write about the mass killings, widespread torture and military convictions. They detained and tortured those who sought to portray what really happened.[92] The dictatorships continued to characterize 4.3 as a broadscale communist uprising and a threat to national security.[93] The message: the villagers thus got the violence they deserved. Government agents tortured a novelist writing a story about the Tragedy and banned his purportedly subversive book's publication.[94]

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[88] 4.3 INVESTIGATION REPORT, *supra* note 3, at 553–54, 561–62.

[89] Kim, *Former Prisoners Request Retrial*, *supra* note 26.

[90] CUMINGS, THE KOREAN WAR, *supra* note 58, at 130.

[91] Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 535–39.

[92] *See id.* at 533 ("Soon after the military government came to power, it moved to disrupt the bereaved families' activities, arresting and prosecuting the leaders of the bereaved families' association and demolishing the cemetery in which they had all buried their dead."); Kunihiko Yoshida, *Reparations and Reconciliation in East Asia: Some Comparison of Jeju April 3rd Tragedy with Other Related Asian Reparations Cases*, 2 WORLD ENV'T & ISLAND STUD. 79, 80 (2012) (explaining that it was "taboo" to discuss the "Jeju mass killing" under the dictatorship government); George Katsiaficas, *Remembering the Kwangju Uprising*, 14 SOCIALISM & DEMOCRACY 85, 86 (2000) [hereinafter Katsiaficas, *Remembering the Kwangju Uprising*]. *See generally* Ko, *US Government Responsibility in the Jeju April Third Uprising and Grand Massacre*, *supra* note 64.

[93] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 144; *see* TRUTH & RECONCILIATION COMM'N, REPUBLIC OF KOREA, TRUTH AND RECONCILIATION: ACTIVITIES OF THE PAST THREE YEARS 6 (2009) [hereinafter TRUTH & RECONCILIATION COMM'N 2009 INTERIM REPORT] ("Influenced by the extreme rightist ideology of Japanese nationalism and the sophisticated manipulation skills of the U.S. military, the Park military junta introduced an extreme right-wing Fascist regime into Korean society during a time when the nation lacked thoughts, values, and awareness of democracy.").

[94] Kim, *Seeking Truth After 50 Years*, *supra* note 61, at 412–14 ("Almost all activists and scholars agree that [the novel *Aunt Suni*] was the key moment in South Korea's transitional justice history . . . . The time between 1978 and 1987 became a period of preparation [for] [u]nderground activists and scholars."); *see also "Sun-i Samch'on" by Hyun Ki-young: An Iconic Novel That Captures the Essence of Jeju 4·3*, JEJU 4·3 PEACE FOUND., http://jeju43peace.org/portfolio/hyun-ki-young/ (last visited Oct. 17, 2022).

In 1979, the Korean Central Intelligence Agency director assassinated President Jung-Hee Park, and military general Doo-Hwan Chun seized power by an internal coup d'état.[95] Under the Chun regime's martial law in 1980, violence erupted on mainland Korea.[96] Many students in Gwangju protested military government repression, and the ensuing violence mobilized the populace.[97] Government armed forces detained and tortured student leaders.[98] Demonstrations spread across the country.[99] The Gwangju conflict escalated over several days, leaving as many as 2,000 civilians dead.[100] With international communities watching, under fierce pressure, government leaders agreed to open elections.[101] And in 1987, South Korea elected President Tae-woo Roh, a former military leader.[102]

In the aftermath, student activists and members of democracy movements identified the Gwangju uprising as the start of the "Democracy Movement."[103] And they pressed for a fair investigation of government violence against the protestors.[104] The push for nationwide democratization encompassed, as one linchpin, the acknowledgment of and redress for grave government injustice.[105]

In this setting, 4.3 advocates lay the political foundations for reparative justice. Student groups at the Jeju National University launched the Tragedy into the public consciousness with the first Jeju 4.3 memorial service in 1989.[106] This public memorial served as "an arena where activists could discuss the 4.3 events and share information, expertise and strategies . . . accompanied by a month-long cultural festival that included local artists and

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[95] Samuel Songhoon Lee, *U.S. Half-heartedly Accepted 1979 Military Coup*, KOREA HERALD (Dec. 11, 2012), http://www.koreaherald.com/view.php?ud=20121211000801; Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 536.

[96] Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 536.

[97] *Id.* at 536–39.

[98] Katsiaficas, *Remembering the Kwangju Uprising*, *supra* note 92, at 87–88.

[99] *Id.* at 88–94.

[100] S*ee id.* at 85, 87–94.

[101] Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 537.

[102] *Id.*; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 145.

[103] Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 537.

[104] *Id.*

[105] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 145.

[106] Kim, *Seeking Truth After 50 Years*, *supra* note 61, at 414.

cultural activists."[107] In response to elevated public awareness and growing demands for a full and truthful public record, scholars and activists established the Jeju 4.3 Research Institute in 1989.[108]

With intense lobbying and support from political and grassroots organizations and journalists, in December 1999, the National Assembly passed the "Special Act for Investigation of the Jeju April 3 Incident and Recovering the Honor of Victims" (Special Act).[109] Most significant, the Special Act established the National 4.3 Committee to investigate the "Incident" – the compromise term describing the 4.3 Tragedy – to create an accurate account of events and causes and identify victims to restore their honor.[110]

D. National 4.3 Committee Investigation, Partial Government Implementation and Backsliding

After extensive analysis of documents and officials' and eyewitness testimony, the National 4.3 Committee's 2003 report concluded that "the ultimate responsibility goes to President Rhee Syng-man" for the carnage.[111] It also summarily identified partial United States responsibility.[112] As redress, the National 4.3 Committee recommended that the national government:

> * issue an apology to Jeju islanders, the victims and their families;
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> * declare the date of April 3 as a memorial day;
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> * utilize the final report as educational material;

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[107] *Id.*

[108] *Id.* Its research purpose was to "find evidence of the massacres and disseminate information." *Id.*

[109] Special Act on Discovering the Truth on the Jeju 4·3 Incident and the Restoration of Honor of Victims, Act. No. 6117, Jan. 12, 2000, *amended by* Act. No. 18745, Jan. 11, 2022 (S. Kor.) [hereinafter 2000 Jeju 4.3 Special Act], *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=42501&lang=ENG; *see also* 4.3 INVESTIGATION REPORT, *supra* note 3, at 688–92.

[110] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 688–89; *Legal Basis and Functions of the Committee*, THE NAT'L COMM. FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APR. 3 INCIDENT, http://www.jeju43.go.kr/english/sub.html (last visited Mar. 21, 2016).

[111] 4.3 INVESTIGATION REPORT, *supra* note 3, at 654.

[112] *Id.* at 654–55 ("The US Military Government and the Provisional Military Advisory Group (PNAG) are not free from being responsible for the . . . 4.3 Incident. Such incidents occurred under the US Military Government regime and the US Army Colonel in Jeju directly commanded the Suppression Operation. The US Army . . . supplied weapons and observation aircrafts for the Suppression Operation.").

> * actively support the establishment of Jeju April 3 Peace Memorial Park;
>
> * provide essential living expenses to bereaved families suffering from poverty;
>
> * support excavations of mass graves and historical sites; and
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> * continuously support further investigations and memorial affairs.[113]

The South Korean government forthrightly implemented many of the recommendations.[114] The Jeju 4.3 Peace Park and Museum "brought to life a compelling memorial and vast gravesite of nearly 15,000 graves where

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[113] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 150 (quoting *Truth-finding Efforts & Recommendations*, THE NAT'L COMM. FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APR. 3 INCIDENT, http://www.jeju43.go.kr/english/sub05.html (last visited Nov. 12, 2021)). President Roh Moo-hyun visited Jeju immediately after the report's publication and officially apologized to the 4.3 victims, survivors and families:

> In response to the recommendations from the Jeju Commission, I, in my capacity as President, would like to apologize for the wrongdoings of the previous government and express my sincere condolences to the victims and the bereaved. May their innocent souls rest in peace. The government will actively support the implementation of the commission's recommendations such as building a memorial park and honoring the victims at the earliest time . . . . By applying the valuable lessons that we have learned from the Jeju 4.3 Incident, we should try to promote universal values such as peace and human rights. We should cease the confrontation and division in this land and open a new era where everyone in Northeast Asia and the world lives in peace.

HUN JOON KIM, THE MASSACRES AT MT. HALLA: SIXTY YEARS OF TRUTH SEEKING IN SOUTH KOREA 153 (2014) [hereinafter KIM, THE MASSACRES AT MT. HALLA] (alteration in original).

[114] KIM, THE MASSACRES AT MT. HALLA, *supra* note 113, at 155. The National 4.3 Committee's report, however, met fierce legislative opposition. *See, e.g.*, *id.* at 153–54. "Over six months, 376 objections from twenty individuals and organizations, mostly representing the police and military, were submitted" before publication. *Id.* at 141. "[C]onservative organizations—for example, retired veterans and retired police—also submitted 143 objections. However, most of the revision requests from the military and police came from committee insiders." *Id.* at 141.

families could pay respects and visitors could sense the enormity of 4.3 events and consequences for people and communities."[115] The government established the Jeju 4.3 Peace Foundation to promote "human rights, democracy and national reconciliation" and to restore the honor of the victims and their families.[116] In addition, the government supported major efforts to locate and excavate mass 4.3 burial grounds.[117]

The National 4.3 Committee's recommendations and initial government follow-through gave voice to the Jeju people and advanced the reconciliation initiative. It acknowledged the fear, violence and suffering. "It also glimpsed communities' halting efforts to rebuild after the cataclysm."[118] But then 4.3 healing regressed. After 9/11, geopolitical and domestic influences appeared to largely shield the United States from the 4.3 investigative and public glare.[119] Conservative South Korean politicians and the military also lobbied to limit the National 4.3 Committee's inquiry and recommendations.[120]

Some conservative South Korean politicians and Ministry of Defense personnel strongly opposed truth and reconciliation processes.[121] That opposition targeted the National 4.3 Committee's investigation and the separate inquiry of the 2005 Truth and Reconciliation Commission of Korea (TRCK) that investigated human rights violations from Japan's early 1900s colonial rule through the Democracy Movement.[122] The TRCK was undercut

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[115] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 157; *see also Jeju 4·3 Peace Park*, JEJU 4·3 PEACE FOUND., http://jeju43peace.org/jeju-4-3-peace-park/jeju-4-3-peace-park-_-memorial-site/ (last visited Oct. 16, 2022).

[116] *Vision & Objective*, JEJU 4·3 PEACE FOUND., http://jeju43peace.org/foundation/vision-objective-2/ (last visited Oct. 17, 2022).

[117] Hun Joon Kim, *International Research on the Jeju 4.3 Events and Suggestions for Internationalization*, *in* JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947-2016) 207, 214 (Chang Hoon Ko, Eric K. Yamamoto, Kunihiko Yoshida et al. eds., 2016) [hereinafter Kim, *International Research on the Jeju 4.3 Events*].

[118] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 150.

[119] *Id.* at 162.

[120] *See, e.g.*, KIM, THE MASSACRES AT MT. HALLA, *supra* note 113, at 153–54; Baik, *Justice Incomplete*, *supra* note 74, at 96, 110–11.

[121] *See* Jae-Jung Suh, *Truth and Reconciliation in South Korea: Confronting War, Colonialism, and Intervention in the Asia Pacific*, 42 CRITICAL ASIAN STUD. 503, 519–20 (2010); Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 543–45; Kim & Selden, *South Korea's Embattled Truth and Reconciliation Commission*, *supra* note 22, at 1, 5.

[122] The National Assembly charged the TRCK with "investigat[ing] incidents regarding human rights abuses, violence, and massacres occurring since the period of Japanese rule to the present time, specifically during the nation's authoritarian regimes." *Truth Commission: South Korea 2005*, U.S. INST. OF PEACE (Apr. 18, 2012), https://www.usip.org/publications/2012/04/truth-commission-south-korea-2005. *See generally* TRUTH & RECONCILIATION COMM'N 2009 INTERIM REPORT, *supra* note 93.

by a lack of cooperation from the "police and the National Intelligence Service under the . . . Lee Myung-bak administration."[123] The "most responsible subject, the Ministry of Defense, . . . steadfastly refused to recognize their misdeeds,"[124] and the TRCK lacked the power to compel testimony, obtain sensitive state documents, or sanction those refusing to cooperate or even name officials involved.[125] As a result, politically significant and costly recommendations tended to be delayed and ultimately abandoned.[126] TRCK's truncated investigative powers and limited remedial reach[127] reflected the clashing interests between justice advocates' push for accountability for prior regimes' human rights violations and conservatives' strong support for the military and anticommunist policies.[128]

The global economic crisis emboldened the conservative party to push aside concerns for justice and human rights. The new 2007 presidential administration vowed to facilitate rapid economic recovery and improve relations with the United States.[129] In backing away from reconciliation initiatives generally, it recharacterized 4.3 as a communist uprising and stalled initial reparative momentum.[130] Attempts to scuttle the initiative,

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[123] Kim & Selden, *South Korea's Embattled Truth and Reconciliation Commission*, *supra* note 22, at 3.

[124] *Id.* at 5.

[125] Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 544–47.

[126] *Government Bodies Stall in Implementation of Truth and Reconciliation Recommendations*, HANKYOREH (Apr. 15, 2009, 10:06 AM), http://english.hani.co.kr/arti/english_edition/e_national/349865.html ("The 'success' of the TRCK is measured by how properly their recommendations to the government are carried out. In that sense, the current situation shows that a long and perilous road lies ahead in voicing the truth of history and leading the way towards reconciliation.").

[127] *See* Kim, *The Long Road Toward Truth and Reconciliation*, *supra* note 59, at 543–47; Kim & Selden, *South Korea's Embattled Truth and Reconciliation Commission*, *supra* note 22, at 3. *See generally* TRUTH & RECONCILIATION COMM'N 2009 INTERIM REPORT, *supra* note 93.

[128] *See* Baik, *Justice Incomplete*, *supra* note 74, at 110–11 (noting conservative party opposition to the Commission); Kim & Selden, *South Korea's Embattled Truth and Reconciliation Commission*, *supra* note 22, at 5 ("The Commission was to reveal the processes and unearth the incidents, but not create a case for prosecution of individuals whose crimes were, for the most part, committed more than half a century earlier.").

[129] *See* Tara J. Melish, *Implementing Truth and Reconciliation: Comparative Lessons for the Republic of Korea*, 19 BUFF. HUM. RTS. L. REV. 1, 8 n.23, 25 (2012) [hereinafter Melish, *Implementing Truth and Reconciliation*]; YAMAMOTO, *What's Impeded Jeju 4.3 Social Healing?*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

[130] *See* Melish, *Implementing Truth and Reconciliation*, *supra* note 129, at 25; Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United*

however, met growing resistance. Jeju families and grassroots justice advocates launched multifaceted political and educational efforts to rejuvenate the social healing movement.[131]

E. *Political and Legal Efforts to Rejuvenate 4.3 Reparative Justice*

Victims' associations worked with documentary filmmakers, teachers, journalists and community advocates to poignantly portray the persisting harms of the Jeju 4.3 Tragedy and rejuvenate the social healing movement.[132] Their works emphasized themes of hardship, resolve, yearning, sorrow, survival, preservation and resilience. Scholars, too, weighed in with assessments of the halting progress of the reparative initiative and with intensified calls for United States engagement.[133] With building momentum for further redress, the National Assembly and President Geun-Hye Park established an annual National Day of 4.3 Remembrance in 2014.[134]

The justice movement also reached the United States and beyond. Jeju survivors, justice advocates and Korean and American scholars traveled to the U.S. Congress in 2015, 2016 and 2017 to deliver the translated National 4.3 Committee's Report and present a Petition for a Joint United States and South Korea 4.3 Task Force.[135] A Smithsonian affiliate museum showcased a Jeju artist's 4.3 artwork collection,[136] the Sundance Film Festival showed a

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States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice, 15 ASIAN-PAC. L. & POL'Y J. 1, 65 (2014) [hereinafter Yamamoto, Pettit & Lee, *Unfinished Business*].

[131] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 181–83.

[132] *See* YAMAMOTO, *What's Revitalized Jeju 4.3 Social Healing?*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

[133] *See, e.g.*, Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 130; Tae-ung Baik, *Social Healing Through Justice-Jeju 4.3 Case*, *in* JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947-2016) 283 (Chang Hoon Ko, Eric K. Yamamoto, Kunihiko Yoshida et al. eds., 2016).

[134] *See* Darren Southcott, *Jeju Massacre Finally 'Out of the Shade': 4.3 Peace Foundation Director Buoyed by National Memorial Day Designation and Potential Presidential Visit*, JEJU WKLY. (Mar. 26, 2014, 3:38 PM), http://www.jejuweekly.com/news/articleView.html?idxno=3930; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 183–85 (discussing grassroots 4.3 justice advocates' efforts to raise national consciousness).

[135] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 185 ("Scholars, journalists and community advocates, too, publicized 4.3 history and crafted beginning recommendations for next steps through popular and academic publications and through convenings in Jeju, Hawai'i, North Carolina, New York, Chicago and Washington, D.C. almost every year from 2013 through 2019.").

[136] Anne Hilty, *Sharing Trauma and Healing*, JEJU WKLY. (Feb. 3, 2014, 12:46 PM), http://m.jejuweekly.com/news/articleView.html?idxno=3845.

4.3 documentary[137] and justice advocates' and environmentalists' promotion of "dark tourism" challenged tourists to discover the hidden history of atrocities on the island.[138] All of these efforts laid a "ground-level foundation for elevated international awareness."[139]

III. JEJU DISTRICT COURT'S REOPENING OF THE EIGHTEEN SURVIVORS' 4.3 CONVICTIONS – RETRIALS, NEW JUDGMENT, IMPACTS

The Jeju court's reopening of the mass military convictions of eighteen 4.3 survivor-petitioners emerged in this partially stalled, partially rejuvenated juncture in the Jeju 4.3 social healing process. The eighteen survivor-petitioners, summarily convicted and harshly imprisoned seventy years earlier, displayed immense courage and determination to remove the stain of disloyalty from their family records and the records of thousands of others. And in a rare coalescing moment, the prosecution and defense united in a desire to impel the Jeju court to right a historic injustice for the benefit of both individual claimants and Korean society at large – decades after the convictions of 2,530 Jeju residents.

A. 2017 Petition to Reopen 70-Year-Old 4.3 Mass Military Commission Convictions – a Comparative Reference to the Japanese American Incarceration Coram Nobis Cases

In April 2017, in the glare of the national media, the eighteen survivors petitioned the Jeju District court to expunge their unlawful mass military convictions for ostensible disloyalty.[140] Earlier Korean criminal cases, however, had not addressed the propriety of a Korean court's reopening of decades-old mass convictions as part of a present-day reconciliation initiative.[141] During a preliminary hearing to consider whether to reopen the eighteen survivors' cases, Jeju District Judge Jegal Chang asked Professor Chang Hoon Ko of Jeju National University, an advocate for the petitioners,

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[137] Jinmi Kim, *"Jiseul" Selected for Sundance Film Festival's World Cinema Dramatic Competition*, JEJU WKLY. (Dec. 3, 2012, 3:05 PM), http://www.jejuweekly.com/news/articleView.html?idxno=2871.

[138] Eun Jung Kang, *Experience and Benefits Derived From a Dark Tourism Site Visit: The Effect of Demographics and Enduring Involvement* (Ph.D. dissertation, University of Queensland 2010) (Academia.edu).

[139] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 182.

[140] *See* Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 33.

[141] *Id.* at 32.

for assistance in identifying international precedents for reopening mass incarceration cases decades later as part of a larger reparative justice initiative. According to Ko, "even though [the judge] ha[d] tried to find some similar cases . . . from both Jeju 4.3 Research Institute and professors from Law School of Jeju National University for [the past] year, it was so difficult for [him] to do it."[142]

Professor Ko then facilitated the translation and submission to the court[143] of three chapters from Professor Yamamoto's 2013 book *Law and the Japanese American Internment*.[144] Those chapters detailed the mid-1980s *Korematsu*, *Hirabayashi* and *Yasui* coram nobis petitions filed in U.S. courts to reopen and vacate World War II-era convictions for resisting the United States incarceration of 120,000 Japanese Americans on falsified grounds of military necessity.[145] Specifically, those extraordinary coram nobis cases in

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[142] *Id.*; *see also* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 186.

[143] Judge Chang asked Professor Ko "to submit one of [the] similar world case[s] for reference [to the] retrial of Jeju 4.3 Survivors" because he had thus far "failed to find meaningful world cases . . . to compare Jeju 4.3 survivors with other cases." Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 32. Ko believed it would be helpful to compare U.S. coram nobis cases reopening the WWII convictions of the Japanese American incarceration resistors that contributed to the U.S. Civil Liberties Act of 1988. Ko asked Professor Yamamoto for permission to translate and submit chapters from *Race, Rights and Reparation: Law and the Japanese American Internment*. Yamamoto granted permission to submit to the Jeju court the translation of the context and particulars of the 1940s U.S. mass Japanese American incarceration and the 1980s coram nobis case reopenings. *See id.* at 32–33.

[144] YAMAMOTO, CHON, IZUMI, KANG & WU, LAW AND THE JAPANESE AMERICAN INTERNMENT, *supra* note 10; *see* YAMAMOTO, BANNAI & CHON, LAW AND THE JAPANESE AMERICAN INCARCERATION, *supra* note 15.

[145] *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985). A *coram nobis* writ is a rarely employed ancient writ of error.

> The writ aims to eliminate the continuing stigma of a "manifestly unjust" conviction arising out of egregious governmental (usually prosecutorial) misconduct with continuing adverse consequences. *See* United States v. Morgan, 346 U.S. 502 (1954). To obtain *coram nobis* relief for manifest injustice, a petitioner must prove: "(1) a more usual remedy is not available [the claimant is no longer in custody, foreclosing habeas corpus relief]; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." Hirabayashi v. United States, 627 F. Supp. 1445, 1454-55 (W.D. Wash. 1986).

U.S. courts undercut the Supreme Court's 1943 and 1944 rulings upholding the convictions of the three resistors of the U.S. government's forced removal and mass racial incarceration.[146] According to Ko, submitting the translated account to the Jeju court in 2018 enabled the petitioners' lawyer to "argue to the judge the relevance of the Korematsu coram nobis case based on his comparison with the [eighteen] cases filed in the Jeju court."[147]

1. *1980s United States Coram Nobis Cases as "International Precedent"*

Based on newly discovered World War II government documents showing officials' fabrication of key aspects of the government's national security justification and deliberate misrepresentations to the Supreme Court, the federal courts in the mid-1980s granted the coram nobis petitions and vacated Korematsu's, Hirabayashi's and Yasui's convictions.[148] Overturning these resistors' convictions forty years later effectively cleared the names of the thousands of innocent Japanese Americans wrongly removed and incarcerated on false claims of disloyalty.[149] The federal courts' findings –

ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 37 n.3 (2018) [hereinafter YAMAMOTO, SHADOW OF KOREMATSU] (alteration in original).

[146] *See* Korematsu v. United States, 323 U.S. 214, 223–24 (1944); Hirabayashi v. United States, 320 U.S. 81, 105 (1943); Yasui v. United States, 320 U.S. 115, 117 (1943); *see also* LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 180–89 (2015); JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989).

[147] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 32.

[148] Finding "manifest injustice," Judge Patel vacated Korematsu's decades-old conviction to cleanse the judicial record infected by egregious government misconduct in falsifying the record on military necessity and making deliberate misrepresentations to the Supreme Court. *See Korematsu*, 584 F. Supp. at 1417. Other courts did the same for Hirabayashi and Yasui. Those courts vacated these resistors' convictions for violating the military orders, and, by extension, cleared the names of all who had been incarcerated en masse. *Hirabayashi*, 828 F.2d at 608; *Yasui*, 772 F.2d at 1499–500; *see* YAMAMOTO, SHADOW OF KOREMATSU, *supra* note 145, at 37–50.

[149] The 1980s U.S. coram nobis litigation proved that "the government had deliberately misled the courts and the American public about the ostensible threat posed by Japanese Americans, effectively deploying them as scapegoats." Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 694 (2019). It also revealed that World War II executive branch leaders "had helped distort and fabricate pivotal facts." *Id.* at 695. In granting Korematsu's coram nobis petition, U.S. District Judge Patel affirmed a congressional investigative commission's finding that "race prejudice, war hysteria

bolstering the 1983 findings of the Congressional investigative commission[150] – laid the judicial cornerstone for the U.S. Civil Liberties Act of 1988.[151] The Act mandated a Presidential Apology, $20,000 reparations payment to each survivor and the creation of a Public Education Fund[152] – all as part of an initiative to heal the long-standing wounds of grave injustice and to prevent "it" from happening again.

Through the translated scholarship on the Japanese American incarceration coram nobis cases, the 4.3 petitioners offered Judge Chang an international precedent[153] – a type of template – for reopening manifestly unjust criminal convictions, decades after-the-fact, as an integral element of an ongoing reparative justice initiative.[154] In a fashion similar to the coram nobis litigation, the Jeju survivor-petitioners more broadly sought to vindicate all 2,500 villagers wrongly mass convicted and punished. And, in important ways, they sought to uplift the justice claims of the 30,000 killed

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and a failure of political leadership" were the underlying causes of this manifest injustice. *Id.* at 698.

[150] Japanese American incarceration redress advocates determined that extensive public education would be needed to advance the broader legislative campaign for reparations. Rather than continuing to pursue direct redress legislation in Congress, despite disagreements, redress leaders opted to raise public consciousness and to galvanize the political redress movement nationwide. They supported the 1981 establishment of the Congressional Commission on Wartime Relocation and Internment of Civilians. The Commission heard testimony from hundreds who had been incarcerated and analyzed reams of documents. It concluded in 1983 that the forced removal and mass incarceration of Japanese Americans during World War II was not based on military necessity but rather on war hysteria, race prejudice and a failure of political leadership. *See* PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1982-83). The coram nobis litigation overlapped with the Commission's investigation, with each bolstering the other and with the combination generating far-reaching publicity. The resulting evolution of public consciousness helped change judges,' legislators' and the public's view of the injustice of the mass racial incarceration and laid a foundation for public support for the Civil Liberties Act of 1988. *See generally* MITCHELL T. MAKI, HARRY H. L. KITANO & S. MEGAN BERTHOLD, ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS (1999); YAMAMOTO, BANNAI & CHON, LAW AND THE JAPANESE AMERICAN INCARCERATION, *supra* note 15, at 337–47.

[151] YAMAMOTO, BANNAI & CHON, LAW AND THE JAPANESE AMERICAN INCARCERATION, *supra* note 15, at 337–47. According to lobbyist John Tateishi, former President of the Japanese American Citizens League, middle ground congresspersons had rejected redress legislation because of the 1944 Korematsu Supreme Court ruling. But after the coram nobis cases, "I actually had some members of Congress say to me well, you know, [given the recent coram nobis decisions] if that's the way the country is going, then, I guess I" can support redress. *Id.* at 343.

[152] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903.

[153] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 32.

[154] *See id.* at 35–36.

and thousands of others tortured or forcibly removed from their villages.[155]

In some respects, the comparison was apt. The forced removal and mass incarceration of Japanese Americans in U.S. concentration camps and the 4.3 Tragedy on Jeju island both began in the violence of the 1940s.[156] Both involved grave legal system injustices as key components of a government's mass civil liberties and human rights transgressions, with devastating damage to the survivors, families and communities.[157] Followed by decades of government silence.[158] Both involved the United States and belatedly maturing demands for healing persisting wounds of individuals and communities.[159] Both eventually turned to investigative commissions, and then the judicial and legislative branches, citing newly uncovered evidence of grave injustice and invoking democracy's tenets of the rule of law and reparative justice.

In other respects, the situations differed notably. "The scale, locale, military involvement and impact upon civilians, communities and societal institutions contrast[ed] significantly . . . . [T]he breadth and intensity of political support for U.S.-engaged redress likely differ[ed] as well."[160] Equally important, the United States role in each controversy differed, too. The World War II Japanese American incarceration occurred on U.S. soil and involved mostly American citizens, implicating American constitutional violations, while 4.3 occurred in South Korea and was orchestrated and overseen by the U.S. and South Korean governments, implicating international human rights abuses.[161] The U.S. government incarcerated well over 120,000 Japanese Americans while 30,000 Jeju residents were killed and many more were tortured and injured, with thousands more detained by South Korean security forces under the initial direction, and later operational supervision, of the U.S. Military authorities.[162]

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[155] *See id.* at 32–36.

[156] Yamamoto, Katano, Oyama & Crowell, *2018 Reopening of the Jeju 4.3 Mass Convictions Through the Lens of the Coram Nobis Japanese American WWII Incarceration Cases*, *supra* note 16, at 178.

[157] *Id.*

[158] *Id.*

[159] *See id.*

[160] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 205.

[161] *See id.*

[162] *See generally* YAMAMOTO, BANNAI & CHON, LAW AND THE JAPANESE AMERICAN INCARCERATION, *supra* note 15; Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 32–36.

Advocates for the eighteen 4.3 petitioners presented this calibrated comparative account of the U.S. coram nobis reopening litigation[163] amid the intensifying political push for far-reaching 4.3 social healing. And Jeju District Judge Chang responded in extraordinary fashion.

B. *The Jeju District Court's 2018 Reopening Order*

In September 2018, Judge Chang set aside the seven-decades-old convictions.[164] After hearing the survivors' preliminary testimonies, the Jeju Judge ordered retrials to ascertain whether the military tribunals acted as little more than kangaroo courts, summarily convicting over 2,500 villagers en masse of "espionage" and "rebellion" without charges, evidence or fair hearings.[165]

1. *Survivor Accounts of 4.3 Mass Military Commission Convictions*

For the first time in nearly seventy years, the survivor-petitioners spoke openly in court about their suffering.[166] Survivors' testimonies revealed that security forces arbitrarily arrested them and often coerced confessions through torture "without legitimate justification, proper hearings, or trial."[167]

One account recited the experience of a young boy tortured by soldiers and then imprisoned without charges.[168] Soldiers broke into the home of survivor-petitioner Won-Hyu Boo, then a fifth-grader, tied him to a cot and tortured him through electric shock.[169] Mr. Boo testified in the Jeju District Court in 2018, "I was tortured many times by military men. During the investigation, they asked me 'why did you cooperate with the guerilla of Mt. Halla?' and 'why did you put [the] flyer on the wall?' I responded negatively to those accusations. They beat me with a stick."[170]

Mr. Boo lamented that neither the tribunal nor police informed him of the charges against him. Or what he had done wrong.[171] At the time, Mr. Boo

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[163] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 32–33, 36–38.

[164] *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 118.

[165] *See id.* at 119, 122.

[166] Min-kyoung Kim, *[Interview] Retrials to Begin for 18 Former Inmates Incarcerated After Jeju Uprising in 1948*, HANKYOREH (Oct. 29, 2018, 5:56 PM) [hereinafter Kim, *Retrials to Begin for 18 Former Inmates*], https://english.hani.co.kr/arti/english_edition/e_national/867861.html.

[167] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 33.

[168] *Id.* at 33–34.

[169] *Id.* at 34.

[170] *Id.*

[171] *Id.*

was a student at Jeju Agricultural School[172] with dreams of becoming a veterinarian.[173] Mr. Boo testified that the military commission convicted forty to fifty defendants at the same trial.[174] The military judge called his name but did not ask him any questions. Later "[w]e assembled in the yard of the prison and one policeman . . . gave us sentences like 'A is one year, B is five years, C is seven years.'"[175] His conviction and imprisonment destroyed his life prospects and forever shattered his dreams.[176]

Another survivor-petitioner spoke of a boy – his family murdered by military police – harshly imprisoned for seven years.[177] Mr. Dong-Su Park recounted desperately trying to survive in his rural mountain village as a sixteen-year-old:

> There was an evacuation order. We were told to move to coastal villages. However, my father delayed moving to coastal villages because he thought he needed to bring some grains to feed his family. But when he was ready, he couldn't move because of the curfew. He had no choice but had to hide in the mountains. My father was killed by the army, and my older brother was killed, too. I was left alone in the mountain. I became an orphan overnight. I was caught by the police while wandering around the mountainous area.[178]

The police who caught him with his long hair proclaimed they "caught the worst of the armed guerrillas" and severely tortured him.[179]

Mr. Park testified that the military tribunals not only tried over a hundred people on the same day as him, but also did not sentence him until he arrived at Incheon Prison.[180] "They called each of us and gave sentences ranging from [fifteen] years to [five] years . . . . Now I think that it was really unfair to prosecute a person who didn't know anything on a charge of violating the national security law and given a [seven]-year sentence. I don't know how to

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[172] Jeju Agricultural School is where the headquarters of the 11th Regiment was located. 4.3 INVESTIGATION REPORT, *supra* note 3, at 18.

[173] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 34.

[174] *Id.*

[175] *Id.*

[176] *See id.*

[177] *Id.* at 34–35.

[178] *Id.* at 35.

[179] *Id.* at 34.

[180] *Id.* at 35.

describe my feeling."[181]

All eighteen survivor-petitioners were either forcefully captured by armed forces, many while desperately searching for shelter, or arrested after turning themselves in in exchange for a false promise of amnesty (for crimes not actually committed).[182] Military personnel then detained all survivors for extended periods, interrogating them under cruel conditions.[183]

The survivors' testimonies also revealed the 1948-49 military tribunals' "brute force and disregard[] [for] legal protocol."[184] Many survivors did not receive any trial, and those who did later attested that their trials were held in large groups of up to 300 people in places including "a big lecture hall" and "a yard near the police station and Gwandeokjeong Pavilion."[185] For many petitioners, a soldier merely called their name, asked a few questions and concluded without informing them of their sentence – or even if they were actually being tried.[186] None received legal representation, nor were any allowed to present a defense.[187]

Mr. Oh testified that he learned in Daegu Prison that the military tribunal sentenced him to fifteen years for "violating the 'National Defense and Security Law.'"[188] Mr. Park did not hear about his seven-year sentence until the Incheon Prison warden announced the sentences for all.[189] Mr. Jeong testified that upon arriving at Mapo Prison, "the warden told him of his indefinite sentence."[190] Many inmates needed to talk with each other or ask prison guards to learn their sentences.[191]

The survivors' compelling stories, recited at a preliminary Jeju court

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[181] *Id.*

[182] *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 122–24. Ms. Han testified that she was trying to shelter herself as her village was being burned down when the military police apprehended her. *Id.* at 123. For Mr. Yang, he decided to leave his mountain village and turn himself in once the military police killed his brother and sister-in-law. *Id.* at 124.

[183] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 586–606.

[184] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 185.

[185] *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 123–24.

[186] *Id.* Mr. Jo testified that the military tribunals sentenced him with "about 105 people . . . without knowing whether it was a trial or not." *Id.* at 123. During Mr. Park's "trial" in a police yard with fifty others, a man in plain clothes casually stated, "you get a few years, and you get a few years . . . . You're getting three years in prison because you're guilty of espionage." *Id.* at 124.

[187] *See id.* at 122–24.

[188] *Id.* at 124.

[189] *Id.*

[190] *Id.*

[191] *Id.*

convening, weighed heavily on Judge Chang.[192] After hearing their testimony, Judge Chang acknowledged the continuing suffering, recognizing that "some [of the petitioners] were incarcerated [and] suffered harsh treatment such as physical abuse and torture during their question[ing]."[193] Judge Chang also observed that "[t]heir testimony was candid and natural, with no sense of embellishment or exaggeration."[194] Accordingly, he cited all eighteen petitioners' testimonies in his preliminary order, conveying the survivors' own words and painting a compelling picture of their injuries and emotional trauma.[195]

The accounts of Dong-Su Park, Won-Hyu Boo and others, reflected the stories of all eighteen survivors-petitioners.[196] Moreover, those accounts gave an empowering voice to the other 2,500 convicted villagers who could not speak for themselves, including numerous women who suffered sexual violence.[197] Many were executed at the time or simply disappeared, and others who survived passed away before they could petition to clear their

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[192] *See id.* at 122; Kim, *Retrials to Begin for 18 Former Inmates*, *supra* note 166.

[193] Min-kyoung Kim, *Retrials to Be Held for Victims of Illegal Detention and Torture During Jeju Uprising*, HANKYOREH (Sept. 4, 2018, 5:50 PM), https://english.hani.co.kr/arti/english_edition/e_national/860653.html. "Many more were tortured (including horrific sexual violence) and detained in awful conditions (at times 100 persons in a jail cell)." YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 110.

[194] Kim, *Retrials to Begin for 18 Former Inmates*, *supra* note 166; *see 2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 122.

[195] *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 122–24.

[196] *See id.*; *see also* Ho-joon Huh, *An Elderly Woman's Terrifying Memories of Being Tortured by Soldiers at 12 Years Old*, HANKYOREH (Oct. 28, 2018, 1:21 PM) [hereinafter Huh, *An Elderly Woman's Terrifying Memories of Being Tortured by Soldiers at 12 Years Old*], http://english.hani.co.kr/arti/english_edition/e_national/867670.html ("When my stomach began to fill up with the water, they would push down on my stomach and knock the wind out of me. Then they would fill a bucket with water and splash it over me to bring me back to consciousness . . . . They prodded my legs with a bamboo stick with a buzzing piece of metal on the end that sent pus streaming down my legs. They would jab my breasts and shoulders, too, which made them swell."); Ho-joon Huh, *Yang Gyeong-sook Lost Her Vision Due to Brutal Torture During the Apr. 3 Jeju Massacre*, HANKYOREH (Jan. 6, 2019, 6:58 PM) [hereinafter Huh, *Yang Gyeong-sook Lost Her Vision Due to Brutal Torture*], http://english.hani.co.kr/arti/english_edition/e_national/877213.html (story of 26-year-old woman who stayed silent through five days of brutal torture to save her fellow villagers).

[197] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 603–05.

criminal records.[198]

2. *Judge Chang's Retrials Order*

According to retired professor and observer Sang-Soo Hur, Judge Chang's September 2018 decision to order retrials surprised many in South Korea, especially lawmakers.[199] Reopening the seventy-year-old convictions for retrials confirmed the illegality of the military tribunals' actions in 1948-1949,[200] and it served as significant political leverage for legislatively revising the 4.3 Special Act to address reparations.[201]

In his retrial order, Judge Chang determined that the military tribunals violated the survivors' rights to a fair trial.[202] He observed survivors who "didn't have a trial in Jeju Island at the time, and . . . learned about the sentence after . . . transferr[ing] to the main[land] . . . ."[203] Judge Chang also noted that nearly half of the testifying survivors "had never received anything to call a trial."[204]

Discovered records confirmed many of the survivors' 4.3-era convictions – reciting names, age, occupation, residence, plea and verdict, adjudication date, sentence and confinement in prison.[205] The government, however, could not find other crucial documents – "indictments, records of trial and ruling, prison transfers and other prison records."[206] That loss, Judge Chang determined, was the government's responsibility. The survivors "[could not] be held responsible" for the loss of the government's historical records at this stage of the litigation.[207]

Judge Chang ordered the retrials bearing in mind that retrials could facilitate the discovery of documents that might, or might not, directly

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[198] *See id.* at 541–42, 583–86; Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 20, at 128; *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 122–24.

[199] Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 20, at 129.

[200] *Id.*; *see 2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 121–22.

[201] Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 20, at 129.

[202] *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 118 ("[I]t is sufficient to recognize that the actual justification or procedural legitimacy of the claimants were violated, and that there was a 'judgment by the judicial authorities' concerning their treatment, and that the petitioners were transported to the mainland and were detained in respective prisons.").

[203] *Id.*

[204] *Id.* at 119.

[205] *Id.* at 117. "The documents are from the Registry of Convicted Persons from the 12th month of the year 4281 (1948) and the 7th month of the year 4282 (1949) & the criminal records of Claimants, Park, Park, Bu, Yang, Bang, Oh, Oh, Jeong, Jo, and Han." *Id.* at 118.

[206] *Id.*

[207] *Id.* at 119.

confirm the original convictions.[208] Acknowledging the risks for the petitioners and families, he noted, "descendants of those who were killed by the armed forces . . . are also present, in some cases the restoration of their identity through the retrial could be another wound to them."[209] Nevertheless, with further inquiry and fact-finding in mind, Judge Chang even-handedly determined that retrials were necessary to investigate the military tribunals' espionage and rebellion convictions and assure just treatment of the petitioners in a present-day court.[210]

C. Jeju District Court's Retrials

After the Jeju District Court ordered retrials, the petitioners-survivors' pro bono lawyer expressed how the new trials deeply affected him.[211] Attorney Jae-Seong Im admitted that he had initially "figured a retrial of these former inmates would be impractical, given [they are] in their 80s and 90s."[212] The survivors' determination to clear their names before they passed away, however, made clear the petitions were about "restoring reputations."[213] For Attorney Im, the survivors' opportunity to speak openly to the Jeju court about their prolonged suffering "was itself a kind of healing."[214]

1. *Startling Prosecutor Request to Dismiss the Indictments*

The Jeju District Prosecutor's Office decided not to appeal the Court's retrials order, and retrials quickly commenced in late 2018.[215] The petitioners presented the evidence described in Part III. In her statement to the court – and to the press – one survivor conveyed both the angst and the strength of the petitioners. She asked Judge Chang, "help ensure for my grandchildren that there is no record stating that their grandmother has a criminal history

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[208] *See id.* at 117.

[209] *Id.* at 120.

[210] *See id.* at 119–20, 122.

[211] Kim, *Retrials to Begin for 18 Former Inmates*, *supra* note 166.

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] Han-sol Ko, *Former Inmates Unjustly Incarcerated During Jeju Massacre to Sue S. Korean Government,* HANKYOREH (Feb. 24, 2019, 8:33 AM) [hereinafter Ko, *Former Inmates Unjustly Incarcerated During Jeju Massacre to Sue S. Korean Government*], http://english.hani.co.kr/arti/english_edition/e_national/883320.html; Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 20, at 128 ("We have decided not to appeal to the court immediately, respecting the court's decision to reopen the retrial case on Jeju April 3rd Events.").

and spent time in prison."[216] The "path we have traveled to this point has been a tremendously perilous and difficult [one]," another survivor added.[217] "What the [eighteen] of us want is to be acquitted."[218]

In December 2018 the retrials took a surprising turn.[219] In closing arguments, Prosecutor Gwang-Byeong Jeong made a startling request.[220] Instead of asking for a guilty verdict, he asked the court to dismiss the indictments against all eighteen defendants.[221] Prosecutor Jeong voiced his wish that rather than produce renewed convictions, the retrials could help heal the survivors' persisting wounds, and the wounds of Korean society itself, by "sharing in some small way in the bitter suffering of these people, and in the suffering of history and the Korean nation, and to bring the truth of what happened then to light as much as possible" now.[222]

2. *Order Dismissing Indictments and Declaring Mass Military Convictions Unlawful*

In January 2019 the Jeju District Court formally dismissed the indictments of all eighteen survivors.[223] Judge Chang's dismissal of all charges against the survivor-petitioners served as a landmark human rights ruling for South Korean courts.[224] He found the actions of the 1948-1949 military tribunals violated criminal procedures for a fair trial,[225] and, most significant, he invalidated the survivors' 4.3-era convictions for "Crime of Rebellion" and violation of the "Criminal and Defense Security Act."[226] Judge Chang's ruling marked the "first decision by the judiciary that recognizes the injustice" of those convicted en masse amid the Jeju 4.3 Tragedy.[227]

More particularly, Judge Chang formally addressed two aspects of the arraignments: 1) whether the charges were specific and 2) whether the necessary procedural provisions were complied with in bringing the

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[216] Kim, *Prosecutors Request Dismissal of Indictments Against Defendants Connected with Jeju Uprising*, *supra* note 17.

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *See 2019 Order Dismissing Indictments*, *supra* note 1, at 100; Lee, *Jeju Massacre Victims Get Their Names Cleared in Court*, *supra* note 19; Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 20, at 130.

[224] Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 20, at 128; *see 2019 Order Dismissing Indictments*, *supra* note 1, at 100.

[225] *2019 Order Dismissing Indictments*, *supra* note 1, at 99–100.

[226] *Id.* at 98, 100.

[227] Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 20, at 128.

defendants to court.[228] First, Judge Chang straightforwardly concluded that the government did not bring specific charges against the defendants given the absence of evidence "confirm[ing] exactly what charges the defendants have led to the court-martial."[229] Second, Judge Chang concluded that the military tribunals failed to comply with procedural requirements in charging and convicting the defendants.[230] He ascertained that 871 civilians suffered through trials "in the course of [twenty-five] days and [twelve] court sessions" in the first tribunal and 1,659 civilians "in the course of [fifteen] days and [ten] court sessions" during the second tribunal.[231]

Most significant, Judge Chang found it likely that biased military tribunals "accepted the opinion of the police without a preliminary hearing and arranged the decision[s] in advance."[232] He then concluded that the sheer number of individuals summarily convicted in such a "short time frame" made it "impossible to conclude that preliminary investigations and indictment delivery procedures were properly observed."[233] The Jeju judge thus declared that all eighteen survivors-petitioners' military commission convictions were unlawful, and he dismissed the seventy-year-old indictments.[234]

Judge Chang employed largely formalist legal language in his orders. Yet, he also revealed a jurisprudential reliance on critical legal precepts.[235] The survivors' compelling personal narratives significantly impacted his decision-making – Judge Chang incorporated all eighteen testimonies into his initial order, noting the survivors' powerful stories.[236] He also considered the surviving family members of those killed by the armed forces,

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[228] *2019 Order Dismissing Indictments*, *supra* note 1, at 98–100.

[229] *Id.* at 99.

[230] *Id.* at 99–100.

[231] *Id.* at 100 ("[I]t is difficult to estimate that the procedures of preliminary investigation and delivery of the bill of indictment were followed, with the collective court-martialing of such a large number of people in a short period of time.").

[232] *Id.*

[233] Ko, *Jeju Court Rules to Erase Red Mark on Jeju Uprising Prisoners*, *supra* note 21; *see 2019 Order Dismissing Indictments*, *supra* note 1, at 100.

[234] *2019 Order Dismissing Indictments*, *supra* note 1, at 100. According to Article 327 section 2 of the Criminal Procedure Act, "the indictment against the accused is applicable when 'the procedure for filing an appeal is invalid in violation of legal regulations.'" *Id*.

[235] *See* D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawaiiʻi's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127 (2011) (discussing courts and critical legal analysis).

[236] *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 122–24.

acknowledging their attendance at trial and highlighting the restoration of their reputations.[237] Finally, Judge Chang contemplated the larger justice implications of his ruling within the context of social, legal and political efforts to heal the continuing wounds of Jeju 4.3.[238]

In doing so, the Jeju court effectively cleared the names of all 2,530 villagers wrongfully convicted en masse by the 4.3 military tribunals.[239] One survivor-petitioner spoke for herself but also for all. "The red mark has been erased from our names, and all the stigma of having been in prison has been lifted."[240] For decades, these survivors and family members lived ostracized as "second-class citizens" and "untouchables."[241] "I endured life in prison without the kind of trial we saw today. That left me with bitterness in my heart, and now I have been acquitted. I don't [know] what else to say."[242]

3. *First-Ever Apologies by the Korean Military and Police*

Shortly after the Jeju court's extraordinary ruling, another historic turn of events followed. The Korean military and police – those most directly responsible – offered their first-ever apologies to the survivors and victim families on the 71st Anniversary of the 4.3 Jeju Tragedy.[243]

In 2019 the National Police Agency Commissioner General Gap-Ryong Min attended the memorial ceremony and offered a dedication of flowers, the first head of police in Korean history to participate in the memorial.[244] In a widely-viewed guest book, General Min invoked the language of healing and reconciliation:

> I humbly share my condolences before the spirits of all those innocent people killed during Jeju April 3, and I respectfully share my wishes that they rest in peace. I wish that the wounds of the tragic history will be healed soon according

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[237] *Id.* at 120.

[238] *See generally id.* at 118–24 (considering, among others, intergenerational wounds); *2019 Order Dismissing Indictments*, *supra* note 1, at 100; Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 2, at 36–38 (stressing international public attention as one crucial piece of the healing effort).

[239] *See 2019 Order Dismissing Indictments*, *supra* note 1, at 98, 100.

[240] Ko, *Jeju Court Rules to Erase Red Mark on Jeju Uprising Prisoners*, *supra* note 21.

[241] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 169.

[242] Ko, *Jeju Court Rules to Erase Red Mark on Jeju Uprising Prisoners*, *supra* note 21.

[243] Ho-joon Huh & Ji-won Noh, *Military and Police Offer First-Ever Apology to Victims of Apr. 3 Jeju Massacre*, HANKYOREH (Apr. 4, 2019, 3:58 PM) [hereinafter Huh & Noh, *Military and Police Offer First-Ever Apology to Victims of Apr. 3 Jeju Massacre*], http://english.hani.co.kr/arti/english_edition/e_national/888713.html.

[244] *Id.*

> to the truth and sincerely hope for reconciliation. I am deeply grateful to all who are committed to this effort, and we will strive to be an organization that further reflects upon past history for a democratic, human rights, and civil police force for the people of South Korea.[245]

In a formal public statement, the Ministry of Defense expressed "deep regret."[246] "We respect the spirit of the Special Jeju April 3 Act, and we express our deep dismay and condolences concerning the deaths of Jeju residents during the suppression process."[247] Later that day, Vice Defense Minister Choo-Suk Suh attended the memorial to meet with family members of 4.3 victims and conveyed that the Defense Ministry "feel[s] really sorry."[248] In the language of social healing, Vice Minister Suh pledged, "[f]rom now onward, we will do our best to actively join government efforts to verify the truth, restore the honor of those sacrificed and heal the scars and sorrow of the bereaved families."[249]

Finally, Prime Minister Nak-Yon Lee vowed to restore the dignity of those affected by 4.3.[250] In his commemorative address at the 2019 memorial, he promised, "[t]he Moon Jae-In administration has taken it as its historical mission to uncover the truth of Jeju April 3 and restore the dignity [of the victims] . . . . We will supply the truth of Jeju April 3 until the residents of Jeju say, '[t]hat's enough,' and we will restore [the victims'] honor."[251]

IV. THE JEJU DISTRICT COURT'S REPARATIONS-COMPENSATION ORDER

A month after the Jeju District Court exonerated the eighteen survivors-

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[245] *Police Commissioner Min Gap-Ryong Attends the 4.3 Memorial Service…"Bow Your Head and Mourn,"* ASS'N FOR THE BEREAVED FAMILIES 4.3 VICTIMS (Apr. 3, 2019, 3:35 PM), http://www.jeju43.com/bbs/board.php?bo_table=article&wr_id=1314&ckattempt=2 (trans. by Suhyeon Burns).

[246] *(LEAD) Defense Ministry Expresses 'Deep Regret' Over Jeju Incident*, YONHAP NEWS AGENCY (Apr. 3, 2019, 7:33 PM) [hereinafter *Defense Ministry Expresses 'Deep Regret' Over Jeju Incident*], https://en.yna.co.kr/view/AEN20190403004551315?section=search.

[247] Huh & Noh, *Military and Police Offer First-Ever Apology to Victims of Apr. 3 Jeju Massacre*, *supra* note 243.

[248] *Defense Ministry Expresses 'Deep Regret' Over Jeju Incident*, *supra* note 246.

[249] *Id.* The Vice Minister visited on behalf of Defense Minister Kyeong-Doo Jeong, who was visiting the U.S. at the time. *Id.*

[250] Huh & Noh, *Military and Police Offer First-Ever Apology to Victims of Apr. 3 Jeju Massacre*, *supra* note 243.

[251] *Id.* (second and last alteration in original).

petitioners, the survivors sought compensation for their unlawful incarceration and psychological trauma.[252] In a follow-up filing with the court, the survivors based their claims on the Act on Criminal Compensation and Restoration of Impairment of Reputation, which authorizes acquitted defendants to request compensation for wrongful detention.[253] The survivors' overturned convictions, together with Judge Chang's follow-up reparations-compensation order, bolstered hundreds of 4.3 families to come forward and request the same – exonerate their missing family members from their illegal military convictions.

A. *Monetary Compensation for the Eighteen Petitioners-Survivors*

In August 2019, Judge Chang awarded the eighteen survivors reparative damages collectively totaling $4.4 million.[254] He styled the monetary award as a form of "compensation." The award, although authorized by the Act,[255] more broadly implicated reparative justice in its aim of restoring honor and reviving reputations in the context of the 4.3 events. Judge Chang crafted the award while considering the "historical significance" of the Jeju 4.3 Tragedy as well as the guidelines of the Act.[256]

The court apportioned the monetary award among the eighteen petitioners, with some receiving more than others.[257] Individual compensation ranged from $66,000 to $1.2 million.[258] Judge Chang considered the kind and length of detention; property loss sustained, loss of wages, mental suffering and

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[252] Ko, *Former Inmates Unjustly Incarcerated During Jeju Massacre to Sue S. Korean Government*, *supra* note 215. The survivors' attorneys and advocates also submitted a request to the Jeju Prosecutors Office to "post the Jeju District Court's ruling exonerating the former inmates on the website of the Ministry of Justice." *Id.*

[253] Act on Criminal Compensation and Restoration of Impaired Reputation, art. 26 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=48260&lang=ENG.

[254] Shim, *South Korea Jeju Massacre Victims Awarded $4M in Damages*, *supra* note 27; Coote, *Exonerated Jeju Massacre Prisoners Fight to Right Korean History*, *supra* note 22.

[255] *See* Act on Criminal Compensation and Restoration of Impaired Reputation, art. 26 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=48260&lang=ENG.

[256] Shim, *South Korea Jeju Massacre Victims Awarded $4M in Damages*, *supra* note 27.

[257] *See Court Orders S. Korea to Compensate Victim of Jeju Uprising*, KBS WORLD (Aug. 17, 2021, 7:45 PM), https://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=163625. Du-Hwang Kim's award is illustrative. The police coerced Du-Hwang Kim in 1948 into making a false confession that he joined the Workers' Party of South Korea. Consequently, the military tribunals convicted Kim on trumped-up charges of aiding rioters and served his prison term for fifteen months. In calculating Kim's award, the court multiplied the daily wage of $58 (68,720 won) by five, and then by 450, the number of days Kim spent in prison.

[258] Shim, *South Korea Jeju Massacre Victims Awarded $4M in Damages*, *supra* note 27.

physical injuries during detention; intentions or errors of the police, prosecutor's offices and courts; and circumstances that constituted actual grounds for a not-guilty verdict.[259]

Viewed collectively, Judge Chang's compensation order reflected an acknowledgment of the imperative of economic justice for the eighteen survivors. It also intensified calls for 4.3 economic justice for all – particularly other survivors, bereaved families and Jeju communities as an integral part of the larger 4.3 social healing initiative.

B. *The "Nation's Largest-Ever Trial" for 335 New Petitioners*

The Jeju court's compensation awards catalyzed new filings. The Association of Surviving Family Members of Victims and Missing Persons from Jeju April 3 requested retrials of missing 4.3 victims who had been wrongly imprisoned.[260] In June 2019, the Jeju District Court held an initial hearing on the petitions on behalf of fourteen now-missing people convicted of charges of rebellion and communications to aid the enemy and espionage.[261] More family members of missing prisoners petitioned for retrials until the number exceeded 330.[262]

Hundreds of bereaved family members waited two years.[263] One family

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[259] Act on Criminal Compensation and Restoration of Impaired Reputation, art. 5 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=48260&lang=ENG. Courts calculate the compensation by "apportioning a daily amount determined to be not less than the minimum daily wage under the Minimum Wage Act of the year in which the grounds for claiming the compensation have taken place but not more than the amount determined by Presidential Decree to the number of days of such detention." *Id.*

[260] Ho-joon Huh, *Several Victims of Jeju Massacre Still Remain Unaccounted For*, HANKYOREH (June 5, 2019, 5:05 PM) [hereinafter Huh, *Several Victims of Jeju Massacre Still Remain Unaccounted For*], http://english.hani.co.kr/arti/english_edition/e_national/896776.html.

[261] *Id.*; *see 2018 Order Reopening 4.3 Mass Convictions*, *supra* note 16, at 100, 119, 122; 4.3 INVESTIGATION REPORT, *supra* note 3, at 549–64; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 185.

[262] *See* Ho-joon Huh, *Request for Retrial by Families of Jeju Massacre Victims Goes Unheard for Over 10 Months*, HANKYOREH (Apr. 6, 2020, 4:54 PM) [hereinafter Huh, *Request for Retrial by Families of Jeju Massacre Victims Goes Unheard for Over 10 Months*], https://www.hani.co.kr/arti/english_edition/e_national/935846.html.

[263] *See id.* One of the petitioners, Pil-mun Kim, was only three years old when the military tribunal summarily convicted and sentenced his father to fifteen years in prison. According to his mother, the police captured his father without any reason, tortured him with electric shocks, then sent him to prison before he fell completely off the radar. Kim opined, "The people who

member described his reason for petitioning, "[t]he government released its Jeju April 3 investigation report, and the president apologized. It seemed like things would be resolved when the Special Jeju April 3 Act was enacted, but they haven't been, which is why I requested the retrial [of my brother who was shot dead]."[264] In light of the delay, Jeju Assemblyman Chang-Il Kang insisted that "compensation must be provided by the National Assembly through legislation in the interest of social justice."[265]

In March 2021, the Jeju court held a subsequent retrial for 335 missing former prisoners, marking "the nation's largest-ever trial, involving the largest number of defendants in a single case."[266] At the time of trial, 333 remained missing (represented by family members). Two survivors were alive and attended the trial.[267] Replicating the retrials of the eighteen survivors, the Jeju prosecutor sought not-guilty verdicts for all.[268]

After hearings divided into twenty-one sessions, the Jeju court acquitted all 335 petitioners on all charges.[269] Family members of those deceased or missing expressed deep relief for "justice" finally done.[270] "I sincerely appreciate the court and the prosecutors [for the ruling]," Young-su Park, a son of the late victim Se-won Park, told the court.[271] Wiping tears away, he continued, "I am too nervous to utter a word."[272] Im-ja Lee, age 79, who lost her father, shed tears of joy upon hearing the verdict. "My mom had gone through a lot since my father went missing. We have longed for his return. Even faint sounds of wind made us wonder if he had come home."[273] In a faltering voice, Ms. Lee continued, "I am so grateful for the acquittal, albeit belated, for my father . . . . I wish my mom were still alive."[274]

The Jeju court's decisions were significant. Judge Chang's rulings laid the foundation for both restoring family reputations and later conferring tailored

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came back alive from prison were exonerated last year and even received compensation from the state. What about the people like me, whose fathers never returned?" *Id.*

[264] Huh, *Several Victims of Jeju Massacre Still Remain Unaccounted For*, *supra* note 260.

[265] Huh, *Request for Retrial by Families of Jeju Massacre Victims Goes Unheard for Over 10 Months*, *supra* note 262.

[266] Jae-yeon Woo, *(3rd LD) After 70 Years, Hundreds of Victims Acquitted in Retrials Over Civilian Massacre on Jeju*, YONHAP NEWS AGENCY (Mar. 16, 2021, 9:41 PM), https://en.yna.co.kr/view/AEN20210316006053315.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.*

compensation for the petitioners and their families. What the court's rulings did not do, however, was formally reach the 4.3 survivors and families who had not filed court petitions. The rulings also did not – and could not – judicially confer general reparations for all persons killed, tortured, injured or wrongfully detained during 4.3 events. Nor did those rulings address sustained economic damage to village communities.

Nevertheless, just as the 1980s U.S. coram nobis court rulings laid the legal cornerstone for the 1988 Congressional Civil Liberties Act authorizing broadscale reparations,[275] Judge Chang's ruling laid the judicial foundation for 4.3 justice advocates' intensified call for the National Assembly to revise the Special Act to encompass broadscale economic justice.

V. THE TWENTY-YEAR REPARATIONS STRUGGLE FOR ECONOMIC JUSTICE

The Jeju court's rulings, just described, marked significant political-legal progress in the Jeju 4.3 social healing initiative. Yet, the rulings reflected only one piece of the larger, and still incomplete, 4.3 reparative justice mosaic.

A. *Revisions to the Seminal 2000 4.3 Special Act: May 2016 and February 2021*

As described in Part II, the seminal 2000 Special Act established the National 4.3 Committee to investigate and create an accurate account of the 4.3 events and causes to restore the honor of affected Jeju residents and to recommend follow-up actions for legislative and executive implementation. The National 4.3 Committee's 2003 recommendations catalyzed rapid government action – presidential apologies, a 4.3 educational museum, a dignified memorial and commemorative gravesite and the Jeju 4.3 Foundation. After initial reparative measures, though, years of political backsliding and infighting halted progress, with glimmers of remaining hope for reparations. The run-up to the Special Act's 2016 revision and the much-anticipated February 2021 amendment reflected those hopes.

1. *2000 Special Act*

From the outset, reparations negotiations in crafting the 2000 Special Act

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[275] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 205. *See generally* YAMAMOTO, BANNAI & CHON, *Executive and Congressional Action*, *in* LAW AND THE JAPANESE AMERICAN INCARCERATION, *supra* note 15 (describing the impact of the Civil Liberties Act-created "Public Education Fund").

faced stern opposition to any kind of individual payments. The "opposition party . . . rejected any retributive or restorative measures beyond the investigation and objected to including the term 'reparations' in the law."[276] Advocates and victims, who viewed reparations as a secondary matter, remained "confident that reparations could be achieved through later advocacy once the official investigation revealed the gruesome nature of the state violence."[277] Ultimately, the Special Act reflected a bipartisan compromise that excluded even the mention of reparations, although it encompassed meager medical subsidies and financial assistance for limited numbers of 4.3 victims.[278]

The originating legislation's omission of reparations, the National 4.3 Committee's minimal economic justice recommendations and the legislative and executive branches' backsliding, in combination, left a yawning gap in the social healing process. Moreover, despite the 2000 Special Act and the National 4.3 Committee's 2003 report, the government denied medical subsidies and financial assistance to thousands of impoverished applicants.[279] It deemed only 132 eligible after its "strict investigation" into the causes of their specific injuries.[280] Further, the Special Act's administrative ordinance made it practically impossible to support those suffering financial hardship because it prohibited "duplicate payments" for those already receiving living allowances (limited general welfare) – the majority of otherwise eligible victims.[281]

2. *The Politically Divided 2016 Special Act Revision and Continued In-Fighting*

A later revision to the Special Act in May 2016[282] failed to cure the economic ills of those in need.[283] Thereafter, President Moon vigorously sought amendments to the Act to authorize broadscale monetary reparations

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[276] KIM, THE MASSACRES AT MT. HALLA, *supra* note 113, at 121.

[277] *Id.*

[278] *Id.* at 122.

[279] *See id.* at 155–67.

[280] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 176 ("Government administrators constricted eligibility determinations . . . excluding those who lacked definite proof that wrongful government actions caused their provable injuries.").

[281] *Id.*

[282] Special Act on Discovering the Truth on the Jeju 4·3 Incident and the Restoration of Honor of Victims, Act. No. 14189, May 29, 2016, *amended by* Act. No. 18745, Jan. 11, 2022 (S. Kor.) [hereinafter 2016 Jeju 4.3 Special Act], *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=42501&lang=ENG.

[283] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 176.

for 4.3 survivors and families.[284] Political infighting, though – over who was entitled to redress, who was not and for what ideological reasons – stalled National Assembly efforts to advance 4.3 economic justice.[285] Moon noted that Korea "still suffers from hatred and hostility," referring to "ideological disputes over the massacres and some people refus[ing] to recognize the dark side of history."[286]

In a 2018 major address, President Moon spoke about the implications of the politically limited 2016 Special Act amendments and apparent backsliding on acknowledgments about the 4.3 Tragedy.[287] Moon highlighted the "pain[ful]" history of Jeju 4.3 and extended his "deepest sympathy and gratitude to the surviving victims, bereaved families and the citizens of Jeju Province who have revealed their sense of resentment and pain."[288] He also committed the national government to further reveal the facts behind the violence in order to address grievances, restore honor, retrieve remains, provide compensation and deal with persisting effects of the 4.3 trauma.[289] President Moon invoked the social goals of "reconciliation and unity, peace and human rights," which, he said, "residents of Jeju . . . and all Korean people hope for."[290]

After the Jeju District Court expunged the criminal records of the eighteen 4.3 survivors wrongly convicted en masse in 2019, described in Part III,

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[284] *See President Moon Jae-in Addresses Mourners at the 70th Anniversary Memorial Service for Victims of Jeju 4·3*, JEJU 4·3 PEACE FOUND. (Apr. 3, 2018) [hereinafter *President Moon Jae-in Addresses Mourners at the 70th Anniversary Memorial Service*], http://jeju43peace.org/historytruth/jeju-4-3-_-the-70th-anniversary/president-moon-jae-in-speech/.

[285] *See* Tae-young Kim, *Scars of Jeju Island: The 4.3 Uprising and Massacre*, ARGUS (Apr. 8, 2019, 11:44 AM), http://www.theargus.org/news/articleView.html?idxno=1535. Jeju Assemblyman Young-Hun Oh emphasized the importance of awarding reparations as a next step towards social healing – describing it as "national obligation." *Id.* He explained that he has been trying to pass the proposed amendment since 2017 to "provide a legal basis for the compensation" for survivors and their families. *Id.* The opposition parties, however, have been on the "ideological offensive." *Id.*

[286] Rahn Kim, *Moon Vows Fact-Finding for Jeju Massacres*, KOREA TIMES (Apr. 3, 2018, 6:05 PM) [hereinafter Kim, *Moon Vows Fact-Finding for Jeju Massacres*], http://www.koreatimes.co.kr/www/nation/2018/04/356_246662.html.

[287] *See President Moon Jae-in Addresses Mourners at the 70th Anniversary Memorial Service*, *supra* note 284.

[288] *Id.*

[289] *Id.*; Kim, *Moon Vows Fact-Finding for Jeju Massacres*, *supra* note 286.

[290] *President Moon Jae-in Addresses Mourners at the 70th Anniversary Memorial Service*, *supra* note 284.

President Moon upped the ante. He strongly supported revising the Special Act to authorize reparations for 4.3 survivors and families, framing it as "basic justice."[291] Despite Moon's support, legislative reparations efforts to further 4.3 social healing ran aground on political shoals – with party polarization the culprit.[292] Both the liberal Democratic Party and the conservative United Future Party proclaimed support for a revised Special Act, but each blamed the other for obstructing its passage.[293]

3. *The Limited February 2021 Special Act Revision*

In February 2021, the National Assembly revised the Special Act again after several years of political struggle.[294] The National Assembly's action, though, still did not authorize general reparations for victims and families – the main source of the infighting. Despite President Moon's backing,[295] Judge Chang's highly publicized 2019 compensation order for the eighteen survivors-petitioners[296] and 133 lawmakers' expressed support for broadscale reparations,[297] the amendments again omitted reparative payments to 4.3 survivors and families.[298]

The February 2021 Special Act revisions authorized basic medical,

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[291] *See* Chi-dong Lee, *Moon Vows Support for Proposed Legislation on April 3 Jeju Incident*, YONHAP NEWS AGENCY (Apr. 3, 2020, 10:30 AM) [hereinafter Lee, *Moon Vows Support for Proposed Legislation on April 3 Jeju Incident*], https://en.yna.co.kr/view/AEN20200403002300315.

[292] *Id.*; *see* Kyu-Seok Shim, *20th National Assembly Dubbed Least Productive in History*, JOONGANG (May 20, 2020), https://koreajoongangdaily.joins.com/2020/05/20/politics/National-Assembly-20th-%EA%B5%AD%ED%9A%8C/20200520183200191.html.

[293] Following the 20th National Assembly, 133 lawmakers from across the political spectrum expressed support for a new bill that could provide over $1 billion in compensation to 4.3 survivors. Passage of the bill remained uncertain because of the National Assembly's partisan political environment. Elizabeth Shim, *South Korea Lawmakers Back Compensation for All Jeju Massacre Victims*, UNITED PRESS INT'L (July 27, 2020, 2:02 PM) [hereinafter Shim, *South Korea Lawmakers Back Compensation for All Jeju Massacre Victims*], https://www.upi.com/Top_News/World-News/2020/07/27/South-Korea-lawmakers-back-compensation-for-all-Jeju-massacre-victims/6511595871949/.

[294] *See* 2021 Jeju 4.3 Special Act, *supra* note 33.

[295] *See* Lee, *Moon Vows Support for Proposed Legislation on April 3 Jeju Incident*, *supra* note 291.

[296] Shim, *South Korea Jeju Massacre Victims Awarded $4M in Damages*, *supra* note 27.

[297] Shim, *South Korea Lawmakers Back Compensation for All Jeju Massacre Victims*, *supra* note 293.

[298] *Compare* 2021 Jeju 4.3 Special Act, *supra* note 33, *with* 2000 Jeju 4.3 Special Act, *supra* note 109, *and* 2016 Jeju 4.3 Special Act, *supra* note 282.

caregiving and living expenses to direct victims meeting stringent criteria.[299] In practice, these provisions again excluded those who would benefit most; those struggling and already receiving general welfare assistance remained ineligible.[300] The criteria still barred many bereaved family members from any benefits – thousands of those born to missing or deceased 4.3 victims who had been re-registered on other family relations rosters.[301]

Seung-Moon Song, Chairman of the Association for the Bereaved Families of April 3 Victims, stressed the urgent need for broader government reparations through a further revised Special Act.[302] "The family members are desperate. The people who lived through the hardship . . . are now in their 90s and suffering from the aftereffects. Their family members are insistent that . . . restoration of their reputation and government compensation need to take place while they are still alive."[303] Song's statement reflected the glaring economic justice gap the National Assembly failed to address.[304] Song also despaired at the continuing obstructionist ideology. "I was astonished by the National Assembly members who seem to look at Jeju April 3 through ideologically colored lenses to this day."[305]

The February 2021 revisions, like the prior Acts, did not redress the persisting pain and loss for most – 30,000 deaths, thousands seriously injured, many tortured, women sexually assaulted, 40,000 homes destroyed along with entire villages and nearly all forms of economic livelihood. The violence killed ten percent of the island's population and devastated most of the working village population.[306] The widespread physical violence, property damage and emotional trauma left Jeju communities and families

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[299] *See* 2021 Jeju 4.3 Special Act, *supra* note 33, art. 5. The provisions authorized eligible survivors to receive around $457 per month if they show difficulty living without a caregiver due to physical disability. *See id.*

[300] *See id.*

[301] Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*, *supra* note 37. Under the February 2021 revision, only those recognized as "Jeju 4.3 victims" by the Central Jeju 4.3 Committee were able to apply for the correction of their family relations register. *Id.*

[302] Huh, *Family Members of Jeju April 3 Victims Demand Amendment of Special Act*, *supra* note 36.

[303] *Id.*

[304] *See id.*

[305] *Id.*

[306] Kim, *International Research on the Jeju 4.3 Events*, *supra* note 117, at 207; *see* 4.3 INVESTIGATION REPORT, *supra* note 3, at 622–24; *see also* KIM, THE MASSACRES AT MT. HALLA, *supra* note 113.

barely able to survive.[307] Those that survived, including many orphans, lived impoverished without access to quality education, jobs or community support. The damage from violence, systemic discrimination, denials of self-determination and cultural suppression were – and continued to be – cross-generational and far-reaching.[308]

Despite progress,[309] the February 2021 revision aggravated the frustration of some survivors and families.[310] They criticized the revision for "only allow[ing] the correction of the date or place of the victim's death" in their family registry, not offering tangible assistance.[311] Expressing palpable frustration, a local Jeju official observed that "[t]hey have lived with pain already for [seventy-three] years and the issue needs to be settled."[312]

The February 2021 Special Act established a 4.3 Jeju Trauma Healing Center for survivors and families[313] – a laudable step towards healing Jeju communities. The Act also contemplated potential future individual awards by contracting with a research institute to assess and recommend methodology for calculating and implementing compensation payments.[314] These legislative actions reflected important foundational economic justice steps and signaled potential gap-filling measures aimed at healing the persisting wounds of 4.3 survivors, families and communities.

Yet, skepticism continued. Past unfulfilled political promises littered the 4.3 reparative justice terrain. More than twenty years passed since the South Korean government's promise to "restore the honor" of affected Jeju residents.[315] A journalist lamented the uncertainty of any "just resolution of the unresolved historical issues."[316] As discussed below, the government's

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[307] *See generally* 4.3 INVESTIGATION REPORT, *supra* note 3, at 586–645 (describing physical, property, and generational trauma).

[308] *See* discussion *infra* Parts V.B, V.C.

[309] *See The Long-Awaited First Step of the 4·3 Trauma Center*, JEJU 4·3 PEACE FOUND. (June 9, 2020), http://jeju43peace.org/the-long-awaited-first-step-of-the-4%c2%b73-trauma-center/.

[310] Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*, *supra* note 37.

[311] *Id.*

[312] *Id.*

[313] *Moon Vows Continued Push to Honor Jeju April 3 'Incident' Victims,* KOREA TIMES (Apr. 3, 2021, 3:55 PM), https://www.koreatimes.co.kr/www/nation/2022/05/356_306554.html ("An April 3 Incident Trauma Center has already been in trial operation since May, and the Moon administration is pushing for the elevation of its legal status to that of a national organization.").

[314] Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*, *supra* note 37.

[315] *Vision & Objective*, *supra* note 116.

[316] Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*, *supra* note 37.

continuing reluctance to squarely face the need – and demands – for economic justice remained a glaring gap in the reparative justice process.

B. *The Urgent Need for Broadscale Reparations: Continuing Economic Justice Gap in 4.3 Social Healing*

After the February 2021 Special Act and buttressing community advocacy and political lobbying, in September 2021, Professor Yamamoto's book *Healing the Persisting Wounds of Historic Injustice* offered an analytical framework for assessing "what's missing" in the 4.3 reparative initiative and other stalled-rejuvenated reconciliation initiatives.[317] Rooted in earlier academic and public presentations,[318] the approach uplifted many of the measures undertaken, particularly the survivors' successful reopening of their mass criminal convictions. The book also spotlighted the significant continuing absence of economic justice both in terms of individual payments and community capacity-building – highlighting that absence as a principal impediment to comprehensive and enduring Jeju 4.3 social healing.[319]

1. *Limits of Traditional Legal Process Remedies*

A glimpse at the promise and limits of the traditional legal process reveals why something more was needed. As demonstrated by the Jeju court's compensatory damage ruling, the legal process can award individual compensation for an individual's proven actual damages.[320] Those awards can be significant both for recipients practically and for society

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[317] *See* discussion *infra* Part VI.

[318] *See* Eric K. Yamamoto, Miyoko Pettit-Toledo & Sarah Sheffield, *Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step*, 15 SEATTLE J. SOC. JUST. 109 (2016); Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 130, at 57–60; Eric K. Yamamoto & Sara Lee, *Korean "Comfort Women" Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences*, 11 J. KOREAN L. 123, 138–39 (2012); Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 32–36 (2009). The *social healing through justice* framework was originally termed "interracial justice," addressing conflict and conciliation among communities of color. *See* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 174–209 (2000) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE].

[319] The book also identified the absence of the United States from the reconciliation table as another key impediment. *See generally* YAMAMOTO, *What's Impeded Jeju 4.3 Social Healing?*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

[320] *See supra* Part IV.

symbolically.[321] But traditional legal remedies are often slow in coming and limited in reach. Although significant as the first authorized award of individual compensation for 4.3 survivors, the judicial remedy revealed the fundamental limits of the legal system – its constricted framing of reparative justice acting as essentially "tort law [notions of] monetary compensation requiring legal proof of identified perpetrators causing direct [compensable] harm to specific victims."[322]

The court's compensation award for the eighteen survivors, authorized by statute, effectively embraced that narrow tort-law remedial model.[323] It excluded many other survivors and bereaved families who suffered through generations. It excluded those without access to proof of actual damages. It also excluded the communities whose social and economic structures were devastated.

Systemic discrimination, denials of self-determination, widespread past violence and culture suppression fell outside the purview of the judicial legal process.[324] The formal legal process thus stopped well short in the face of pervasive damage to culture, education, healthcare and job and entrepreneurial opportunities as well as community belonging and spiritual well-being – far-reaching harms that traumatized Jeju people for generations.[325]

2. *Economic Justice as a Key Aspect of Reparation*

But, reparation, as repair, reaches far more broadly and cuts more incisively.[326] Economic justice – as an integral part of social healing – emphasizes reparation, in the sense of repairing multifaceted economic

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[321] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 34–38 (outlining various national and international reconciliation initiatives).

[322] *Id.* at 46–47.

[323] *See* Act on Criminal Compensation and Restoration of Impaired Reputation (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=48260&lang=ENG.

[324] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 68; *see also* Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 21–27 (2007) (critiquing the limits of traditional tort law framework); Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriquez, *American Racial Justice on Trial – Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1302–03 (2003) (describing tort law barriers for reparation claims, including statute of limitations, absence of directly harmed individuals, absence of individual perpetrators, lack of direct causation, indeterminacy of compensation amounts and sovereign immunity).

[325] See generally Chapters 3 and 4 in YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4; *id.* at 25 ("Psychological and financial wounds may persist through generations, particularly in the form of community or institutional maladies.").

[326] *See infra* Part VI.

damage to individuals and communities.[327] Reparation (without the "s," meaning "to repair") may well incorporate reparations (with an "s" at the end) – individual payments – either to partially compensate for property or financial loss or psychological trauma, or to symbolize acceptance of responsibility for serious wrongdoing.[328]

As discussed above, the final language of the original 2000 Special Act[329] and the following two revisions made it practically impossible to provide meaningful support for those suffering economic hardship since the Act prohibited those already collecting limited government assistance from receiving "duplicate" payments.[330] And neither of the revised Special Acts addressed direct payments or capacity-building for the affected Jeju families and communities.[331] After over twenty years of advocacy, the February 2021 Special Act still left painful gaps in *reconstruction* or *reparation* for Jeju people and communities.

C. *A Significant, Albeit Still Limited, Step Toward 'Just Resolution': The December 2021-2022 Special Act and Economic Justice*

The February 2021 Special Act revision initiated steps toward individual compensation but left the door open for political backsliding. Public education and political lobbying intensified. Many reparations questions remained – especially the amount and method of compensation and expanding recipient eligibility and, indeed, whether any payments would be forthcoming at all.[332]

The government contracted with an external institute to research issues on family relations eligibility.[333] 4.3 justice advocates continued to apply

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[327] *See infra* Part VI; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 220.

[328] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 87.

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

[330] *See supra* Part V.A.

[331] Yamamoto's writing and speaking highlighted the need for broadly framed economic justice as a critical element of enduring Jeju 4.3 reparative justice. See Chapters 4 (reparation), 9 (absence of economic justice) and 11 (task force proposal to address economic justice) in YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, for an elaboration on economic justice in reparative justice initiatives; *see also* Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 130.

[332] *See* Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*, *supra* note 37.

[333] *Id.*

political pressure to the National Assembly. The annual 4.3 Remembrance Day also spotlighted the need for general reparations. Scholars, too, continued to advocate for next reparative justice steps, including economic reparation.[334] In response, the National Assembly momentously revised the Special Act.[335]

The December 2021-2022 Special Act,[336] differed markedly from prior versions. It broadly and directly addressed economic justice. With near unanimous support,[337] the Act appropriated $767,676,000 (909 billion won) for 4.3 survivors and bereaved family members – by far the South Korean government's largest monetary reparations award to any group suffering from a single historical tragedy.[338] The legislation authorized payment of $76,000 (90 million won) to each of the recognized[339] 10,101 4.3 survivors

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[334] Professor Yamamoto's book *Healing the Persisting Wounds of Historic Injustice* emphasized, among other things, the continuing need for broadscale financial reparations and community capacity-building as forms of economic justice. *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 68–69. Professor Sang-Soo Hur highlighted an international convening to chart next steps, including economic justice, which "[brought together] social healing measures" through justice "through . . . a video conference with Professor Eric Yamamoto" making it a "very meaningful general meeting." Chang-joon Lee, *The 2021 Global Aging Network (GAN) Jeju World Congress 'Successful,'* HEADLINE JEJU (Sept. 9, 2021, 6:11 PM), http://www.headlinejeju.co.kr/news/articleView.html?idxno=462082 (translation from Google Translate) (title trans. by Suhyeon Burns).

[335] *See Revised Jeju 4·3 Special Act Passed at the National Assembly Plenary Session, Taking One Step Closer to the Resolution of Jeju 4·3*, JEJU 4·3 PEACE FOUND. (Jan. 18, 2022) [hereinafter *Revised Jeju 4·3 Special Act Passed at the National Assembly Plenary Session*], http://jeju43peace.org/revised-jeju-4%c2%b73-special-act-passed-at-the-national-assembly-plenary-session-taking-one-step-closer-to-the-resolution-of-jeju-4%c2%b73/.

[336] Special Act on Discovering the Truth on the Jeju 4·3 Incident and the Restoration of Honor of Victims, Act. No. 18745, Jan. 11, 2022 (S. Kor.) [hereinafter 2022 Jeju 4.3 Special Act], https://www.law.go.kr (search required).

[337] Changbin Hong, *Jeju 4.3 Special Law Passes Plenary Session of the National Assembly… 'Payment of Compensation from Next Year,'* HEADLINE JEJU (Dec. 9, 2021, 3:50 PM) [hereinafter Hong, *'Payment of Compensation from Next Year'*], http://www.headlinejeju.co.kr/news/articleView.html?idxno=470661 (translation from Google Translate) (title trans. by Suhyeon Burns) (169 out of 177 voted to approve).

[338] *Assembly Passes Bill on Record State Compensation for Jeju April 3 Incident Victims*, YONHAP NEWS AGENCY (Dec. 9, 2021, 5:03 PM) [hereinafter *Assembly Passes Bill on Record State Compensation for Jeju April 3 Incident Victims*], https://en.yna.co.kr/view/AEN20211209009000315; *see generally* 2022 Jeju 4.3 Special Act, *supra* note 336.

[339] *Revised Jeju 4·3 Special Act Passed at the National Assembly Plenary Session*, *supra* note 335. The Act authorized compensation for inheritors in the order of lineal descendants, recognizing up to fifth-degree blood relatives with certain conditions. The National 4.3 Committee "will establish a deliberation subcommittee to pay the compensation money." *Id.*

and family members.[340] In addition, unlike the previous Special Acts' meager and limited monetary support, the new revision also accounted for lost earnings and emotional damage and opened eligibility for those receiving general welfare.[341]

In light of the Jeju District Court's 2019 and 2021 rulings, the National Assembly's 2021-2022 Special Act amendment also authorized new petitions for the "exoneration of 2,530 victims who were unlawfully convicted during the two courts-martial in 1948 and 1949 by entitling the prosecutor to request ex officio retrials for their collective cases."[342] Additionally, the Act stipulated that those survivors-petitioners "shall not be prohibited from claiming criminal compensation . . . even after receiving the [Special Act's monetary] compensation [award]."[343] The 2021-2022 revisions thus aimed to comprehensively restore the honor of survivors, families and communities not only through words but also through material recompense.

Jeju legislators, government officials and 4.3 advocates welcomed the passage of the compensation legislation, claiming a major victory.[344] They

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[340] *Assembly Passes Bill on Record State Compensation for Jeju April 3 Incident Victims*, *supra* note 338.

[341] *Revised Jeju 4·3 Special Act Passed at the National Assembly Plenary Session*, *supra* note 335.

[342] *Id.*

[343] *Id.*; *see* 2022 Jeju 4.3 Special Act, *supra* note 336; *see generally* Act on Criminal Compensation and Restoration of Impaired Reputation (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=48260&lang=ENG.

[344] Changbin Hong, *President Moon "Jeju 4.3 Amendment of Special Law, Realization of Justice in 70 Years,"* HEADLINE JEJU (Jan. 4, 2022, 3:48 PM) [hereinafter Hong, *President Moon "Jeju 4.3 Amendment of Special Law, Realization of Justice in 70 Years"*], http://www.headlinejeju.co.kr/news/articleView.html?idxno=473069 (translation from Google Translate) (title trans. by Suhyeon Burns); Hong, *'Payment of Compensation from Next Year,' supra* note 337; Changbin Hong, *Senator Oh Young-hoon "4.3 Amendment of Special Law, First Step to 'Just Resolution,'"* HEADLINE JEJU (Dec. 9, 2021, 5:30 PM) [hereinafter Hong, *Senator Oh Young-hoon "4.3 Amendment of Special Law, First Step to 'Just Resolution'"*], http://www.headlinejeju.co.kr/news/articleView.html?idxno=470702 (translation from Google Translate) (title trans. by Suhyeon Burns); Changbin Hong, *Jeju Island Justice Party: "We Welcome the Passage of the Revised 4.3 Special Act by the Plenary Session of the National Assembly,"* HEADLINE JEJU (Dec. 9, 2021, 5:41 PM) [hereinafter Hong, *Jeju Island Justice Party: "We Welcome the Passage of the Revised 4.3 Special Act*], http://www.headlinejeju.co.kr/news/articleView.html?idxno=470704 (translation from Google Translate) (title trans. by Suhyeon Burns); Changbin Hong, *Jeju 4.3 Bereaved Families "Welcomes the Passage of Revised Special Act…Thank You,"* HEADLINE JEJU (Dec.

characterized the 2021-2022 revision as "the first step [in the] recovery of [real] damage[s],"[345] and marked its passage as "the journey [towards] a just resolution of Jeju 4.3."[346] President Moon praised it as "the first legislative [action] among civilian sacrifice[s] . . . that occurred [around] the Korean War."[347] He declared that the revised Act's emphasis on economic justice will serve as a lesson in solving past history issues and a legislative standard for similar civilian victimizations, and demonstrates internationally "the value of reconciliation" for "peaceful investigation, restoration of honor, and payment of compensation . . . ."[348]

Still, some leaders cautioned about potential shortfalls, calling for immediate "follow-up measures,"[349] including acknowledgment of government power abuses and the United States' pivotal role. Jeju Assemblyman Young-Hoon Oh expressed disappointment over the language targeting payments for specific injuries "rather than [reparations] for the . . . exercise of [unjust] public power."[350] The Justice Party stressed the need for "additional fact-finding for a complete resolution of [4.3]," including ascertaining the role and responsibility of the U.S.[351]

While expressing gratitude, the Association of Bereaved Families of the 4.3 Victims urged the National Assembly to take further steps to fill in the legislation's missing pieces. The Association sought a final resolution relating to family relations that the final version of the December 2021-2022 Act ultimately excluded.[352] Draft provisions sought to expand family beneficiaries eligible for payments, curing defects in prior Special Act

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9, 2021, 3:56 PM) [hereinafter Hong, *Jeju 4.3 Bereaved Families "Welcomes the Passage of Revised Special Act…Thank You"*], http://www.headlinejeju.co.kr/news/articleView.html?idxno=470670 (translation from Google Translate) (title trans. by Suhyeon Burns).

[345] Hong, *'Payment of Compensation from Next Year,' supra* note 337.

[346] Hong, *Senator Oh Young-hoon "4.3 Amendment of Special Law, First Step to 'Just Resolution,'" supra* note 344.

[347] Hong, *President Moon "Jeju 4.3 Amendment of Special Law, Realization of Justice in 70 Years," supra* note 344.

[348] *Id.*

[349] Cheol-su Yoon, *The Justice Party "Welcomes the Passage of the 4.3 Special Law Amendment Bill… Excluded Family Relationship Special Cases Should be Supplemented,"* HEADLINE JEJU (Dec. 10, 2021, 11:50 AM), http://www.headlinejeju.co.kr/news/articleView.html?idxno=470754 (translation from Google Translate) (title trans. by Suhyeon Burns).

[350] Hong, *Jeju Island Justice Party: "We Welcome the Passage of the Revised 4.3 Special Act*, *supra* note 344.

[351] *Id.*

[352] Hong, *Jeju 4.3 Bereaved Families "Welcomes the Passage of Revised Special Act…Thank You," supra* note 344.

revisions.[353] For instance, the draft provisions recognized marriages reported after the spouse's death, and granted an exception for those who did not have biological parents listed in their family register because they were orphaned.[354]

In the final hours before the legislation's passage, however, the National Assembly removed those and other salutary draft provisions, citing potential legal ramifications.[355] Instead of adopting the revisions supported by 4.3 justice advocates, the National Assembly punted, authorizing further fact-finding and research.[356]

From one perspective, the apparent last-minute legal maneuvering by the National Court Administration, resulting in removal of desired eligibility language from the legislation, reflected continuing roadblocks to economic justice.[357] From another perspective, the Court Administration's call for further research and fact-finding reflected a genuine need for fact-based analysis.[358] At bottom, the December 2021 compromise left in place some of the catch-22 constraints that thousands of bereaved family members faced for decades. With the cumbersome, lengthy process for revising family registers and its seemingly paradoxical requirements for appropriate individual compensation, many cross-generational claimants continued to face nearly insurmountable administrative barriers.[359]

In sum, spurred by decades of public education, scholarly research, community advocacy, journalist reporting and political lobbying, and

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[353] *See* Hong, *'Payment of Compensation from Next Year,' supra* note 337.

[354] *See id.*

[355] *See id.*; *Revised Jeju 4·3 Special Act Passed at the National Assembly Plenary Session*, *supra* note 335.

[356] Hong, *'Payment of Compensation from Next Year,' supra* note 337. The Assembly deleted the proposed language because, in a last-minute written opinion, the National Court Administration raised the need for further review of the special provisions on family relations. The Court Administration asserted that the proposal's language could cause confusion throughout the legal system. Because marriage reports impact kinship and inheritance laws, the Court Administration cautioned against recognizing existing marriage relationships without confirmation procedures. As for claimants with non-biological parents in their family register, the Court Administration maintained that it is possible to request recognition against the parents under existing law if it is "objectively clear" that they are different from the biological parents. *Id.* Thus, it was "questionable whether there [would be] any . . . benefit" in enacting the proposed amendment. *Id.*

[357] *See id.*

[358] *See* Heo, *Revised Jeju 4·3 Special Act Now Effective, But With What Improvements?*, *supra* note 37.

[359] *See id.*

galvanized by the Jeju court's rulings, the National Assembly's December 2021-2022 Special Act amendments reflected a major step toward the key economic justice reparation component of *comprehensive* and *enduring* 4.3 *social healing through justice*. The revisions incorporated important aspects of what 4.3 advocates struggled for since the 2000 Special Act's inception and through subsequent iterations. But with significant limitations. With South Korea's new president in 2022,[360] the prospects for implementation of the Assembly's 2021-2022 dictates, let alone final revisions to the Special Act, remain uncertain.[361]

VI. NEXT, AND POTENTIALLY FINAL, STEPS TOWARD COMPREHENSIVE AND ENDURING JEJU 4.3 SOCIAL HEALING THROUGH JUSTICE

To productively assess the Jeju 4.3 retrials and the December 2021-2022 Special Act revisions and help chart next – and perhaps final – steps in the Jeju 4.3 reparative justice process, this article and its companion article employ the analytical framework for *social healing through justice*.[362] That framework, which shaped the analysis in the preceding sections of this article, guides, evaluates and reconfigures reconciliation initiatives endeavoring to heal the persisting wounds of injustice suffered by individuals, communities and the larger society itself. Drawing from commonalities among several scholarly disciplines,[363] as well as the United

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[360] *See* Sang-Hun Choe, *Yoon Suk-yeol, South Korean Conservative Leader, Wins Presidency*, N.Y. TIMES (Mar. 9, 2022), https://www.nytimes.com/2022/03/09/world/asia/south-korea-election-yoon-suk-yeol.html.

[361] *Compare* Duk-kun Byun, *(News Focus) With Yoon, S. Korea, U.S. to Strengthen Alliance, Deterrence Against N. Korea: Experts*, YONHAP NEWS AGENCY (May 10, 2022, 7:00 AM), https://en.yna.co.kr/view/AEN20220510000500325?section=nk/nk (reporting that U.S. foreign policy experts forecast South Korea-U.S. alliance under the Yoon administration will emphasize strong military and defense readiness, similar to South Korea's former conservative administrations under Myung-bak Lee and Geun-hye Park), *and* Jae-hoon Lee, *Yoon's Policy Initiatives Forewarn Full-Fledged Return to Neoliberalism for S. Korea*, HANKYOREH (May 6, 2022, 6:07 PM), http://english.hani.co.kr/arti/english_edition/e_national/1041864.html (predicting the Yoon administration will prioritize promoting privatization of public institutions such as health care and social welfare), *with supra* notes 119–31 and accompanying text (discussing political backsliding under the earlier conservative Lee administration because of its focus on strengthening ties with U.S. military and the recharacterization of Jeju residents as "communists" amidst the global economic crisis).

[362] *See generally* YAMAMOTO, *A Framework for Social Healing Through Justice*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

[363] The *social healing through justice* framework draws insights from commonalities among disciplines of law (including human rights), social psychology, theology, political theory, economics and indigenous healing. *See generally* YAMAMOTO, *Working Principles of Social Healing Commonalities Among Disciplines*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4 (discussing multidisciplinary approaches to social healing, including works by Ronald J. Fisher, John Dawson, Joseph V. Montville, Donald W. Shriver,

Nations' Basic Principles for Reparations,[364] *social healing through justice* coalesces six working principles[365] into the concepts and language of the 4Rs*: recognition, responsibility, reconstruction* and *reparation*.[366]

A. *Social Healing Through Justice*

The working principles and 4Rs offer a framework for productively assessing what is impeding ongoing reparative initiatives and what is needed to rejuvenate them, all with an emphasis on self-determination for those suffering. The first R, *recognition*,[367] prompts two collaborative

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Jr., David Phillips Hansen, Linda Hasan-Stein, Valmaine Toki, Peter Crutchley and Alexander Keller Hirsch).

[364] See Yamamoto, Burns & Takeuchi, *Apology & Reparation II*, *supra* note 52, at 92, for a discussion of the international human rights reparative justice regime established in the United Nations' "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law."

[365] Six working principles of social healing suggest that individual and societal healing engages people, communities, justice organizations, educators, students, lawyers, businesses, therapists, clergy, scholars, journalists, policymakers and government officials in a dynamic process involving recognition, responsibility, reconstruction and reparation. *See generally* YAMAMOTO, *Working Principles of Social Healing Commonalities Among Disciplines*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4. The first principle is *mutual engagement* – cooperative participation by all with some degree of responsibility. *Id.* at 62–64. The second is that social healing needs to coincide *on two levels* – *the personal* and *the societal* – with attention to the reverberations of both individual and collective trauma. *Id.* at 64–66. The third principle embraces *reparative justice across generations* – moving beyond restrictive notions of legal justice and reaching into the next generations by restructuring social, economic and political relationships to prevent recurrence of the injustice. *Id.* at 66–67. The fourth principle is that *financial assistance and capacity-building* are integral in shaping economic justice. *Id.* at 68–69. The fifth principle is practical. It reflects the social healing imperative of generating a "real world" collective sense of "justice done" by infusing real world *pragmatism*. *Id.* at 69–70. As an extension of the pragmatism principle, the final working principle is cautionary – anticipating *the darkside* of the reparative justice process. *Id.* at 70–71. It anticipates opponents' pushback and even recriminations, whether for ideological, financial, political or other reasons. *Id.*

[366] An analytical framework for *social healing through justice* is developed in YAMAMOTO, *A Framework for Social Healing Through Justice*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4. *See generally* YAMAMOTO, *Working Principles of Social Healing Commonalities Among Disciplines*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4 (articulating the six working principles).

[367] *Recognition*, a primary stage in social healing, acknowledges the particulars and context of the injustice. *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 73. All stakeholders must "first empathize, not sympathize; listen,

stakeholders' inquiries.[368] It asks each participant to come to the social healing table and to "see into the woundedness of self and others."[369] It then undertakes critical interrogation to "fully and fairly assess the specific circumstances and [the] larger historical context of the justice grievances undergirding present-day tensions."[370] With these inquiries in mind, *recognition* focuses on identifying the justice grievance and, while acknowledging discordant voices,[371] aims for a newly framed collective memory of the injustice as a foundation for collaborative efforts to repair the continuing damage.[372]

The social healing framework also embraces acceptance of appropriate *responsibility*[373] for the injustice and the attendant human suffering and damage to communities. A calibrated understanding of *responsibility*[374] also generates commitments to repair the damage through words and actions tailored to specific individual and community needs.[375]

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not analyze; acknowledge, not blame" to foster the deepened understanding that makes social healing possible. *Id.* at 75; *see* GEIKO MÜLLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION 5, 25–26 (1997). It also aims to identify oppressive social and political structures that denigrate and exclude vulnerable "others" and to expose the faulty justifications advanced especially by governments and powerful institutions. *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 75–78.

[368] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 78.

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.* Those harms may include intergenerational trauma from the killings, torture and wrongful imprisonment, as well as the sustained financial losses from the guilt-by-association system, the destruction of homes and personal property and the devastation of long-term medical care and village economic life. *See id.* at 110–17. *See generally* 4.3 INVESTIGATION REPORT, *supra* note 3, at 469–645.

[373] *Responsibility* encompasses both acknowledging the harms generated by the misuse of "power over others" and accepting responsibility for repairing the inflicted damage. *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 79.

[374] *Responsibility* can arise through four related ways: 1) direct participation in the abuse, 2) complicity in the abuse, 3) receipt of benefits from the transgressions of others' rights and 4) membership in a damaged democratic polity by its overriding mistreatment of communities within it. *See id*. at 126–34. The third level of responsibility is distinct because even where there is no direct participation, complicity, or awareness of the past or present transgressions, responsibility for social healing may accrue through the receipt of benefits from the oppressive actions of others. *See id*. at 80, 132–34. "When benefits or privileges derived from the oppression of others remains unacknowledged, the system is 'allowed to perpetuate, regenerate, and re-create itself.'" *Id.* at 133 (citing STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 8 (1996)).

[375] *See id.* at 90. Acceptance of group, or government, responsibility for widespread hurts historically inflicted often faces complex social psychological, political and cultural barriers.

The final two Rs provide significant insight into the Jeju 4.3 social healing initiative. Acts of *reconstruction* and *reparation* aim to symbolically and practically repair the long-standing damage through apologies, institutional restructuring, monetary payments, promotion of health, education and welfare, along with community economic capacity-building. *Reconstruction*,[376] in particular, seeks to build a new relationship through performative exchanges (for instance, an apology and forgiveness). It also aims to reform the disabling institutional constraints contributing to the injustice (for instance, the absence of checks on government security abuses; media scapegoating of vulnerable groups) in order to prevent "it" from happening again.[377] Reconstructive action thus often facilitates changes in laws and institutional practices and assists in reframing underlying cultural understandings. It might encompass:

> * performative interactions among participants (apologies and forgiveness),
>
> * targeted remedial programs (health, education, welfare),
>
> * substantive messaging (crafting a new collective memory of the injustice and its impacts) and, most important,

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Id. at 81–82. Political leaders, in particular, attuned to immediate public criticism about expenditure of taxpayer dollars and tarnished national reputations, oftentimes retreat from reparative initiatives, despite potential long-term and far-reaching benefits. Framing notions of responsibility in nuanced fashion at times helps overcome these barriers and encourages the broader populace's recognition of its interest in healing the specific wounds to lessen general societal ill-will, recriminations, social divisions and impaired productivity. *Id.*

[376] *Reconstruction* entails acting on the words of *recognition* and *responsibility* – rebuilding relationships and institutions. *Id.* at 82 (citing Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, NW. J.L. SOC. POL'Y 1, 3–4 (2017). "While the processes and forms of restorative practices vary, the unifying theme is the restoration of relationships." *Id.* at 82 n.49.

[377] *Id.* at 84. *Reconstruction* is closely linked to the fourth working principle – the salience of *changes in social structures* to prevent recurrence of the injustice. *See id.* at 25, 84. Institutional changes in laws and politics need to occur over time – otherwise, "the root problems of misuse of power remain, particularly the maintenance of oppressive systemic structures, including discriminatory courts, legislators, bureaucracies and businesses." *Id.* at 84.

> * institutional restructuring of power to prevent recurrence of abuses (changes in the legal system, political participation, public education).[378]

The fourth R, *reparation*, is closely linked to *reconstruction* but with a distinct emphasis on repairing the prolonged emotional and financial damage.[379] While incorporating appropriate monetary or property recompense, *reparation* (without an "s") cuts deeper.[380] In addition to those surface exchanges, *reparation* also speaks to promoting economic justice in the form of socio-economic repair for individuals and communities.[381] *Reparation* in this sense refers to repairing the deeper damage to the edifice of well-being and productivity (jobs, education, health and culture) as well as to promoting economic capacity-building to address the cumulative damage to the financial livelihoods of individuals and communities.[382]

In sum, the final two Rs of the *social healing through justice* framework offer two integrated insights. One is normative: acts of *reconstruction* and *reparation* by governments or groups must result over time in restructuring the institutions and relationships that generated the disabling constraints

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[378] *Id.* at 82–84. Only when reconstructive action tackles political institutions as well as specific policies and practices can a reparative initiative begin to integrate the moral and the pragmatic dimensions of *social healing through justice*. *Id.* at 84.

[379] *Id.* at 86. Drawing from its root word "repair," *reparation* speaks to transformation. *Id.* It also means tailoring the reparative acts, so they correlate with the kind and degree of harms suffered – restoring what was taken or repairing what was broken. *See id.* at 86–87.

[380] *Id.*

[381] *Id.*; *see* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ (observing that reparation is more than compensation for past injustices but is a national reckoning leading to spiritual renewal).

[382] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 87–88. *See generally* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997) [hereinafter Nussbaum, *Capabilities and Human Rights*]; Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, *in* WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61 (Martha C. Nussbaum & Jonathon Glover eds., 1995). Capacity-building aims to transform "the material conditions of . . . group life – transferring money and land, building schools and medical clinics, allowing unfettered voting – and of restoring injured human psyches – enabling those harmed to live with, but not in, history." YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 318, at 203. This embraces a victim-centered self-determination that "empowers [those injured] to define [for themselves] the restoration that matters to them." YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 68 (alteration in original) (quoting Thomas M. Antkowiak, *A Dark Side of Virtue: The Interamerican Court And Reparations for Indigenous Peoples*, 25 DUKE J. COMP. & INT'L L. 1, 4 (2014)).

contributing to the underlying justice grievances.[383] Otherwise, the reparative initiative cannot effectively address the root problems of power abuses, particularly oppressive systemic structures.

A second insight is prescriptive: restructuring those institutions and changing societal attitudes will not flow naturally and inevitably from words of apology or the formal bestowal of reparations.[384] Instead, governments or private groups will likely oppose or at least twist reparative efforts and "cast reparations in ways that tend to perpetuate existing power structures and relationships."[385] Therefore, those driving social healing initiatives need to collaborate with civic organizations, journalists, educators, artists, officials, lawyers, businesses, scholars and community advocates to continue to push for systemic changes so that "this will not happen again . . . to anyone."[386]

In recounting the Jeju survivors' mass convictions retrials and their catalyzing impact on broadscale – albeit belated – 4.3 reparations, this article's earlier sections tacitly drew upon some of the framework's insights into *reconstruction* and *reparation*. The remainder of this section deploys the framework and its working principles to more fully to assess the next – and

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[383] The fifth working principle recognizes that part of the real-world practical reality – or ground-level *pragmatism* – is understanding that what may be ideal theoretically may not be entirely achievable practically. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 70. As competing interests may dictate what is possible at a given moment, reparative justice goals and processes will likely need to "embody some degree of flex, with an eye on long-term strategic aims." *Id.*

[384] As the sixth working principle cautions, the *darkside* of the reparative justice framework "recognizes the danger of incomplete, insincere acknowledgments and ameliorative efforts – how words of recognition [or symbolic monetary payments] without economic justice and institutional restructuring can mask continuing oppression." *Id.* at 70. Inadequate acknowledgment, meager acceptance of responsibility or a failure of institutional restructuring renders a reconciliation initiative as "just talk." *Id.* at 70.

[385] Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. THIRD WORLD L.J. 477, 518 (1998) [hereinafter Yamamoto, *Racial Reparations*]. The *darkside* principle also warns against entanglement with a *distorted legal framing* of justice claims and anticipates political *backlash*. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 71. Acknowledging the *darkside* risks counsels caution and preparedness for strategic framing of the initiative, complementing the other affirmative working principles for social healing. *Id.*; *see also* Yamamoto, *Racial Reparations*, *supra*, at 482–83 (articulating three *darkside* of reparations efforts: the distorted legal framing of reparations claims; the dilemma of reparations process; and the ideology of reparations).

[386] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 90.

potentially final steps – in the prolonged 4.3 reparative justice initiative.

B. *Needed Amendments to the 2021-2022 Special Act*

1. *An Amendment to Remove Restrictive Eligibility Barriers for Intergenerational Survivors*

The National Assembly's exclusion of special provisions on family relations from the December 2021-2022 Special Act prevented 4.3 reparations from taking full flight. As detailed in Part V.C., at the last moment, the Assembly substituted a fact-finding study for draft provisions that would have removed eligibility barriers for intergenerational survivors. A Korean research institute contracted by the government advanced the proposed language to remove the obstacle to family relations eligibility, but political lobbying pushed the Assembly to opt for more "careful consideration."[387]

The *darkside* principle informing the *social healing through justice* cautions that words of recognition or symbolic payments without broader economic justice and institutional restructuring tend to mask continuing oppression.[388] Inadequate acknowledgment, meager acceptance of responsibility or a failure of institutional restructuring renders reconciliation efforts to "just talk."[389] Likewise, with hidden eligibility requirements or without robust administrative implementation, monetary commitments to some can hide continuing economic oppression of others, tainting the overall reparative initiative with a patina of cheap grace.

Jeju politicians assured survivors and families that extensive payments would be forthcoming without delay.[390] To actualize those assessments, a further amendment to the Special Act is needed to remove the substantial

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[387] *See* Hong, *'Payment of Compensation from Next Year,' supra* note 337.

[388] *See supra* notes 384–85 and accompanying text.

[389] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 70; *see* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 318, at 194–95; U.S. INST. OF PEACE, RECONCILIATION AND TRANSITIONAL JUSTICE IN NEPAL: A SLOW PATH 3 (2017) (describing the lack of "political will" to address survivors' desire for truth and accountability); Kai Schultz, *A Decade After Nepal's Maoist Rebellion, Little Justice for Victims*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/world/asia/a-decade-after-nepals-maoist-rebellion-little-justice-for-victims.html. The chairman of Bereaved Families of April 3 Victims worried that "the ruling and opposition party leaders speak as though they will be passing a Jeju April 3 Special Act any day now, but once they return to Seoul they don't say anything more about it." Huh, *Family Members of Jeju April 3 Victims Demand Amendment of Special Act*, *supra* note 36.

[390] *See, e.g.*, Hong, *Jeju Island Justice Party: "We Welcome the Passage of the Revised 4.3 Special Act*, *supra* note 344; Hong, *'Payment of Compensation from Next Year,' supra* note 337.

intergenerational reparations barrier for numerous 4.3 families.[391] What remains uncertain is whether the National Assembly and the newly-installed Yoon administration will make those changes.[392]

2. *Community Capacity-Building to Repair Intergenerational Economic and Emotional Health Damage*

Economic justice, as a key aspect of *reparation* – and related to *reconstruction* – often involves direct individual payments, whether symbolic or compensatory. Beyond individual payments, it also facilitates needed community economic capacity-building aimed at transforming the structural conditions affecting 4.3 survivors' and descendants' life opportunities – education, healthcare, job skills training, access to capital and government and community support.[393] Support for developing those life-empowering capabilities – individually and collectively – links economic capacity-building to reparative justice.[394]

Capacity-building fosters financial advancement and also enhances autonomy, self-determination and participation in the polity.[395] Its premise is that an individual's "human capabilities," encompassing material and psychological well-being, are linked foremost not to a nation's overall wealth, but rather to that individual's economic capacity and opportunities in her community setting.[396] Individual payments and economic capacity-

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[391] *See* discussion *supra* Part V.C.

[392] *See supra* notes 360–61.

[393] Capacity-building points to the *reparation* dimension of social healing by empowering those at the bottom to participate in mapping the full range of harms and the possibilities for economic repair. *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 68–69.

[394] Capacity-building as a reparative goal reaches beyond ordinary economic development programs designed to benefit all. *Id.* at 69. It addresses the social structural conditions for building the harmed person's capacity to productively survive, or even thrive in the community. *Id.* It also aims to benefit the larger society by diminishing social divisions, ill will, dampened productivity and tarnished legitimacy. *Id.*

[395] *See id.*

[396] *See* Nussbaum, *Capabilities and Human Rights*, *supra* note 382, at 280–81. Economic stability facilitates the development of what Professor Martha Nussbaum calls "human capabilities." *See generally* Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21 (2007). Nussbaum identifies ten central human capacities that individuals need to fully develop: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; interacting with the environment and other species; play; and political and material control over one's environment. *See id.* at 23–24; Nussbaum, *Capabilities and Human Rights*, *supra* note 382, at 287–88.

building, buttressed by community development opportunities, bear the potential for becoming integral aspects of a sense of "reconciliation achieved."[397]

More specifically, capacity-building might inform 4.3 economic justice through targeted small business support, government jobs, business partnerships, loans and advising, expedited government permits and licenses, sustainable tourism planning, media and technology training, community networking and educational scholarships. Economic justice for 4.3 families and Jeju communities thus would endeavor to *repair* or *reconstruct* the foundations for enhanced individual financial advancement and strengthened community-driven economic development. It would aim to foster a measure of self-determination for Jeju's people in their interplay with government, business, culture, environment and social justice.[398]

The need exists. For instance, Jeju residents' resistance against central government-led development initiatives driven by outside ownership and money highlighted Jeju people's continuing post-war struggle for self-determination.[399] Jeju groups in collaboration with others sharply criticized the national government and its 1990 Jeju Special Development Act and subsequent revisions.[400] They criticized both the policy and implementation of the Development Act as "an empty promise to develop people['s] well-being" that instead aimed to benefit outside development companies, large landowners and government officials.[401] Critics also charged that the Act enabled outsiders to extract tourism development profits while excluding locals from meaningful economic opportunities and decision-making

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[397] Peru's Plan Integral de Reparaciones ("Integral Reparations Plan") truth commission reparations recommendations embraced individual capacity-building for direct and indirect victims of the prolonged violent conflict. *See, e.g.*, Lisa J. LaPlante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L. J. 141 (2007); Lisa J. LaPlante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51 (2007).

[398] See YAMAMOTO, *A Framework for Social Healing Through Justice*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, for a discussion of capacity-building as an integral aspect of economic justice.

[399] *See* Sangcheol Kwon, *Alternating Development Strategies in Jeju Island, Korea*, 43 J. KOREAN GEOGRAPHICAL SOC'Y 171, 179–80 (2008).

[400] *See id.* at 175, 180–82. As tourism elevated its role in the island economy, the question arose: who is benefitting? *Id.* at 177. Apparent answers tended to exclude many Jeju people, with a "we-they" division of tourism beneficiaries becoming brightly discernible. *Id.* Since then, residents' worries about the threat of outsider dominance signaled a recurrent theme in Jeju. *Id.* (describing confrontations between outside interests and local residents related to the Jeju Special Development Act).

[401] *Id.* at 180–81.

processes, exploiting Jeju's people, land and natural resources.[402]

Jeju 4.3 justice advocates joined in the broader quest for community empowerment and self-determination, leveling criticisms of Jeju's exceeding "touristification,"[403] environmental degradation[404] and desecration of sites of 4.3 atrocities, along with protests against the national government's construction of a Jeju naval base (for apparent partial United States usage without U.S. acknowledgment of its responsibility for 4.3).[405]

Another aspect of capacity-building aims to heal psychological trauma transmitted over generations.[406] Survivors often "unintentionally influence future generations by transmitting dysfunctional fears and beliefs associated with traumatic memories."[407] That trauma is often disabling, undercutting a

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[402] *See id.* at 175–81. *See generally* Ben Jackson, *Pretty and Polluted: Jeju Overfilling With Tourists*, KOREA EXPOSÉ (Dec. 5, 2017) [hereinafter Jackson, *Pretty and Polluted: Jeju Overfilling With Tourists*], https://koreaexpose.com/jeju-pretty-polluted-overfilling-tourists/.

[403] *See* Mincheol Kim et al., *Overtourism in Jeju Island: The Influencing Factors and Mediating Role of Quality of Life*, 7 J. ASIAN FIN. ECON. & BUS. 145, 147 (2020); Jackson, *Pretty and Polluted: Jeju Overfilling With Tourists*, *supra* note 402; Kevin Lee, *"Too Many Tourists!" Jeju Residents Say Quality of Life is Dropping*, KOREA BIZWIRE (Nov. 21, 2017), http://koreabizwire.com/too-many-tourists-jeju-residents-say-quality-of-life-is-dropping/101917.

[404] *See generally Governor Won Hee-ryong Expresses Objection to Jeju Animal Theme Park Development Project*, JEJU WKLY. (Dec. 23, 2020, 11:56 AM), http://m.jejuweekly.com/news/articleView.html?idxno=6239 (describing Governor Won Hee-ryong's objection to the harmful recreational facilities on and around the geographically rare double volcanic craters on Mt. Songak).

[405] *See* Elizabeth Shim, *South Korea Arrests Protester for Infiltrating Jeju Naval Base*, UNITED PRESS INT'L (Mar. 30, 2020, 12:46 PM), https://www.upi.com/Top_News/World-News/2020/03/30/South-Korea-arrests-protester-for-infiltrating-Jeju-Naval-Base/2991585585755/; Bo-hyeop Kim, *Moon Addresses Residents of Gangjeong Village Opposed to Jeju Naval Base*, HANKYOREH (Oct. 12, 2018, 6:00 PM) [hereinafter Kim, *Moon Addresses Residents of Gangjeong Village Opposed to Jeju Naval Base*], https://english.hani.co.kr/arti/english_edition/e_national/865618.html; Byong-su Park, Ji-won Noh & Min-kyung Kim, *Government Drops Lawsuit Against Gangjeong Village Residents*, HANKYOREH (Dec. 13, 2017, 6:01 PM), https://english.hani.co.kr/arti/english_edition/e_national/823363.html; Jon Rabiroff & Yoo Kyong Chang, *Plans for South Korean Naval Bases Moving Forward*, STARS & STRIPES (July 6, 2012), https://www.stripes.com/theaters/asia_pacific/plans-for-south-korean-naval-bases-moving-forward-1.182252.

[406] *See* 4.3 INVESTIGATION REPORT, *supra* note 3, at 607–21 (describing the persisting damage by the guilt-by-association system).

[407] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 67. Children often endure psychological harm through their parents' reactions and inability to reconstruct their own lives after the experience of mass injustice. As a result, children of

parent and child's capacity for participating productively in community economic life. "Trauma transmission potentially gives rise to hatred, mistrust and fear that span generations and percolate throughout entire communities."[408] Intergenerational effects of mass traumas on capacity-building are far-reaching and require more than individual therapy.[409]

As detailed in Part V, for Jeju communities, the intergenerational effects of the 4.3 mass trauma persist. South Korean people speak of *han* – the indescribable deep pain, sorrow, grief and resentment emerging from past injustices shared among Korean people across generations.[410] *Han* from Jeju 4.3 runs deep.[411]

Far from subsiding, collective memories of the injustice intensify. While apologizing to Jeju residents about the earlier-planned construction of the controversial military base on lands marked by 4.3 atrocities, President Moon acknowledged "how much bitterness and pain has built up in [their]

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traumatized parents can exhibit transgenerational transmission of trauma. *See* Michelle R. Ancharoff, James F. Munroe & Lisa M. Fisher, *The Legacy of Combat Trauma: Clinical Implications of Intergenerational Transmission*, *in* INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA 257 (Yael Danieli ed., 1998).

[408] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 67. Transgenerational social wounds may require engagement less across generations than within a subsequent generation that experiences inherited trauma differently from previous generations. *Id.* at 58 n.54.

[409] *See id.* at 67; Ruth Pat-Horenczyk et al., *Posttraumatic Symptoms, Functional Impairment, and Coping Among Adolescents on Both Sides of the Israeli-Palestinian Conflict: A Cross-Cultural Approach*, 58 APPLIED PSYCHOL. 688 (2009); Laurie Leydic Harkness, *Transgenerational Transmission of War-Related Trauma*, *in* INTERNATIONAL HANDBOOK OF TRAUMATIC STRESS SYNDROMES 635 (John P. Wilson & Beverley Raphael eds., 1993) (describing the intergenerational trauma transmission by assessing the impact of a father's combat-related PTSD on family life); *see also* BREAKING INTERGENERATIONAL CYCLES OF REPETITION: A GLOBAL DIALOGUE ON HISTORICAL TRAUMA AND MEMORY (Pumla Gobodo-Madikizela ed., 2016) (exploring intergenerational trauma and its repercussions through case studies involving South Africans, Holocaust survivors and Aboriginal Australians). Recent research also shows that children may inherit genes that increase the likelihood of stress disorders from parents who themselves endured trauma as children. Linda Hasan-Stein & Valmaine Toki, *Reflections from the Roundtable: Access to Justice – How Do We Heal Historical Trauma?*, 15 Y.B. N.Z. JURIS. 183, 194 (2017); Natan P. F. Kellermann, *Transmission of Holocaust Trauma – An Integrative View*, 64 PSYCHIATRY 256 (2001).

[410] The minjung (ordinary Korean people) theologian Nan-dong Suh describes *han* as a

> feeling of unresolved resentment against injustices suffered, a sense of helplessness because of the overwhelming odds against one, a feeling of total abandonment, a feeling of acute pain in one's guts and bowels making the whole body writhe and squirm, and an obstinate urge to take revenge and to right the wrong – all these combined.

BOO-WOONG YOO, KOREAN PENTECOSTALISM: ITS HISTORY AND THEOLOGY 221 (1988).

[411] YAMAMOTO, *Prologue: The Han (Persisting Pain) of the Jeju 4.3 Tragedy*, *in* HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

hearts."[412] Moon also recognized the government's aggravation of unreconciled hurts by its exclusion of 4.3 community voices from decision-making on the naval base. "Even in matters that are intended to support national security, it's necessary to maintain procedural and democratic legitimacy, and we failed to do that."[413]

As recounted in a story in *Healing the Persisting Wounds of Historic Injustice*, a father of a young girl (now an adult) was distraught to see her play with dolls hanging by strings on her bedroom wall in Jeju.[414] Although she did not understand her father's strange angry reaction at the time, she internalized his deep anxiety.[415] Her father later reluctantly revealed his traumatic 4.3 childhood memories – witnessing soldiers invade his town and hang his neighbors from trees.[416] The image of men and boys he knew hanging from ropes lastingly occupied his memory.[417] *Han* grew in the father's heart, and it passed on to his daughter.[418]

The story concluded by observing that *han* "reflects the reality that Koreans despair over past injustice, and painfully realize it as a seemingly inevitable part of Korean life. Indeed, the pain of injustice lasts forever . . . unless it is acknowledged and the lasting damage is repaired," unless there is comprehensive and enduring social healing across generations.[419] As a key aspect of r*eparation*, economic justice – particularly a mix of individual payments and capacity-building – is essential to repairing the economic damage and dissipating the emotional pain as predicates to enduring social healing.

Full government funding and support of the recently established Jeju 4.3 Mental Health Center would contribute significantly to capacity-building for 4.3 families and communities.

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[412] Kim, *Moon Addresses Residents of Gangjeong Village Opposed to Jeju Naval Base*, *supra* note 405.

[413] *Id.*

[414] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 3 (recounting the story by Yea Jin Lee).

[415] *Id.*

[416] *Id.* at 3, 290.

[417] *Id.*

[418] *Id.*

[419] *Id.*

3. *Reparative Measures Tailored to Women Survivors of Widespread 4.3 Sexual Violence*

Pervasive sexual violence against Jeju women remains a largely overlooked horror of the Tragedy.[420] The National 4.3 Committee's investigative report mentioned but did not highlight the special suffering of Jeju women. It did not systematically assess widespread sexual violence, or the unique economic and psychological harms suffered by women targets of that violence.[421] Nor did the Special Act or its revisions. While the most recent revision authorizes payment for officially recognized "victims," it fails to reach tens of thousands of others, many of whom were tortured, subject to sexual violence and dispossessed of homes.[422]

Police, soldiers and paramilitary forces horrifically sexually assaulted many Jeju women. Regardless of age, pregnancy, marriage or family relationship,[423] Jeju women suffered "violent sex, rape or sexual torture."[424]

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[420] *See id.* at 154–55, 219-20; Miyoko T. Pettit, *Who Is Worthy of Redress?: Recognizing Sexual Violence Injustice against Women of Color as Uniquely Redress-Worthy—Illuminated by a Case Study on Kenya's Mau Mau Women and Their Unique Harms*, 30 BERKELEY J. GENDER L. & JUST. 268 (2015) [hereinafter Pettit, *Who Is Worthy of Redress*] (highlighting Mau Mau women and their economic justice claims arising out of sexual-political violence); Ruth Elizabeth Velásquez Estrada, *Grassroots Peacemaking: The Paradox of Reconciliation in El Salvador*, 41 SOC. JUST. 69, 81–82 (2015) (noting grassroots peacemaking in a bottom-up approach to reconciliation could lead to deeper understanding of root causes of conflict and reparations to both victims and perpetrators).

[421] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 219. *See generally* Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 244 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter Yamamoto & Sonen, *Reparations Law*] (exploring implicit bias among reparations advocates in overlooking the particularized harms of women's sexual violence trauma); Pettit, *Who Is Worthy of Redress*, *supra* note 420, at 305–08 (comparing omission of gender violence in the reparations process for Jeju 4.3 reparations and Mau Mau reparations).

[422] *See supra* Parts V.C, VI.B.1 (discussing the limitations of the reparative package).

[423] Rimwha Han, *Cases of Sexual Assault Committed to Local Women During Jeju 4.3 Incident*, 5 WORLD ENV'T & ISLAND STUD. 185, 194–96 (Ae-Duck Im trans., 2015) [hereinafter Han, *Cases of Sexual Assault Committed to Local Women During Jeju 4.3 Incident*] (describing cases where a Special Investigative Team forced a daughter-in-law and father-in-law to have sex, dissected a pregnant woman's belly with a dagger then shot the fetus and inserted a sweet potato or hand grenade into young women). One survivor "testified that a police officer inserted the heated muzzle of his gun into a pregnant woman[] . . . and then burned her with oil to death." Tae-Ung Baik, *Social Healing Through Justice: Jeju 4.3 Case*, 2 WORLD ENV'T & ISLAND STUD. 59, 64 (2012).

[424] Rimwha Han, *The Sexual Assault Horrors on Jeju's Women: Testimonies*, *in* JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947-2016) 79, 84 (Chang Hoon Ko, Eric K. Yamamoto, Kunihiko Yoshida et al. eds., 2016) [hereinafter Han, *The Sexual Assault Horrors on Jeju's Women: Testimonies*].

Some attackers treated women as sex slaves.[425] According to the National 4.3 Committee's investigation, the "Seochong" police tortured women with a special whip called "[s]oejonmae" after stripping them naked.[426] The police then took turns raping women in front of the entire force, as well as the local people imprisoned.[427] Security forces also sexually coerced women "in trade for their family members' lives."[428] The trauma devastated. "At that time, I wanted to kill myself – but I lived, for the sake of my family."[429] And the trauma – often unspoken – passed from mothers to daughters.

For these reasons, international law now condemns this kind of sexual violence attendant to military action as crime against humanity. The United Nations recognizes conflict-related sexual violence as a peace and security issue, and "rape and other forms of sexual violence [as] war crimes, crimes against humanity or a constitutive act with respect to genocide."[430]

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[425] *Id.*

[426] *Id.* at 92–93; *see* 4.3 INVESTIGATION REPORT, *supra* note 3, at 603–07. Survivors attested that the head police officer "was notorious as a master of [sexual] torture." Han, *Cases of Sexual Assault Committed to Local Women During Jeju 4.3 Incident*, *supra* note 423, at 196.

[427] Han, *The Sexual Assault Horrors on Jeju's Women: Testimonies*, *supra* note 424, at 92–93.

[428] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 219; *see* Anne Hilty, *A Look at Jeju Women's Lives Throughout Time: The History of Jeju Women's Culture*, JEJU WKLY. (Dec. 9, 2011, 1:26 PM) [hereinafter Hilty, *A Look at Jeju Women's Lives Throughout Time*], http://www.jejuweekly.com/news/articleView.html?idxno=2242.

[429] Hilty, *A Look at Jeju Women's Lives Throughout Time*, *supra* note 428.

[430] Press Release, Security Council, Security Council Demands Immediate and Complete Halt to Acts of Sexual Violence Against Civilians in Conflict Zones, Unanimously Adopting Resolution 1820 (2008), U.N. Press Release SC/9364 (June 19, 2008). In 2009, the mandate of the Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC) was "established through the adoption of Security Council resolution (SCR) 1888 . . . to tackle conflict-related sexual violence (CRSV) as a peace and security issue, while also bearing in mind other serious violations of human rights that occur during armed conflict" and are condemned as crimes against humanity under international law. *Our Mandate,* OFF. OF THE SPECIAL REPRESENTATIVE OF THE SEC'Y-GEN. ON SEXUAL VIOLENCE IN CONFLICT, https://www.un.org/sexualviolenceinconflict/our-work/our-mandate/#:~:text=The%20mandate%20of%20the%20Special,bearing%20in%20mind%20other%20serious (last visited Oct. 17, 2022). More recently, the Security Council adopted Resolution 2467 (2019) to implement concrete commitments to fight sexual violence during conflict and demand for the complete cessation of all acts of sexual violence by all parties to armed conflict. Press Release, Security Council, Security Council Adopts Resolution Calling

Moreover, with thousands of men and boys killed along with many women, the Jeju 4.3 Tragedy left numerous women alone to support families and reconstruct destroyed villages in a culture heavily influenced by male-centered Confucian teachings.[431] Jeju women had to "bear not only the terror and hardship of that time but the loss of their husbands[,] . . . sons [and daughters] as well."[432] Some organized "widows' networks" to support each other, entered previously male work realms like farming, and continued arduous deep-sea diving as "Haenyeo" women divers.[433] Others committed suicide, unable to "forget the images" of death of loved ones.[434] Despite exceedingly harsh conditions, the women's networks proved a vital force for communal problem-solving and gradual Jeju community revival.[435]

The 4.3 women's special suffering and resilience live in Jeju's *samda* – the three Jeju abundances of winds, stones and *women*.[436] What Jeju women's abundance means today is an evolving question. Soonie Kim, a historian, mythologist and Jeju representative to the Cultural Heritage Administration, speaks of "soul healing."[437] She observes that, with historical roots in 4.3, "Jeju women need enlightenment in order to improve Jeju [now] . . . . We are

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upon Belligerents Worldwide to Adopt Concrete Commitments on Ending Sexual Violence in Conflict, U.N. Press Release SC/13790 (Apr. 23, 2019).

[431] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 219–20; *see* JEONG-SIM YANG, JEJU 4.3 UPRISING: RESISTANCE AND PAIN HISTORY (2008) (title trans. by authors); JEJU APRIL 3 PEACE FOUNDATION, WIND OF PEACE: JEJU APRIL 3 PEACE PARK (2008) [hereinafter JEJU APRIL 3 PEACE PARK] (on file with authors); *see also* Huh, *Yang Gyeong-sook Lost Her Vision Due to Brutal Torture*, *supra* note 196 ("Thinking about my [dead] younger brothers makes me want to lie down and cry. I would gladly die if only one of them could have lived.").

[432] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 219; *see also* Huh, *Yang Gyeong-sook Lost Her Vision Due to Brutal Torture*, *supra* note 196.

[433] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 219–20; Huh, *An Elderly Woman's Terrifying Memories of Being Tortured by Soldiers at 12 Years Old*, *supra* note 196 ("[S]he wasn't able to keep up the diving for long because of the lingering effects of the torture she'd suffered. Whenever she got into the water, her whole body would ache, and when she came out again she would suffer awful spasms."); *see also* Emily Cataneo, *The Female Free Divers of Jeju*, RDS. & KINGDOMS (Apr. 5, 2017), https://roadsandkingdoms.com/2017/the-female-free-divers-of-jeju/.

[434] Hilty, *A Look at Jeju Women's Lives Throughout Time*, *supra* note 428; *see also* Huh, *Yang Gyeong-sook Lost Her Vision Due to Brutal Torture*, *supra* note 196 ("The loss of her two sons and the torture of her daughter was too much for Yang's mother to bear, and she died of a broken heart at the age of 55.").

[435] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 220 (citing JEJU APRIL 3 PEACE PARK, *supra* note 431).

[436] *Id.* "In 1952, Jeju's population of women over 20 years old was nearly double that of men." *Id.* at 220 n.21.

[437] Hilty, *A Look at Jeju Women's Lives Throughout Time*, *supra* note 428.

selling our souls for tourism and money – but there's more than this. We need soul healing."[438] What that soul healing might mean for Jeju women today? Scholar Rimhwa Han offers: "We have a new identity now – but we don't know what it is. We need to rebuild Jeju women's society – and take care of each other."[439]

Moving forward, then, the third and fourth Rs of Jeju 4.3 social healing (*reconstruction* and *reparation*) might aim to help rebuild Jeju women's society. Encompassing women's soul healing. To date, neither the National 4.3 Committee's Report nor the National Assembly's handling of 4.3 redress – or the larger political discourse on 4.3 harms – grapples meaningfully with this. The East Timor Truth and Reconciliation Commission highlighted women's unique emotional trauma and financial devastation resulting from occupying soldiers' sexual violence, all as a key tenet of the reparative process.[440] Deepening the justice discourse in this fashion and tailoring National Assembly remedies to promote Jeju women's self-defined soul healing would mark a significant advance in the reparative initiative.

4. *Potential United States Acceptance of Partial 4.3 Responsibility and Participation in Next Reparative Steps*

Enlivening the social healing working principle of "mutual engagement," calling forward all responsible for the Jeju 4.3 Tragedy – and particularly the United States – would stand as a symbolic refusal to shield anyone from

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[438] *Id.*

[439] *Id.*

[440] *See Sexual Violence*, *in* FINAL REPORT OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR (CAVR) (2006). Many survivors of sexual violence and slavery develop long-term mental illnesses as a result of "the continued lack of security, the lack of mental health services to deal with the trauma, and their sense of rage, shame, isolation and guilt." *Id.* at 96. Even with support from their family, many women were not able to recover from their trauma. *Id.* One woman remains "mentally unstable, has fainting spells and . . . [remains] unmarried." *Id.* at 97. "I do not want to get married, because he destroyed me like an animal. I am too embarrassed to get married. Better I just sit tight and work in my garden for my livelihood." *Id.* at 98. "Women who became pregnant and bore children from non-consensual sexual relationships faced multiple layers of discrimination . . . . Their children were often discriminated against . . . as illegitimate children born out of wedlock." *Id.* at 100. The stigma from sexual slavery "resulted in isolation from her family, ridicule from the community and discrimination against the woman and her children, including in some cases by church officials." *Id.* at 46; *see also* Yamamoto & Sonen, *Reparations Law*, *supra* note 421.

accountability.[441] It would also demonstrate the South Korean government's resolve to *comprehensively* heal the persisting wounds of the Tragedy.[442]

As detailed in the companion article, South Korean and U.S. scholars recently intensified their calls for United States engagement.[443] International human rights organizations and the Association of Bereaved Families of Victims of the Jeju April 3rd Uprising of Historical Truth, joined the chorus.[444]

Perhaps most significant, advocacy groups intensified their demand for United States participation in the reparative initiative, observing that *comprehensive* and *enduring* Jeju 4.3 social healing will be impossible without it.[445] In 2018, on the seventieth anniversary commemoration of Jeju 4.3, prominent justice advocacy organizations called for

> an "apology and acceptance of responsibility" by the United States. In a joint letter to the U.S. Embassy in Seoul – authored by the Association of Bereaved Families of the 4/3 Victims, the Memorial Committee of the 70th Anniversary of the Jeju April 3rd Uprising and Massacre and the Pan-National Committee for the 70th Anniversary of Jeju April 3rd – the groups observed that the U.S. military administration was "sent as a commander of the U.S. forces in the Jeju area just after April 3, 1948, to command and direct all suppression operations in Jeju and provided active support with weapons and equipment for the punitive forces while the scorched earth operation was taking place."[446]

The groups also highlighted the absence of U.S. participation in the 4.3

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[441] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 215.

[442] *Id.* at 215–16.

[443] See Yamamoto, Burns & Takeuchi, *Apology & Reparation II*, *supra* note 52, at 92, for a fuller discussion on the South Korean and U.S. scholars collectively calling for United States participation in the social healing initiative.

[444] See *id.* for a discussion on the calls from human rights groups including the East Asian Network for Democracy, Peace and Human Rights.

[445] *See, e.g.*, Anthony Kuhn, *Survivors of a Massacre in South Korea are Still Seeking an Apology from the U.S.*, NPR (Sept. 7, 2022, 5:10 AM), https://www.npr.org/2022/09/07/1121427407/survivors-of-a-massacre-in-south-korea-are-still-seeking-an-apology-from-the-u-s. *See generally* Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 130, at 57–59.

[446] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 5; Keum-bi Hwang, *Jeju Citizens Demand US Apology for Apr. 3 Massacre*, HANKYOREH (Apr. 9, 2018, 6:04 PM) [hereinafter Hwang, *Jeju Citizens Demand US Apology for Apr. 3 Massacre*], https://english.hani.co.kr/arti/english_edition/e_national/839789.html.

reconciliation process, declaring that the "US administrations that should have taken responsibility have remained 'bystanders' and not said a word for 70 long years."[447]

The joint letter by the Bereaved Families also rejected the conservative opposition political party's attempt to reframe the "incident" as a broadscale armed revolt by communists "stag[ing] guerrilla warfare" that compelled government forces to carry "out a strong crackdown in response, which caused damage to Jeju civilians."[448] Most significant, the Bereaved Families demanded that the United States now "actively investigat[e] the role of the U.S. military administration and U.S. military advisory group."[449]

VII. CONCLUSION

Amid a revitalized Jeju 4.3 justice movement – marked by family storytelling, artist portrayals, teacher lessons, journalist reports, scholarly assessments and political lobbying – eighteen survivors of the 4.3 mass military tribunal convictions petitioned the Jeju court in 2017 to reopen their seventy-year-old cases and clear from their records the false stain of guilt for espionage and unlawful rebellion. This article examined the monumental pleas by those survivors – for themselves and 2,500 others tortured during detention and wrongly convicted en masse without proper charges or trials. It explored the explicit linkage of those Jeju retrial petitions to the Japanese American resistors' successful 1980s coram nobis challenges to the U.S. Supreme Court's rulings during World War II upholding the forced removal and mass incarceration of Japanese Americans – laying the judicial cornerstone for the 1988 U.S. Civil Liberties Act's government apology and reparations.

The article then uplifted Jeju District Judge Chang's extraordinary 2019 rulings, with the nation watching, vindicating not only the eighteen survivors but also sweeping away the manifest injustice suffered by all. And it tracked Judge Chang's remarkable ensuing "compensation" order for the petitioners that more broadly helped galvanize – after prolonged political struggle – the

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[447] Hwang, *Jeju Citizens Demand US Apology for Apr. 3 Massacre*, *supra* note 446.

[448] *Parties Mark 70th Anniv. of Jeju April 3 Incident With Varied Interpretations*, KOREA HERALD (Apr. 3, 2018, 1:04 PM), http://m.koreaherald.com/view.php?ud=20180403000545 (reporting on both the Bereaved Families joint letter and the opposition Liberty Korea Party's characterization).

[449] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 5 (alteration in original). See generally *id.* at chapters 10, 11, 12 and 13 for an in-depth discussion of U.S. participation.

National Assembly's broadscale reparations/compensation program for many 4.3 survivors and families.

Drawing upon human rights precepts of reparative justice and multidisciplinary insights into social healing, the article then assessed the remarkable recent progress in the twenty-year Jeju 4.3 social healing initiative, highlighting the Jeju court's rulings and the National Assembly's 2021-2022 Special Act revisions. It also identified critical gaps in the 2021-2022 Act's eligibility requirements; underscored the continuing need for economic justice in the form of tailored group capacity-building to empower Jeju communities; and uplifted the importance of further reparative action to address the unique suffering of Jeju women subjected to widespread 4.3 sexual violence.

In the closing parts, through the lens of reparative justice developed in the 2021 book *Healing the Persisting Wounds of Historic Injustice*,[450] this article synthesized assessments about what recently advanced and what still impedes *comprehensive* and *enduring* Jeju 4.3 *social healing*, acknowledging the prolonged absence of the United States from the reparative initiative. The Jeju 4.3 Special Act, as reflected in its title, sought to "Discover[] the Truth" and "Restor[e] of Honor of Victims." Jeju people, human rights advocates and scholars maintain that without the United States at the reconciliation table, aging survivors and their families, Jeju communities and South Korea as a nation cannot fully grapple with the "truth" of the Tragedy or "restore the honor" of those suffering the scorched earth violence.

A companion article to this work – titled "*Apology & Reparation II: United States Engagement with Final Stages of Jeju 4.3 Social Healing*" – evaluates the propriety and impact of America's refusal to engage along with intensifying calls by 4.3 justice advocates, scholars and human rights organizations for the United States to step up and take its place at the 4.3 reconciliation table. Linking the two articles together, the companion piece suggests a path forward that may well benefit the United States, South Korea and, most important, the people of Jeju. Comprehensive and enduring Jeju 4.3 *social healing through justice* awaits.

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[450] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4.

Apology & Reparation II: United States Engagement with Near-Final Stages of Jeju 4.3 Social Healing

Eric K. Yamamoto,[*] Suhyeon Burns[**] and Taylor Takeuchi[***]

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I. OVERVIEW: HEALING THE PERSISTING WOUNDS OF THE JEJU 4.3 TRAGEDY

This article and its companion article – *Apology & Reparation: The Jeju Tragedy Retrials and the Japanese American Coram Nobis Cases as Catalysts for Reparative Justice*[1] – address a pressing challenge for global communities: healing the persisting wounds of historic injustice. The articles collectively focus on the Jeju 4.3 Tragedy and South Korea's ongoing twenty-year 4.3 reconciliation initiative,[2] and they enfold the United States into that initiative in two distinct though related ways. First, through the Jeju court's consideration of the American courts' 1980s coram nobis reopenings of the World War II Japanese American incarceration cases as global precedent for retrying in 2018 the Jeju 4.3's mass military convictions – with each court righting historic wrongs and serving as a catalyst for apologies and legislative reparation.[3] And second, through uplifting the imperative of

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The authors express appreciation for the valuable contributions of Chang Hoon Ko, Rachel Oyama, Katya Katano, William Kaleio Crowell, Abigail Lazo, Elizabeth Songvilay and Hanna Wong Taum.

[1] Eric K. Yamamoto & Suhyeon Burns, *Apology & Reparation: The Jeju Tragedy Retrials and the Japanese American Coram Nobis Cases as Catalysts for Reparative Justice*, 45 U. HAW. L. REV. 5 (2022) [hereinafter Yamamoto & Burns, *Apology & Reparation I*].

[2] Officials, scholars, journalists and government documents employ differing descriptors for the collective efforts to heal the persisting wounds of the Jeju 4.3 Tragedy. "Reconciliation" and "social healing" are often used. Some scholars also employ "reparative justice" to characterize the efforts because the overall aim is to "repair" the Tragedy's long-term damage and because United Nations' principles of "reparation" are especially relevant. This article uses these terms interchangeably. It also employs "initiative" to signal the "repair" efforts emanating from the National Assembly's Special Act of 2000 that started the formal investigation, recommendation, implementation and supplementation process.

[3] *See* Chang Hoon Ko & Yunyi Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases in 2018 from Consequences of 1984 Korematsu Coram Nobis Case Decisions and Civil Liberties Act of 1988*, 8 WORLD ENV'T & ISLAND STUD. 31, 32–33 (2018) [hereinafter Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*]; Min-kyung Kim, *Court Weighs Question of Granting Retrials for Those Imprisoned During 1948 Jeju Uprising*, HANKYOREH (Mar. 25, 2018), https://english.hani.co.kr/arti/english_edition/e_national/837522.html. For a detailed discussion, *see* Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part III.

U.S. participation in the final stages of the 4.3 social healing initiative[4] for its partial, albeit significant, military responsibility for the "scorched earth" carnage and enduring suffering.[5] *Apology & Reparation I* broadly described 4.3 events, the pervasive damage and horrific suffering and South Korea's started-stalled-rejuvenated reconciliation initiative. A brief recounting is warranted for context.

> Euphemistically called "an incident," and marked by widespread violence and immense suffering, the 4.3 Tragedy [commencing on April 3, 1948] swept across an entire island of villagers during the supposed "peacetime" between World War II and the Korean War. Initiated by the U.S. Military Government and then overseen by U.S. Military officials, South Korean armed forces killed an estimated 30,000 island villagers, detained and tortured thousands more and burned down nearly all seaside villages. All fueled by the mischaracterization of Jeju as an "island of reds."[6]

More specifically, the article discussed the United States' partial responsibility for the Jeju 4.3 Tragedy.

> [T]he U.S. Military Government (as United Nations designated Trustee) and later the Republic of Korea (under United States oversight) carried out a "scorched earth" Jeju 4.3 "suppression operation . . . ." [G]overnment forces killed and maimed thousands of others in villages, fields and

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[4] *See* ERIC K. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY 198, 251, 280–87 (2021) [hereinafter YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE]. *See also infra* Part III for further discussion on the imperative of U.S. participation in the Jeju 4.3 reparative initiative.

[5] See Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part III.A. for a detailed discussion of the scorched earth carnage and suffering of the Jeju 4.3 Tragedy. *See also infra Part* III.C. for further discussion of the United States' responsibility for Jeju 4.3. *See also* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 137–43; Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing through Justice*, 15 ASIAN-PAC. L. & POL'Y J. 1, 28–32 (2014) [hereinafter Yamamoto, Pettit & Lee, *Unfinished Business*]; Ko & Cho*, Some Insights on 18 Jeju 4.3 Survivors' Retrial Case*, *supra* note 3, at 32–33.

[6] Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, at 8.

> mountain hideouts, even though the villagers lacked unlawful links to communism or resistance activities. By 1949, the violence of the Tragedy left "one in every five or six islanders" dead and "more than half the villages . . . destroyed."[7]

Inspired by the 1980s South Korea democracy movement, the 2000 National Assembly legislated for Jeju 4.3 truth finding and reconciliation,

> with an emphasis on [rectifying] the suffering of victims and their families. The resulting 2003 Korean language report of the "National Committee for Investigation of the Truth About the Jeju April 3 Incident" ascertained historical facts, examined responsibility and made recommendations. Immediately after, [South Korea] President Roh Moo-Hyun visited Jeju and apologized to survivors and their families. The national government also took active steps toward social healing. But reconciliation efforts stalled after 2007.[8]

> [Even though t]he beautiful peace park, the inspiring memorial as well as the informative April 3rd museum [were] established . . . the problem still exist[ed]: (a) [redress was] very limited; (b) victims still c[ould not] get any reparations because their [wrongful] status as the core group of 'communist guerillas,' . . . and (c) the United States' secondary responsibility ha[d] not been discussed legally at depth yet, despite [the fact that the U.S.] also played an important role [in the Jeju Tragedy]."[9]

In this setting, as the initial article described, eighteen Jeju 4.3 survivors petitioned a South Korea court in 2017 to clear their 1948-49 wrongful mass military convictions for alleged "rebellion," "aiding and contacting the [Communist] enemy" and "espionage."[10]

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[7] *Id.* at 16-17.

[8] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 3, at 4 (citing Kunihiko Yoshida, *Reparations and Reconciliations in East Asia: Some Comparison of the Jeju April 3rd Tragedy with Other Related Asian Reparations Cases,* 2 WORLD ENV'T & ISLAND STUD. 79, 80–81 (2012)). The legislatively created Korea National Committee for Investigation of the Truth About the Jeju April 3 Incident is hereinafter referred to as the "National 4.3 Committee."

[9] *Id.* (emphasis added) (citing Yoshida, *supra* note 8, at 80–81).

[10] *See* Yamamoto & Burns, *Apology & and Reparation I*, *supra* note 1, at 8.

The initial article linked the survivors-petitioners' 4.3 retrials in 2018[11] to Japanese American incarceration resistors' 1980s coram nobis petitions[12] challenging the U.S. Supreme Court's World War II rulings[13] – both cleansing decades-old manifestly unjust convictions.[14]

> Through the translated scholarship on the Japanese American incarceration coram nobis cases,[15] the 4.3 petitioners offered [Jeju District Court] Judge Chang an international precedent – a type of template – for reopening manifestly unjust criminal convictions, decades after-the-fact, as an integral element of an ongoing reparative justice initiative. In a fashion similar to the coram nobis litigation, the Jeju survivors-petitioners more broadly sought to vindicate all 2,500 villagers wrongly mass convicted and punished. And, in important ways, they sought to uplift the justice claims of the 30,000 killed and thousands of others tortured or forcibly removed from their villages.[16]

In making that linkage between the Jeju 4.3 retrials and the Japanese American coram nobis case reopenings, the article teased out similarities and differences between both court cases and tracked the impacts of latter-day liberatory judicial rulings in galvanizing key aspects of the political push for

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[11] Jaegal Chang et al., *Korea Jeju District Court Second Criminal Department: The Decision*, 9 WORLD ENV'T & ISLAND STUD. 97 (Jin ju Moon, Chang hoon Ko & Michael Saxton trans., 2019) [hereinafter *2019 Order Dismissing Indictments*].

[12] Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985).

[13] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

[14] See Yamamoto & Burns, *Apologies & Reparations I*, *supra* note 1, Part III.A. for further discussion.

[15] *See Eric K. Yamamoto, Margaret Chon, Carol L. Izumi, Jerry Kang & Frank H. Wu*, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INCARCERATION (2d ed., 2013) [hereinafter Yamamoto, Chon, Izumi, Kang & Wu,, RACE, RIGHTS AND REPARATION]. Responding to Jeju Judge Chang's request for international precedent, Jeju justice advocates translated and submitted to Judge Chang several chapters from RACE, RIGHTS AND REPARATION. Those chapters by the Asian American scholars analyzed the historical context, court decisions and impacts of the Japanese American coram nobis cases. Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 3, at 32 (describing submission of the chapters on the Japanese American incarceration coram nobis cases).

[16] Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, at 32-33.

apologies and legislative reparations in South Korea and the United States, respectively.[17]

The article then drew upon human rights precepts of reparative justice[18] and multidisciplinary insights into social healing[19] to uplift the remarkable recent progress. It also identified remaining gaps in the reparative initiative.[20]

> The Jeju court's 2019 landmark decisions expunging the convictions of the eighteen survivors and awarding substantial monetary damages were significant practically and symbolically. Yet, the decisions ironically underscored the glaring void in the larger 4.3 reparative initiative. The enduring han ("deepest pain") of the tens of thousands of other Jeju 4.3 survivors, families and communities persisted in the face of continuing political opposition to broadscale reparations and other forms of economic justice.[21]

Especially significant, the United States continued to refuse to "recognize and assume responsibility for its 4.3 role and to repair the damage," or to acknowledge, let alone participate in, the reconciliation initiative.[22]

With this in mind, in synthesizing potential next steps toward comprehensive and enduring Jeju 4.3 *social healing through justice*, this companion article highlights a crucial – and perhaps final – missing piece in

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[17] *See id.* at 53-55; *see also* Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 5, Part V (discussing the need for a joint South Korea and United States Jeju 4.3 Task Force to further implement past recommendations and to foster comprehensive and enduring *social healing through justice*).

[18] *See generally* G.A. Res. 60/147 (Dec. 16, 2005) [hereinafter *Basic Principles and Guidelines on Reparation*], https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf (adopting Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law).

[19] *See generally* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, Chapters 3–4.

[20] See Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part VI.B. for further discussion on the notable gaps in the 2021–2022 Special Act amendments.

[21] Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, at 13-14. "The Special Act's February 2021 revision established a Jeju 4.3 Trauma Healing Center and authorized minimal medical support and welfare for a limited number of survivors. But it declined to confer general reparations. For thousands who suffered directly and indirectly from the 4.3 'scorched earth' carnage, reconciliation efforts remained starkly incomplete." *Id.*; *see* Special Act on Discovering the Truth on the Jeju 4·3 Incident and the Restoration of Honor of Victims, Act. No. 17963, Mar. 23, 2021, *amended by* Act. No. 18745, Jan. 11, 2022 (S. Kor.) [hereinafter 2021 Jeju 4.3 Special Act], https://www.law.go.kr (search required).

[22] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 286.

the 4.3 reparative initiative: American engagement, with the United States affirmatively stepping up to its place at the 4.3 reconciliation table.

A. Intertwining the 1980s Japanese American Coram Nobis Case Reopenings and the 2018 Jeju 4.3 Military Commissions Retrials

Both the Jeju 4.3 Tragedy and the World War II mass incarceration of Japanese Americans erupted in the 1940s, marked by wartime hysteria and egregious government abuse of civilians under the falsely constructed mantle of national security.[23] In both tragedies, those suffering eventually turned to the courts and the rule of law in democratic societies to correct the legal-historical record and repair some of the prolonged damage – invoking the language and principles of civil and human rights.[24] Decades after-the-fact, courts in the two countries opened public eyes to help alter public consciousness about the grave historical injustice with continuing consequences.[25] Both catalyzed acceptance of government responsibility for historic civil and human rights transgressions and helped generate long-awaited broadscale legislative action aimed at reconstruction and reparation.[26] The reparative justice initiatives in both countries served as "cautionary tale[s] of grave injustice arising out of popular fears,

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[23] *See* Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases*, *supra* note 3, at 33.

[24] *See* Jaegal Chang, *Each Retrial Shall be Initiated for the Decision to be Re-judged: Decision About Case: 2017 Inventory Hab-4*, 8 WORLD ENV'T & ISLAND STUD. 117, 118 (Chang Hoon Ko & Michael Saxton trans., 2018) [hereinafter *2018 Order Reopening 4.3 Mass Convictions*]; *see generally* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985).

[25] *See* ERIC K. YAMAMOTO, LORRAINE BANNAI & MARGARET CHON, RACE, RIGHTS AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION 313–15, 343–44 (3d ed., 2020) [hereinafter YAMAMOTO, BANNAI & CHON, RACE, RIGHTS AND NATIONAL SECURITY]; MITCHELL T. MAKI, HARRY H. KITANO & S. MEGAN BERTHOLD, ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS 135–36 (1999); Sang-Soo Hur, *Historical Significances of Opening Decision for Retrial by Jeju District Court of Jeju April 3rd Events' Survivors Under Illegal Martial Law Court (1948–1949)*, 9 WORLD ENV'T & ISLAND STUD. 127, 129 (2019) [hereinafter Hur, *Historical Significances of Opening Decision for Retrial*].

[26] *Compare* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, *with* Special Act on Discovering the Truth on the Jeju 4·3 Incident and the Restoration of Honor of Victims, Act. No. 18745, Jan. 11, 2022 (S. Kor.) [hereinafter 2022 Jeju 4.3 Special Act], https://www.law.go.kr (search required).

opportunistic politicians, [dissembling officials, on matters of national security,] and deferential courts."[27]

As developed in Part III of the companion article, at the outset of the case, in response to Jeju District Judge Chang's query, the 4.3 petitioners' advocates suggested that the Jeju court view the Japanese American coram nobis reopenings[28] as a kind of international precedent.[29] Nearly forty years after the initial 1944 *Korematsu* Supreme Court ruling,[30] newly discovered World War II government documents presented in the coram nobis cases compelled the federal courts to invalidate the convictions of resistors Korematsu, Hirabayashi and Yasui.[31] Those documents revealed a "scandal without precedent in the history of American law."[32] More specifically, the resistors'

> coram nobis petitions asserted that newly discovered government wartime documents unequivocally demonstrated that: (1) no military necessity existed to justify the racial exclusion and imprisonment, (2) government decision-makers knew this and yet proceeded with the mass incarceration, and (3) the government suppressed and manufactured crucial evidence on pressing public necessity

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[27] *See* Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Façade of National Security*, 128 YALE L. J. F. 688, 698 (2019) [hereinafter Yamamoto & Oyama, *Masquerading Behind a Façade of National Security*]; ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 48 (2018) [hereinafter YAMAMOTO, IN THE SHADOW OF KOREMATSU].

[28] Margaret Chon, *Remembering and Repairing the Error Before Us, In Our Presence*, 8 SEATTLE J. FOR SOC. JUST. 643, 645–47 (2012) [hereinafter Chon, *Remembering and Repairing the Error Before Us*] (describing the writ of coram nobis as a vehicle for reopening badly tainted convictions and repairing the continuing damage by correcting court records and constructing a new memory of the injustice).

[29] Ko & Cho, *Some Insights on 18 Jeju 4.3 Survivors' Retrial Case*, *supra* note 3, at 33.

[30] Yamamoto & Oyama, *Masquerading Behind a Façade of National Security*, *supra* note 27, at 688, 698 (discussing the behind-the-scenes U.S. maneuvers revealing egregious governmental misconduct both in the original mass racial incarceration decisions and in the judicial prosecution of the Japanese American resistors during World War II).

[31] Korematsu v. United States, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984) (vacating Fred Korematsu's conviction); Hirabayashi v. United States, 828 F.2d 591, 615 (9th Cir. 1987) (vacating Gordon Hirabayashi's conviction); Yasui v. United States 772 F.2d 1496, 1497 (9th Cir. 1985) (vacating Minoru Yasui's conviction). *See generally* YAMAMOTO, IN THE SHADOW OF KOREMATSU, *supra* note 27; LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE (2015); JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed. 1989).

[32] Yamamoto & Oyama, *Masquerading Behind a Façade of National Security*, *supra* note 27, at 694 (quoting PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES viii (1983)).

> in its presentations to the Supreme Court, in effect defrauding the Court and the American public about the legality – and legitimacy – of "the internment."[33]

And the federal courts' mid-1980s coram nobis decisions cleared the names of thousands of Japanese Americans and contributed to a notable measure of social healing through the U.S. Civil Liberties Act of 1988[34] and its congressional and presidential apologies and symbolic reparations.[35]

As also developed in Part III, like the U.S. courts in the Japanese American coram nobis cases, in September 2018 the Jeju court reopened the eighteen survivors' sham convictions rooted in mischaracterizations of communist threats to national security.[36] Deeply moved by the Jeju survivors' personal stories of suffering, Judge Chang vacated their seventy-year-old convictions.[37] On retrial, with South Korea watching, the Jeju judge issued a landmark ruling formally dismissing the indictments, clearing the criminal records of the eighteen survivors and effectively exonerating the 2,500 others wrongfully convicted.[38] In August 2019, the Jeju judge followed with an award of substantial monetary damages for each petitioner.[39]

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[33] YAMAMOTO, IN THE SHADOW OF KOREMATSU, *supra* note 27, at 37.

[34] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (acknowledging "the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II").

[35] *Id.*

[36] *See 2018 Order Reopening 4.3 Mass Convictions*, *supra* note 24, at 118. *See* Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part II.A. for more discussion on the mischaracterization of Jeju as the "Island of Reds."

[37] *2018 Order Reopening 4.3 Mass Convictions*, *supra* note 24, at 122; Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 25, at 128–29.

[38] *See 2019 Order Dismissing Indictments*, *supra* note 11, at 98; Suh-yoon Lee, *Jeju Massacre Victims Get Their Names Cleared in Court*, KOREA TIMES (Jan. 18, 2019, 11:13 AM), https://www.koreatimes.co.kr/www/nation/2019/01/251_262242.html#:~:text=The%20Jeju%20District%20Court%20overturned,April%203%20Uprising%20and%20Massacre; *see generally* Hur, *Historical Significances of Opening Decision for Retrial*, *supra* note 25.

[39] Elizabeth Shim, *South Korea Jeju Massacre Victims Awarded $4M in Damages*, UNITED PRESS INT'L (Aug. 21, 2019), https://www.upi.com/Top_News/World-News/2019/08/21/South-Korea-Jeju-Massacre-victims-awarded-4M-in-damages/5291566394271/?upi_ss=Jeju; Darryl Coote, *Exonerated Jeju Massacre Prisoners Fight to Right Korean History*, UNITED PRESS INT'L (Oct. 15, 2019), https://www.upi.com/Top_News/World-News/2019/10/15/Exonerated-Jeju-Massacre-prisoners-fight-to-right-Korean-history/9431569816973/.

More remained, though, for the larger 4.3 reparative initiative.

B. *What's Missing from the Jeju 4.3 Social Healing Initiative Even After Judge Chang's Rulings?*

Judge Chang's path-forging rulings ironically underscored the yawning reparations void for most 4.3 victims and families. Economic justice awaited.[40]

In partial response, the Korean Nation Assembly revised the Jeju 4.3 Special Act (originally enacted in 2000 and amended in 2016).[41] But the February 2021 amendments still abjured general reparations for thousands who suffered.[42] Then, in response to further Jeju community grassroots advocacy, political lobbying, scholars' assessments and research analyses, in December 2021, the National Assembly authorized substantial individual payments to over 10,000 designated victims and family members of the 4.3 Tragedy.[43] A legislative reparations landmark.

Important gaps nevertheless remained. As Part VI of the first article developed, the most recent Special Act revisions imposed strict eligibility requirements – a remaining impediment to broadscale economic support for potentially thousands of other family members.[44] It also failed to uplift

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[40] *See* NAT'L COMM. FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APR. 3 INCIDENT, THE JEJU APRIL 3 INCIDENT INVESTIGATION REPORT (Jeju Apr. 3 Peace Found. trans., 2014) 333, 688–92 (2003) [hereinafter 4.3 INVESTIGATION REPORT]; Special Act on Discovering the Truth on the Jeju 4·3 Incident and the Restoration of Honor of Victims, Act. No. 6117, Jan. 12, 2000, *amended by* Act. No. 18745, Jan. 11, 2022 (S. Kor.) [hereinafter 2000 Jeju 4.3 Special Act], *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=42501&lang=ENG. *See also* Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part V.A. for further discussion on the original 2000 Special Act.

[41] *See* 2021 Jeju 4.3 Special Act, *supra* note 21.

[42] *See id.*; Ho-joon Heo, *Revised Jeju 4·3 Special Act Now Effective, but With What Improvements?*, JEJU 4·3 PEACE FOUND. (Oct. 5, 2021), http://jeju43peace.org/revised-jeju-4%c2%b73-special-act-now-effective-but-with-what-improvements/. Some of the Jeju residents most harmed – those living in poverty or with severe disability – remained excluded from broadscale reparations. *See* Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part V.C.

[43] 2022 Jeju 4.3 Special Act, *supra* note 26; *Assembly Passes Bill on Record State Compensation for Jeju April 3 Incident Victims*, YONHAP NEWS AGENCY (Dec. 9, 2021), https://en.yna.co.kr/view/AEN20211209009000315. *See* Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part V.C. for more discussion on the December 2021–2022 Special Act Revision.

[44] *See* Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part VI.B.1 for further discussion on the Jeju 4.3 Special Act's eligibility barriers for intergenerational survivors.

tailored "capacity-building" economic justice[45] and tended to overlook the voices and suffering of women sexual violence survivors.[46]

Perhaps most significant, the 2021-2022 legislation avoided acknowledging a main missing piece in the reparative initiative – the United States' presence at the Jeju 4.3 reconciliation table.[47] Two questions reverberated. Would the United States expressly acknowledge its partial, though crucial, responsibility for the Tragedy? And would it mutually engage with next – and potentially final – reparative steps toward *comprehensive* and *enduring* 4.3 social healing through justice?

C. *Calls from Researchers, Residents, Human Rights Groups and Scholars for United States Participation in Jeju 4.3 Social Healing*

Indeed, contemporary American and South Korean scholars, researchers, historians and human rights organizations collectively called upon the United States to engage in the 4.3 reparative initiative.[48] Most significant, building on its investigation and detailed findings, South Korea's National 4.3 Committee ascertained that the United States, as trustee,[49] initiated the armed

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[45] *See* International Covenant on Civil and Political Rights, Art. I, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (emphasizing that sustained community-wide human rights violations often trigger deeply rooted economic injustice that reflects the suppression of people's human right to self-determination to "freely pursue their economic, social and cultural development"); *see generally* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS (2020). *See also* Yamamoto & Burns, *Apology & Reparation I*, *supra* note 1, Part VI.B.2. for further discussion on the absence of economic justice through capacity-building initiatives.

[46] Rimhwa Han, *Cases of Sexual Assault Committed to Local Women During Jeju 4.3 Incident*, 5 WORLD ENV'T & ISLAND STUD. 185, 189–95 (Ae-Duck Im trans., 2015); Tae-Ung Baik, *Social Healing Through Justice: Jeju 4.3 Case*, 2 WORLD ENV'T & ISLAND STUD. 59, 64 (2012); *see* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 154–55, 219–20. *See also* Yamamoto & Burns, *Apology and Reparation I*, *supra* note 1, Part VI.B.3. for further discussion on the absence of reparative justice for female sexual violence survivors.

[47] *See* 2022 Jeju 4.3 Special Act, *supra* note 26.

[48] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 137 (highlighting "American and South Korean historians and reparative justice scholars [who] have . . . called for present-day United States participation to examine the existing record and clarify the extent and limits of [the United States'] responsibility and to engage with further Jeju 4.3 social healing efforts").

[49] *See* 4.3 INVESTIGATION REPORT, *supra* note 40, at 92–97 (describing the establishment of the United States Army Military Government in Korea after World War II); OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1945, THE BRITISH COMMONWEALTH, THE FAR EAST, VOLUME VI (Oct. 1945),

forces' scorched earth devastation and then retained operational control over security forces in Korea.[50] Most noteworthy, the 4.3 Committee concluded that the 4.3 widespread violence

> occurred under the US Military Government regime and the US Army Colonel in Jeju directly commanded the Suppression Operation. The US Army continued Operational Control on Korea after the establishment of the Republic of Korea under the US/Korea Military Convention and supplied weapons and observation aircrafts for the Suppression Operation.[51]

The United States' collective actions – direct military orders and years of knowing complicity – ascribed partial U.S. responsibility.[52]

Prior to the National 4.3 Committee's 2003 report, at least two American scholars determined that the U.S. Military Government initiated and directed central parts of the 4.3 devastation.[53] John Merrill, former Northeast Asia Bureau director for the U.S. State Department, determined that

> The U.S. "Military Government's use of right-wing youth groups that employed terroristic methods" contributed significantly to the bloodshed. Moreover, a "Vietnam-like syndrome in which commanders competed to accumulate impressive statistics on casualties inflicted on the guerillas also contributed to the heavy death toll [of civilians]." Intense "political pressure to clean up the rebellion and the tactics of area clearance used by the government forces" blurred the "distinction between civilians and guerillas."[54]

Merrill also found that even after the establishment of the Republic of Korea, American officials remained "present as advisors throughout the pacification campaign and should have attempted to modify the excessive

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https://history.state.gov/historicaldocuments/frus1945v06/d802 (noting the United Nations' formal designation of the United States as trustee).

[50] *See* 4.3 INVESTIGATION REPORT, *supra* note 40, at 333–34 (describing a Korean military commander recalling the U.S. Military Governor "emphasiz[ing] that the only way to settle the Jeju 4.3 incident quickly was a scorched earth strategy").

[51] 4.3 INVESTIGATION REPORT, *supra* note 40, at 654.

[52] *See* GREGORY MELLEMA, COMPLICITY AND MORAL ACCOUNTABILITY 19–20 (2016) (recognizing that the failure to prevent tragedy constitutes complicity when one has power and is morally bound to prevent what happens).

[53] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 137–41.

[54] *See id.* at 13.

brutality with which the operations were often conducted."[55] He therefore concluded that the "excuse that these excesses were inevitable . . . is unconvincing" and that the "question of American responsibility and role in the rebellion [still] has to be addressed.[56]

Following Merrill's preliminary assessment, historian Bruce Cumings' extensive research affirmed the United States directed extensive suppression operations, including "the daily training of counterinsurgent forces, interrogation of prisoners, and the use of American spotter planes to ferret out guerrillas."[57] He cited "formerly classified American materials [that document a] wholesale assault on the [Jeju] people."[58] Cumings maintained that "[i]f it should come to pass that any Koreans succeed in gaining compensation from the American Government for the events of 1945 to 1953, certainly the people of [Jeju] should come first."[59]

George Katsiaficas, Professor of Asian Politics and U.S. Foreign Policy, also concluded that the United States played an active role in the Tragedy.[60] Katsiaficas declared Jeju 4.3 as "the worst single massacre under the post-war U.S. military government . . . and has yet to be acknowledged by the United States."[61]

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[55] John Merrill, *The Cheju-Do Rebellion*, 2 J. KOREAN STUD. 139, 184, 196 (1980) [hereinafter Merrill, *The Cheju-Do Rebellion*] (determining that during a "final push to try to clear the island of guerillas . . . [m]any innocent persons were killed . . . . 630 persons were killed in a single week . . . a tremendous amount of overkill"). *See* 4.3 INVESTIGATION REPORT, *supra* note 40, at 441.

[56] *Id.* at 196.

[57] BRUCE CUMINGS, THE KOREAN WAR: A HISTORY 121, 127 (2010).

[58] *See id.*

[59] Bruce Cumings, *The Question of American Responsibility for the Suppression of the Chejudo Uprising* (Mar. 14, 1998) (paper presented at the 50th Anniversary Conference of the April 3, 1948 Chejudo Rebellion, Tokyo).

[60] *See* GEORGE KATSIAFICAS, ASIA'S UNKNOWN UPRISINGS, VOLUME 1: SOUTH KOREAN SOCIAL MOVEMENTS IN THE 20TH CENTURY 92–94 (2012) [hereinafter KATSIAFICAS, ASIA'S UNKNOWN UPRISINGS] (detailing documents showing that the United States impos[ed] a "scorched earth policy" on Jeju – a "fabricated report [by] the United States blam[ing police instigated killings] on [Jeju] insurgents"); *see also* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 139.

[61] George Katsiaficas, *Why Many South Koreans Fear the U.S.*, EROS EFFECT – GEORGE KATSIAFICAS, https://www.eroseffect.com/articles/why-many-south-koreans-fear-the-us (last visited Aug. 17, 2022) (cautioning that until "Americans acknowledge and accept responsibility for the tragic actions of our government [like the mass killings at Jeju], many Koreans will regard us with fear, hostility, and suspicion"); *see* KATSIAFICAS, ASIA'S UNKNOWN UPRISINGS, *supra* note 60, at 92, 96; *see also* Yang Han Kwon, *The Truth About*

Following the publication of the 2013 English translation of the National 4.3 Committee's report, law professor Eric K. Yamamoto and researchers Miyoko Pettit-Toledo and Sara Lee observed that U.S. military leadership issued direct orders to the South Korean armed forces, triggering and sustaining the 4.3 Tragedy.[62] The American researchers also confirmed that the "United States, thus far [] has not acknowledged the extent of its role as trainer, initiator, initial director and later overseer" of 4.3 events.[63]

Similarly, in 2016 American reparations scholar Carlton Waterhouse observed that the "United States has not been an official part of South Korea's investigation."[64] Waterhouse maintained that the United States bears a duty to examine the tragedy to openly address its responsibility for proper redress.

> As the commanding military force, at the time, the United States has an obligation to openly examine its role in the tragedy and its responsibility to the victims today. Doing any less would raise questions about the value and worth the United States has placed on the lives of these victims that their soldiers were ostensibly deployed to protect.[65]

South Korean scholars, too, highlighted the pressing need for United States engagement.[66] Professor Chang Hoon Ko of Jeju National University reported that at a minimum, Jeju islanders "strongly desire the US government to tell the truth about the US government role [in] the Jeju 4.3 Uprising and Grand Massacre."[67] Along with Japanese reparations scholar Kunihiko Yoshida,[68] Ko urged United States participation in a "[b]alanced

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the Jeju April 2nd Insurrection, *in* FOR THE TRUTH AND REPARATIONS: JEJU APRIL 3RD OF 1948 MASSACRE NOT FORGOTTEN 4 (Sang-Soo Hur ed., 2001).

[62] 4.3 INVESTIGATION REPORT, *supra* note 40 (describing the direct U.S. role in operations in Jeju); Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 5, at 57.

[63] Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 5, at 59.

[64] Carlton Waterhouse, *Reparations: The Problems of Social Dominance*, *in* JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947–2016) 333, 344–45 (2016) (recognizing that despite the South Korean government's actions to "prominently honor[] victims of the tragedy," without United States participation, the "reparative process remains incomplete").

[65] *Id.* at 345.

[66] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 141–42.

[67] Chang Hoon Ko, *US Government Responsibility in the Jeju April Third Uprising and Grand Massacre: Islanders' Perspective*, 8 LOCAL GOV'T STUD. 123, 126–27 (2004) (confirming that Jeju Island and its residents were incorrectly labeled a "Red Island," and the residents were instead part of a "civil rights movement concerned with peace and individual rights").

[68] *See* Yoshida, *supra* note 8, at 79–81.

[i]mplementation of a short term action plan on the long term vision of social healing of the Jeju April 3 tragedy."[69]

Professor Tae-Ung Baik, formerly of South Korea and now a United States expert in international human rights and Korean law, observed that the United States "used its power to strengthen the rightist political factions while cracking down on leftist groups" in Jeju.[70] By identifying the United States as a culpable actor in the 4.3 devastation, he pushed for an important measure of U.S. accountability to "achiev[e] transitional justice in Korea."[71]

Jeju 4.3 advocacy groups and human rights organizations joined the campaign to compel U.S. participation. In 2018, on the seventieth anniversary of the Tragedy, the Association of Bereaved Families of the 4.3 Victims, the Memorial Committee of the 70th Anniversary of the Jeju April 3rd Uprising and Massacre and the Pan-National Committee for the 70th Anniversary of Jeju April 3rd prominently authored a joint letter calling out the absence of U.S. participation in 4.3 social healing.[72] These groups uplifted the imperative of U.S. engagement, proclaiming that the "U.S. administration[s] that should have taken responsibility have remained 'bystanders' and not said a word for [seventy] long years."[73]

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[69] Chang Hoon Ko, *Tolerance Philosophy of Social Healing Through Justice for Victims of Korea Jeju 4.3 Grand Reparations and Reconciliation*, *in* JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947–2016) 367 (2016).

[70] Tae-Ung Baik, *Justice Incomplete: The Remedies for the Victims of the Jeju April Third Incidents*, *in* RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA: THE KOREAN EXPERIENCE 94, 99–100 (Gi-Wook Shin, Soon-Won Park & Daqing Yang eds., 2007).

[71] *Id.* at 94–111.

[72] *See* Keum-bi Hwang, *Jeju Citizens Demand US Apology for Apr. 3 Massacre*, HANKYOREH (Apr. 9, 2018) [hereinafter Hwang, *Jeju Citizens Demand US Apology for Apr. 3 Massacre*], https://english.hani.co.kr/arti/english_edition/e_national/839789.html; *see also* Yonhap, *Parties Mark 70th Anniv. of Jeju April 3 Incident With Varied Interpretations*, KOREA HERALD (Apr. 3, 2018), http://m.koreaherald.com/view.php?ud=20180403000545 (reporting on the joint letter rejecting the conservative framing of the incident as a revolt by communists "stag[ing] guerrilla warfare" that resulted in the government carrying "out a strong crackdown . . . which caused damage to Jeju civilians").

[73] Hwang, *Jeju Citizens Demand US Apology for Apr. 3 Massacre*, *supra* note 72; *see also* ASSOC. OF BEREAVED FAMILIES OF VICTIMS OF THE JEJU APR. 3RD UPRISING FOR HISTORICAL TRUTH, WHO ARE THE TRUE VICTIMS OF THE JEJU APRIL 3RD UPRISING? 4–5 (2013) ("The truths and lessons of the Jeju Uprising have yet to be fully unearthed.").

Similarly, a broad-based United Nations convening in 2019 resulted in a demand for United States participation in the 4.3 reparative initiative.[74] Academics, "human rights experts, journalists, diplomats, religious leaders, and peace activists" urged present-day U.S. involvement in the 4.3 truth and reconciliation process.[75] In response to a flurry of international media coverage, human rights groups, including the East Asian Network for Democracy, Peace and Human Rights, advocated for the establishment of international 4.3 peace networks.[76] The Jeju World Peace Academy encouraged the U.S. Congress to pass a "Jeju 4.3 Human Rights and Peace Island Act 2021."[77] Together, their calls for globalizing the Jeju 4.3 social healing initiative with active United States participation bolstered an international conscious-raising effort – "to finally leave the dark cave and emerge into the light of truth."[78]

II. UNITED STATES ENGAGEMENT IN JEJU 4.3 SOCIAL HEALING

The United States, however, responded, and continues to respond, with silence. In the early 2000s it shunned requests to actively participate in the South Korea National 4.3 Committee's inquiry.[79] Nor did it later engage in the reparative process. As the working principles of reparative justice suggest, some meaningful level of United States engagement will likely be essential for healing the enduring wounds of 4.3 survivors, families and

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[74] *See* Int'l Center for Transitional Justice, *Jeju 4.3: A Dark Chapter in Korean History Revealed at UN*, MEDIUM (July 1, 2019), https://medium.com/@ICTJ/jeju-4-3-holds-historic-event-at-un-3c6c9976273a#:~:text=June%2020%2C%202019%20%E2%80%94%20In%20a,%E2%80%9Cthe%204.3%20Jeju%E2%80%9D%20events (Ruben Carranza, director of the International Center for Transitional Justice, envisioning a joint United States and South Korea 4.3 truth commission).

[75] *See id.*

[76] *See Peace Networks*, JEJU 4.3 PEACE FOUND., http://jeju43peace.org/peace-the-future/peace-networks/ (last visited Oct. 10, 2022).

[77] Chang Hoon Ko, *Korean Jeju 4.3 Human Rights and Peace Island Act 2021: A Righteous Social Healing of Jeju 4.3 Grand Tragedy Through Jeju Massacre Consultation*, 9 WORLD ENV'T & ISLAND STUD. 221, 221 (2019). The suggested "Jeju 4.3 Human Rights and Peace Island Act 2021" was based on the Jeju National University student's 2019 "Jeju 4.3 Reconciliation Act" proposal. *Id.* at 226–27. This proposed act referenced the U.S. Civil Liberties Act of 1988 and made parallels to the reparative justice claims of the *Korematsu* coram nobis case to stress the importance of U.S. participation in Jeju 4.3 social healing. *Id*.

[78] *Jeju 4.3, U.N. and the United States*, JEJU 4.3 PEACE FOUND. (Feb. 6, 2020), http://jeju43peace.org/jeju-4%C2%B73-u-n-and-the-united-states/.

[79] *See* Jae-Jung Suh, *Truth and Reconciliation in South Korea: Confronting War, Colonialism, and Intervention in the Asia Pacific*, 42 CRITICAL ASIAN STUD. 503, 520 (2010) ("[T]he collective amnesia . . . can be seen not only in the [United States'] almost total refusal to acknowledge any wrongdoing by U.S. forces in [South] Korea but also in the complete denial of American culpability [for Jeju events].").

communities and for South Korean society itself. The Biden administration's 2022 renewed commitment to human rights, and particularly the human rights reparative justice regime, opens the door.

A. *U.S. Commitment to Repair the Damage of Its Human Rights Transgressions – Strengthening American Legitimacy as a Democracy Committed to the Rule of Law*

With the United States facing manifold pressing geopolitical challenges, what might compel American policymakers and leadership to engage in the final stages of the Jeju 4.3 reparative justice initiative? One answer lies in the United States' renewed commitment to international human rights – including reparative justice – and its interest in restoring its damaged global stature as a leading democracy.[80]

1. *The United States' Recent Renewed Commitment to Repair the Damage of Its Past Human Rights Injustices*

The United States' strong interest in revitalizing its stature impelled newly-elected President Biden to embrace America's renewed commitment to accountability for human rights transgressions.[81] Early in his presidency, Biden announced the Presidential Initiative for Democratic Renewal.

> The United States has long worked to strengthen democracy and advance respect for human rights. Not only is this the right thing to do, it is in the United States' national security interest, because strong, rights-respecting democracies are more peaceful, prosperous, and stable.[82]

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[80] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, Chapter 12 for more discussion on the United States' interest in manifesting democratic legitimacy.

[81] *See* Antony J. Blinken, U.S. Sec'y of State, Remarks on the Release of the 2021 Country Reports on Human Rights Practices (Apr. 12, 2022) [hereinafter Blinken, Human Rights Remarks], https://www.state.gov/secretary-antony-j-blinken-on-the-release-of-the-2021-country-reports-on-human-rights-practices/.

[82] Press Release, Joseph R. Biden, U.S. President, Fact Sheet: Announcing the Presidential Initiative for Democratic Renewal (Dec. 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/09/fact-sheet-announcing-the-presidential-initiative-for-democratic-renewal/ (announcing the "establishment of the Presidential Initiative for Democratic Renewal . . . that build[s] upon the U.S. Government's significant, ongoing work to bolster democracy and defend human rights globally").

Following up, in mid-2022, Biden's Secretary of State Anthony Blinken uplifted the United States' pledge to repair the damage of its own serious human rights violations.[83] Marking the release of the United States "2021 Country Reports on Human Rights Practices," Blinken underscored America's strong "interest in standing up for human rights."[84] Moreover, recognizing the "vital" importance of human rights credibility to America's "enduring security and prosperity," Blinken also acknowledged the United States' need to "hold [itself] accountable" for the damage of its own civil and human rights "shortcomings."[85] Indeed, the President conceded that on American soil the United States "know[s] that it is long past time to confront deep racial inequities and the systematic racism that continue to plague our nation."[86]

In recent years, the United States has deployed charges of human rights violations against other countries to constrain their abusive conduct.[87] Secretary of State Blinken endorsed that tactic, announcing that "a country that's perpetrating gross and systematic violations of human rights shouldn't sit on a body whose job it is to protect those rights."[88] In light of these pronouncements, Blinken's acknowledgment of the United States'

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[83] *See* Blinken, Human Rights Remarks, *supra* note 81; *see also* Lisa Peterson, U.S. Acting Assistant Sec'y of the Bureau of Democracy, Human Rights, and Labor, Remarks on the Release of the 2021 Country Reports on Human Rights Practices (Apr. 12, 2022), https://www.state.gov/acting-assistant-secretary-for-democracy-human-rights-and-labor-lisa-peterson-on-the-release-of-the-2021-country-reports-on-human-rights-practices/. Peterson also uplifted the United States' commitment to "defend and strengthen democracy and to promote and protect human rights." She acknowledged the Biden-Harris administration's commitment to "global leadership on human rights." *Id.*

[84] Blinken, Human Rights Remarks, *supra* note 81; *see also* Antony J. Blinken, U.S. Sec'y of State, Preface to the 2021 Country Reports on Human Rights Practices (Apr. 12, 2022), https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/ (recognizing "the continued U.S. commitment to advance human rights, both domestically and internationally . . . [that] push[es] America toward a 'more perfect union'").

[85] Blinken, Human Rights Remarks, *supra* note 81.

[86] Press Release, Joseph R. Biden, U.S. President, Statement by President Joe Biden on Black History Month (Feb. 1, 2021) [hereinafter Biden, Statement on Black History Month], https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/01/statement-by-president-joe-biden-on-black-history-month/.

[87] *See, e.g.*, Blinken, Human Rights Remarks, *supra* note 81 (referring to abuses by Russia, China, Afghanistan, Ethiopia and others).

[88] *Id.* For example, "[a]fter regaining a seat on the UN Human Rights Council" in October 2021, the United States "led a successful effort to suspend Russia from that [Council]." *Id.* The United States Treasury Department also "appl[ied] sanctions and impose[d] visa restrictions on human rights abusers and those who enable and profit from them through the Global Magnitsky Act, the Khashoggi Ban, and other tools." *Id.*

"responsibility to address [its human rights] shortcomings" appeared to mark America's bold step forward on rule-of-law accountability.[89]

2. The United States' Failure to Acknowledge Its Own Human Rights Injustices

These rhetorical commitments, while empowering, also opened American leadership to charges of hypocrisy. The United States' follow-through actions await.[90]

After World War II, the United States repeatedly denied redress for 2,300 innocent Japanese Latin Americans (JLAs).[91] The United States orchestrated the abduction of JLAs from their home countries during the war and incarcerated them in U.S. concentration camps because of their Japanese ancestry.[92] After years of harsh imprisonment, the United States government released the JLAs.[93] But it designated them "illegal aliens," ignoring the grave injustice of their race-based abduction and incarceration, maintaining that the JLAs entered the United States "without permission."[94] The government's grave mislabeling of the JLAs generated immense suffering as JLAs struggled to rebuild broken lives.[95]

Compounding the injustice, the U.S. Civil Liberties Act of 1988, aimed at repairing some of the damage suffered by Japanese Americans incarcerated during World War II, excluded JLA survivors on the ironic grounds that JLAs failed to possess U.S. citizenship or legal permanent residency at the time of

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[89] *Id.*; *see also* Biden, Statement on Black History Month, *supra* note 86.

[90] *See* Josh Rogin, *The Supreme Court has Undermined U.S. Credibility on Human Rights*, WASH. POST (June 29, 2022) [hereinafter Rogin, *The Supreme Court has Undermined U.S. Credibility on Human Rights*], https://www.washingtonpost.com/opinions/2022/06/29/supreme-court-undermined-us-credibility-human-rights-women-abortion/.

[91] Eric K. Yamamoto, *Reluctant Redress: The U.S. Kidnapping and Internment of Japanese Latin Americans*, *in* BREAKING THE CYCLES OF HATRED: MEMORY, LAW AND REPAIR 134–36 (M. Minow ed., 2002) [hereinafter Yamamoto, *Reluctant Redress*]; *see* YAMAMOTO, BANNAI & CHON, RACE, RIGHTS AND NATIONAL SECURITY, *supra* note 25, at 217.

[92] Yamamoto, *Reluctant Redress*, *supra* note 91, at 134–36. During World War II, the United States orchestrated the kidnapping of thousands of Japanese Latin Americans and their transportation to the United States and incarceration in American "internment" camps. *Id.* The majority of these JLAs were Peruvian citizens of Japanese ancestry with no ties to Japan other than race. *Id. See also* Shibayama v. United States, 55 Fed. Cl. 720, 723 (2002).

[93] Yamamoto, *Reluctant Redress*, *supra* note 91, at 134–36.

[94] *Id.*

[95] *Id.*

their wartime internment.[96] Moreover, the subsequent *Mochizuki* class action lawsuit against the U.S. for JLA inclusion in the Act further salted the wounds of injustice.[97] The suit's putative settlement offered only $5,000 per individual JLA if reparations money remained after payment of Japanese Americans – none remained – and a boilerplate apology that excluded recognition of the JLAs' circumstances and suffering and the United States' responsibility for human rights transgressions.[98] The trauma persisted through generations.[99]

In 2020 the Inter-American Commission on Human Rights produced a groundbreaking investigative report implicating the United States' role in the JLAs' prolonged suffering.[100] It concluded that the U.S. government violated the JLAs' human right to equality and denied them the human right to a meaningful remedy for the government's human rights violations in excluding the JLAs from the Civil Liberties Act's redress.[101] President Biden acknowledged the United States' role in this JLA injustice in his February 2022 Day of Remembrance annual statement on the World War II Japanese American incarceration – the first such presidential acknowledgment.[102] The President, however, did not undertake or even signal proactive U.S. measures to repair the damage.[103]

As the Black Lives Matter demonstrations revealed to American and international populaces, the United States also avoided full reckoning with the persisting harms of slavery, Jim Crow segregation and continuing

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[96] *Id*. (finding that illegally interned JLAs applied for redress under the Civil Liberties Act of 1988, but the U.S. government denied their claims because they were not citizens or permanent resident aliens at the time of incarceration); s*ee Shibayama*, 55 Fed. Cl. at 739–40.

[97] *See* Yamamoto, *Reluctant Redress*, *supra* note 91, at 134–36; *see generally* Mochizuki v. United States, 43 Fed. Cl. 97 (1999).

[98] *See* Yamamoto, *Reluctant Redress*, *supra* note 91, at 134–36.

[99] *See* YAMAMOTO, CHON, IZUMI, KANG & WU, RACE, RIGHTS AND REPARATION, *supra* note 15, at 343–48 (describing the continuing redress struggle for JLAs); *see generally* Shibayama v. United States, Case 12.545, Inter-Am. Comm'n H.R., Report No. 26/20, OEA/Ser.L/V/II, doc. 36, ¶¶ 23–28 (Apr. 22, 2020) [hereinafter *Shibayama* Merits Report].

[100] *Shibayama* Merits Report, Case 12.545, Report No. 26/20, ¶¶ 23–32.

[101] *See id.*

[102] Press Release, Joseph R. Biden, U.S. President, Day of Remembrance of Japanese American Incarceration During World War II (Feb. 18, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/18/day-of-remembrance-of-japanese-american-incarceration-during-world-war-ii/ (acknowledging "the painful reality that Japanese Latin Americans, who were taken from their Central and South American homes and incarcerated by the United States Government during World War II").

[103] *See id.*

systemic discrimination and violence against Black Americans.[104] The resulting social divisions, acrimony and diminished productivity continue.[105]

Moreover, the United States committed to and then at least partially reneged upon its reconciliation promise to Native Hawaiians.[106] The 1993 Congressional Apology Resolution apologized for the United States' pivotal role in the illegal overthrow of the sovereign Hawaiian nation in 1893 and the ensuing harms to indigenous Hawaiian life, lands and culture.[107] Many of the government's promises for follow up reparative action, though, withered on political vines.[108]

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[104] MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA – 1945–1990 6–11 (2d ed., 1991); WILLIAM A. DARITY & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 207–36 (2020) (discussing racial injustice toward Black Americans even after the abolishment of American slavery over 150 years ago); *see also* YAMAMOTO, CHON, IZUMI, KANG & WU, LAW AND THE JAPANESE AMERICAN INCARCERATION, *supra* note 15, Chapter 7, Part D.

[105] *See, e.g.*, YAMAMOTO, BANNAI & CHON, RACE, RIGHTS AND NATIONAL SECURITY, *supra* note 25, at 83–85 (describing present day, persisting harms and reduced productivity resulting from internalized negative cultural stereotypes).

[106] *See* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993); Rebecca Tsosie, *The BIA's Apology to Native Americans: An Essay on Collective Memory and Collective Conscience*, *in* TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION (Elazar Barkan & Alexander Karn eds., 2006) 185, 199–201 [hereinafter Tsosie, *The BIA's Apology to Native Hawaiians*] (describing the Native Hawaiian reconciliation process following the United States' illegal overthrow of the Hawaiian Kingdom); *see generally* NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapuaʻala Sproat eds., 2015) [hereinafter NATIVE HAWAIIAN LAW: A TREATISE] (describing how the 1993 Apology Resolution "establishe[d] a foundation for reconciliation . . . [but] does not, however, require any particular restorative action or even set forth a process for reconciliation"); *see also* YAMAMOTO, CHON, IZUMI, KANG & WU, LAW AND THE JAPANESE AMERICAN INCARCERATION, *supra* note 14, at 363–66.

[107] *See* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 106, at 41; Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration's Efforts of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. 273, 278 (2017) [hereinafter Andrade, *Legacy in Paradise*] (highlighting that the Apology Resolution "set forth an apology on behalf of the American people for the actions of Americans in supporting and orchestrating the overthrow of the [Hawaiian] Kingdom and called for reconciliatory efforts between Native Hawaiians and the United States").

[108] *See* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 106, at 41; (recognizing that the "Apology Resolution contains strong findings, establishes a foundation for reconciliation, and calls for a reconciliation process. It does not, however, require restorative action or even set forth a process for reconciliation"); Andrade, *Legacy in Paradise*, *supra* note 107, at 278 (spotlighting that though "the time was opportune for true reconciliation" for Native

In failing to follow through and fully address, and in appropriate ways redress, the continuing wounds through generations, the United States' renewed pledge to uplift human rights rings somewhat hollow – potentially eliciting a charge of hypocrisy.[109]

3. The United States' Opportunity to Strengthen Democracy by Assuring That "It" Will Not Happen Again

United States political leadership now possesses an opportunity to partially attenuate a charge of hypocrisy and to strengthen American legitimacy as a democracy.[110] Through engagement with the Jeju 4.3 initiative, the United States would potentially foster an interest-convergence: healing the wounds of those still suffering while endeavoring to live up to human rights precepts of reparative justice.[111] In acting upon its recent recommitment to human rights accountability, the United States would demonstrate acceptance of its

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Hawaiians, that time "quickly dissipated as the political winds shifted and a conservative regime gained control of the federal government"). Notably, however, in October 2022 United States Secretary of the Interior Deb Haaland announced that "[t]he Interior Department is committed to working with the Native Hawaiian Community on a government-to-sovereign basis to address concerns related to self-governance, Native Hawaiian trust resources, and other Native Hawaiian rights." Press Release, Interior Department Announces Development of First-Ever Consultation Policy with Native Hawaiians, U.S. DEP'T OF THE INTERIOR (Oct. 18, 2022), https://www.doi.gov/pressreleases/interior-department-announces-development-first-ever-consultation-policy-native.

[109] *See* Rogin, *The Supreme Court has Undermined U.S. Credibility on Human Rights*, *supra* note 90. Macarena Saez, executive director of the Women's Rights Division at Human Rights Watch, highlighted that the "U.S. is aligned today with those very countries that the U.S. has often criticized for its violation of human rights, including the way in which women and girls are treated . . . . The U.S. is now an outlier in terms of democracies." *See also* Blinken, Human Rights Remarks, *supra* note 81.

[110] FERNANDO R. TESON, HUMANITARIAN INTERVENTION 15–16 (2d ed., 1999) (Fernando Teson, a renowned author on humanitarian intervention, observing that "a government that engages in substantial violations of [civil or] human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well").

[111] *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980) (observing that parties with power tend to repair the damage to vulnerable communities only when doing so uplifts their larger interests). An extension of this thesis "predicts that a society's (and its government's) interest in repairing persisting damage converges with the interest of those harmed when the reparative actions restore or enhance the society's stature as a democracy actually (not just professedly) committed to the rule of law and particularly civil liberties and human rights." YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 237; *see also* Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 67–74 (2007) (articulating how a modified interest-convergence theory offers a strategic approach to compel government actors to join reparative initiatives).

"responsibility to address [its human rights] shortcomings."[112] With the benefits of human rights accountability in mind, Secretary of State Blinken acknowledged in 2022 that "practicing what we preach at home gives us greater legitimacy" as a democracy.[113] Indeed, that kind of human rights accountability is "critical to sustaining healthy democracies" worldwide.[114]

Accountability for U.S. human rights violations on foreign soil, as well as "at home," is also essential to democratic legitimacy.[115] Sarah Yager,[116] Washington director of Human Rights Watch, welcomed the U.S. Human Rights Report, but also highlighted its failure to particularize the United States' international transgressions.[117] She chided the United States government to extend the reach of the U.S. reparative justice commitment to encompass American human rights violations on foreign land.[118]

In sum, the United States' renewed commitment to human rights and reparative justice casts into sharp relief its refusal to participate in the Jeju 4.3 social healing initiative.[119] And, for reasons discussed below, it also opens a pathway for U.S. engagement.

What might that pathway look like practically? *Social healing through justice* often initially entails "a vehicle for cogent historical fact-finding (encouraging official *recognition*) and expansive public consciousness-shifting through intensive political education (for accepting *responsibility*)" – steps often serving as the foundation for affirmative reparative actions

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[112] Blinken, Human Rights Remarks, *supra* note 81.

[113] *Id*.

[114] *Id.*

[115] *See id.*

[116] *Sarah (Holewinski) Yager*, HUM. RTS. WATCH, https://www.hrw.org/about/people/sarah-holewinski-yager (last visited Oct. 10, 2022). As the Washington Director at Human Rights Watch, Yager "leads the organization's engagement with the United States government on global human rights issues." *Id*.

[117] Missy Ryan, *Human Rights and Democracy Eroding Worldwide, U.S. Finds*, WASH. POST (Apr. 12, 2022), https://www.washingtonpost.com/national-security/2022/04/12/state-global-human-rights-report/ (Yager observing that it is "[a]lways a little odd to read about other's human rights abuses as if US had nothing to do with them. e.g. no mention of US support to Saudi [Arabia] in Yemen . . .").

[118] *See id.*

[119] *See* 4.3 INVESTIGATION REPORT, *supra* note 40, at 57–58 (describing the National 4.3 Committee's difficulties in obtaining Jeju-related documents from United States officials); YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, Chapter 10.

(*reconstruction* and *reparation*).[120] That vehicle for the United States might take the form of a multi-layered U.S.-Jeju 4.3 Truth Committee sponsored by the legislative or executive branches;[121] or a U.S. executive branch ad hoc 4.3 task force; or, after internal inquiry, a Congressional decree or a Presidential declaration.[122]

Any of these vehicles, and especially the most logistically simple, a presidential declaration, might recommend as a reparative starting point a meaningful United States apology to Jeju 4.3 survivors and communities.[123] Shaped both by international reparative justice precepts and South Korean cultural norms,[124] an apology would likely mark a cogent step toward comprehensive 4.3 social healing.

In uplifting the United States' commitment to human rights accountability, Secretary of State Blinken implicitly drew upon the international reparative justice principles embodied in the United Nations' "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" ("Basic Principles and Guidelines for Reparation").[125] The Basic Principles and Guidelines for Reparation establish a regime for reparative justice for serious human rights violations – a regime incorporated into the *social healing through justice* framework outlined in Part VI of *Apologies & Reparations I*.[126] The Basic Principles and Guidelines

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[120] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, Chapter 4 (offering a *social healing through justice* framework comprised of the 4Rs – recognition, responsibility, reconstruction and reparation); Chon, *Remembering and Repairing the Error Before Us*, *supra* note 28, at 643 (highlighting that "[i]f the primary purpose of reparations is to repair past harm, then reparations should first include a backward-looking mechanism to remember the harm accurately from the point of view of those harmed and then a forward-looking mechanism to correct past harm that has 'hardened' into present everyday practices").

[121] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 199–203. A proposed U.S.-Jeju 4.3 Truth Committee would resemble the 1980s U.S. congressional commission that investigated the World War II mass incarceration of Japanese Americans (the Commission on Wartime Relocation and Internment of Civilians). *Id*. at 203–06.

[122] *See id*. at 206 (describing each of these potential vehicles for U.S. reparative engagement).

[123] *See id.* at 206–10.

[124] See *infra* Part III.B. for discussion of apologies and Korean cultural norms.

[125] *Basic Principles and Guidelines on Reparation*, *supra* note 18 ("Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.").

[126] *See* Yamamoto and Burns, *Apologies & Reparations I*, *supra* note 1, Part VI.A; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 238–

for Reparation encompass far more than monetary payments for human rights violations victims. To the extent feasible, they aim to restore the physical, emotional and financial well-being of those harmed. Setting forth concrete multifaceted forms of reparation, the Basic Principles and Guidelines for Reparation target *restitution,*[127] *compensation,*[128] *rehabilitation,*[129] *satisfaction*[130] and *guarantees of non-repetition.*[131]

In addressing America's accountability for its human rights "shortcomings"[132] – including its partial responsibility for the Jeju Tragedy – the United States might draw from these forms of reparation in fashioning appropriate justice measures that resonate with the Jeju people.[133] Although some forms of reparation, for instance *restitution*, may be impracticable in light of the passage of time and remedial actions already taken by the South Korean government, *satisfaction*, the broadest reparation form, might offer the most effective path forward.[134]

As conceived by the United Nations Human Rights Commission, *compensation* entails "verification of the facts and full and public disclosure of the truth" and *satisfaction* entails an "official declaration [apology] . . . restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim."[135] The verification of the historical facts coupled with a public apology – key aspects of *compensation* and *satisfaction* – would square with the *reconstruction* tenet of *social healing through justice*

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40 (distilling international human rights precepts of reparative justice); *see generally Basic Principles and Guidelines on Reparation, supra* note 18.

[127] *Basic Principles and Guidelines on Reparation, supra* note 18, ¶ 19 ("Restitution should . . . restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.").

[128] *Id.* ¶ 20 ("*Compensation* should be provided for any economically assessable damage . . . resulting from gross violations of international human rights law and serious violations of international humanitarian law.").

[129] *Id.* ¶ 21 ("*Rehabilitation* should include medical and psychological care as well as legal and social services.").

[130] *Id.* ¶ 22 (listing the measures of "[*s*]*atisfaction*").

[131] *Id.* ¶ 23 (listing the measures of "[*g*]*uarantees of non-repetition*").

[132] Blinken, Human Rights Remarks, *supra* note 81.

[133] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 238–40.

[134] *Basic Principles and Guidelines on Reparation, supra* note 18, ¶ 15 ("Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law.").

[135] *Id.* ¶ 22(d).

(rebuilding relationships through performative apologies, institutional restructuring and creation of a new resonant narrative of the injustice).[136] Through those threshold reconstructive actions, the United States would demonstrate its renewed human rights commitment to repair the damage of past transgressions.[137] And as developed below, an appropriate U.S. public apology to the Jeju people might well ignite final steps in the 4.3 social healing initiative.

Moreover, *guarantees of non-repetition*, another form of reparation, conveyed as a part of an apology, may prove to be pivotal in light of compelling U.S. geopolitical challenges and rising tensions in Asia and beyond.[138] An apology proactively conveying a *guarantee of non-repetition* reflects the *reconstruction* tenet's commitment to alter institutions and public understandings so that past military or national security power abuses will not be replicated in the future – so that "it" will not happen again to anyone.[139] *Guarantees of non-repetition* include "[p]romoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises."[140]

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[136] *Reconstruction* includes rebuilding relationships through performative apologies, institutional restructuring and creation of a new resonant narrative of the injustice. Eric K. Yamamoto, Rachel Oyama & Katya Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions: A Key Next Step Toward Comprehensively and Enduringly Healing Persisting Wounds of Injustice*, 8 WORLD ENV'T & ISLAND STUD. 181, 183 (2018) [hereinafter Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*] ("Reconstruction strives to build and sustain new productive relationships, generating over time a grounded sense of justice achieved. Reconstructive acts might include genuine apologies engendering a measure of forgiveness."); *see also* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 153–71, 185–90 (2000) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE].

[137] *See* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 183*; see also* Natsu Taylor Saito, *Redressing Foundational Wrongs*, 51 U. TOL. L. REV. 13, 31 (2019) [hereinafter Saito, *Redressing Foundational Wrongs*]. Professor Saito observed that "in the struggle for reparations, we are not asking for redress from the state because it would be the moral or politically correct thing to do (though we may also be making that claim); we are asking for compliance with the rule of law" and the United States has long promoted itself as a champion of the global rule of law. *Id.*

[138] *See Basic Principles and Guidelines on Reparation*, *supra* note 18, ¶¶ 18, 23.

[139] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 227 (discussing how "restructuring could target human rights protections for Jeju civilians to assure the populace that 'it' would not happen again").

[140] *Basic Principles and Guidelines on Reparation*, *supra* note 18, ¶ 23(f).

Commitment to *non-repetition* is especially significant for Jeju communities in light of the decade-long controversy over the Jeju Naval Base construction.[141] In 2005 the South Korea government named Jeju as the "Island of World Peace."[142] Yet, "with the recently completed naval base on Jeju [partially on 4.3 land], peace on the island appeared to be illusive."[143] The Jeju Naval base – for apparent partial United States usage – "strengthen[ed South Korea's] ability to counter North Korea's miscalculations and further enable[d] its access to the open seas."[144] But its construction in the face of strident resident opposition failed "to address the grievances of those who live there."[145] Gyung-Lan Jung, Chairperson of South Korea's Women Making Peace Commission, captured the "inflamed Jeju survivors, descendants and human rights supporters' sense of 4.3 injustice,"[146] proclaiming,

> Jeju still has the memory of the massive state violence of 4.3 . . . . Even now 60 years on, the people of Jeju Island who lost members of their families and have been living with

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[141] John Lasker, *US Seeks to Establish Naval Base on Jeju Island in Spite of Protests*, TOWARD FREEDOM (Oct. 18, 2011), https://towardfreedom.org/story/archives/asia-archives/us-seeks-to-establish-naval-base-on-jeju-island-in-spite-of-protests/; *see also* Gyung-Lan Jung, *Korean Women Want Nature Instead of Naval Base on Jeju Island*, WOMEN NEWS NETWORK (June 14, 2011) [hereinafter Jung, *Korean Women Want Nature Instead of Naval Base on Jeju Island*], https://womennewsnetwork.net/2011/06/14/korea-women-naval-base-jeju/; Chang Hoon Ko et al., *Jeju Governance of World Heritage*, 2 WORLD ENV'T. & ISLAND STUD. 25, 44 (2012) (recognizing other potential consequences of the naval base construction including the "threat to biodiversity and general welfare of Gangjeong Village, one of the last living remnants of traditional Jeju culture").

[142] Anne Hilty, *Island of Peace? The Peace Culture of Jeju*, JEJU WKLY. (Apr. 10, 2011) [hereinafter Hilty, *Island of Peace? The Peace Culture of Jeju*], http://www.jejuweekly.com/news/articleView.html?idxno=1437.

[143] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 227; *see* Hilty, *Island of Peace? The Peace Culture of Jeju*, *supra* note 142; *see generally* Kath Rogers & Kaimipono David Wenger, *Environmental Justice Reparations for Jeju Island*, 7 WORLD ENV'T & ISLAND STUD. 95 (2017) [hereinafter Rogers & David, *Environmental Justice Reparations for Jeju Island*].

[144] Young-jin Oh, *New Naval Base*, KOREA TIMES (Feb. 29, 2016), https://www.koreatimes.co.kr/www/opinion/2022/07/202_199213.html.

[145] *Id*.; s*ee also* Rogers & David, *Environmental Justice Reparations for Jeju Island*, *supra* note 143, at 99 ("Critics of the [naval] base cite threats to Jeju's biodiversity, displacement of communities, as well as the disruption of culture and the local economy.").

[146] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 228–29.

> grief for years are not able to raise their voices, and their bitterness cannot be brushed away. However, the new form of massive state violence in the form of the naval base is threatening our lives and peace.[147]

Because the United States refrained from engaging in the 4.3 reconciliation initiative, and because it never acknowledged its serious abuse of military authority during 4.3, the naval base construction "reignited fears of human rights abuses among some Jeju residents."[148] In the event of conflict with North Korea or China,[149] and without human rights assurances of non-repetition, 4.3 survivors and others remained apprehensive about whether U.S. military abuse could happen again in some modern form.[150]

These compelling present-day concerns, linked to the history of 4.3, underscore the importance of a U.S. public apology that conveys, among other things, a commitment to institutional structures aimed at preventing recurrence.[151] With its embrace of human rights precepts of reparative justice, the United States is now tethered to the reparative precept of *satisfaction* (including a public apology) that incorporates a *guarantee of non-repetition* and *reconstruction.*[152]

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[147] Jung, *Korean Women Want Nature Instead of Naval Base on Jeju Island*, *supra* note 141.

[148] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 229; *see also* Chang Hoon Ko et al., *Global Governance of Jeju World Heritage*, 2 WORLD ENV'T. & ISLAND STUD. 25, 44 (2012).

[149] Noam Chomsky, *US Military Base in South Korea Threatens China: The Threat of Warships on an "Island of World Peace,"* GLOBAL RES. (Oct. 8, 2011), https://www.globalresearch.ca/us-military-base-in-south-korea-threatens-china-the-threat-of-warships-on-an-island-of-world-peace/26986 (cautioning that the Jeju Naval base project is naturally seen by China "as a threat to its national security . . . [and] is likely to trigger confrontation and an arms race between South Korea and China, with the U.S. almost inevitably involved").

[150] *See id.*; John Lasker, *US Seeks to Establish Naval Base on Jeju Island in Spite of Protests*, TRANSCEND MEDIA SERV. (Oct. 24, 2011), https://www.transcend.org/tms/2011/10/us-seeks-to-establish-naval-base-on-jeju-island-in-spite-of-protests/ (discussing protests against the Jeju island naval base and subsequent arrests and police harassment).

[151] Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 182 (describing the "salience of changes in institutional structures" to prevent the recurrence of injustice).

[152] *See* Blinken, Human Rights Remarks, *supra* note 81 ("The universal nature of human rights also means that we [the United States] have to hold ourselves accountable to the same standards [of international human rights regimes]."); *see also Basic Principles and Guidelines on Reparation*, *supra* note 18, ¶¶ 18, 23 (including guarantees of non-repetition as part of the reparation process). Rabbi Lynn Gottlieb prescribes similar dimensions of social healing for serious human rights violations. Lynn Gottlieb, Comment to *The Feminist Revolution*, JEWISH WOMEN'S ARCHIVE, https://jwa.org/feminism/gottlieb-lynn (last visited Oct. 17, 2022). In

Through these threshold reparative actions benefitting Jeju communities, the United States would also strengthen America's legitimacy as a democracy actually, rather than merely professedly, committed to the rule of law.[153] And as developed below, both the Basic Principles and Guidelines on Reparation[154] and the *reconstruction* tenet of *social healing through justice* speak to the significance of a resonating culturally-attuned apology.[155]

B. *United States Apologies for Its Role in Other Human Rights Transgressions*

To grapple with the significance of a potential U.S. apology to Jeju communities, and how it might operate practically, a glimpse of past United States apologies for its human rights transgressions offers a rough template.[156]

1. *The United States Congressional and Presidential Apology to Incarcerated Japanese Americans*

Upon Congress' passage of the Civil Liberties Act of 1988, President Ronald Reagan formally apologized to Japanese Americans incarcerated

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light of the "massive harms of colonial settlerism, racism, patriarchy, environmental destruction and, in the Jewish world, Israeli occupation," the rabbi interpreted Maimonides 12th century Teshuvah – a five step process carrying the meaning of "return to wholeness through acts of repair." Lynn Gottlieb, *Making Reparations after Churban*, T'RUAH (Aug. 2, 2022) [hereinafter Gottlieb, *Making Reparations after Churban*], https://truah.org/resources/lynn-gottlieb-tisha-bav-moraltorah/.

[153] *See Basic Principles and Guidelines on Reparation*, *supra* note 18; Saito, *Redressing Foundational Wrongs*, *supra* note 137, at 13, 31; *see also* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 182 (recognizing that reconstructing social, economic and political institutions "build[s] democratic checks and balances into exercises of government power").

[154] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 285 (highlighting that the "U.N.'s basic principles of human rights reparative justice recognize formal apologies as an important mode for achieving 'satisfaction' in rectifying human rights violations"); *see generally Basic Principles and Guidelines on Reparation*, *supra* note 18.

[155] *See infra* Part III.C. for a more robust discussion on the significance of a genuine, culturally-attuned apology.

[156] *See generally* Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUSTICE 47, 68 (1997) [hereinafter Yamamoto, *Race Apologies*] (providing a "glimpse of the national and international proliferation of race apologies" after the mid-1990s work of South Africa's Truth and Reconciliation Commission).

during World War II.[157] President George H.W. Bush followed in 1991, apologizing by personal letter to every survivor.[158] Bush acknowledged that though the United States "[could] never fully right the wrongs of the past," it desired to "take a clear stand for justice [to] recognize that serious injustices were done to Japanese Americans during World War II."[159] In "calling for restitution and offering a sincere apology," the nation "renewed [its] traditional commitment to the ideals of freedom, equality, and justice."[160]

The Presidents' apologies, catalyzed by the *Korematsu*, *Hirabayashi* and *Yasui* coram nobis litigation, the Congressional Commission's investigation and grassroots organizing, spoke to the persisting decades-long trauma and energized an intergenerational social healing process.[161] Congress followed up by appropriating substantial, yet symbolic, monetary reparations ($20,000) for each survivor and funding public education projects aimed at an accurate recounting of history to prevent this kind of civil and human rights transgression from recurring on U.S. soil or elsewhere.[162]

For the Japanese American incarceration survivors, the presidential and congressional apologies, buttressed by monetary reparations, marked long-awaited progress in healing emotional, economic and cultural wounds.[163] The apologies also served converging Japanese American and United States

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[157] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (codified at 50 U.S.C. §§ 4211–20 (1996)); Yamamoto, *Race Apologies*, *supra* note 156, at 68.

[158] Letter from George H. W. Bush, U.S. President, to surviving Japanese American incarceration internees (Oct. 1990) [hereinafter Letter from U.S. President], https://www.digitalhistory.uh.edu/active_learning/explorations/japanese_internment/bush.cfm; *see* YAMAMOTO, BANNAI & CHON, RACE, RIGHTS AND NATIONAL SECURITY, *supra* note 25, at 347.

[159] Letter from U.S. President, *supra* note 158.

[160] *Id.*

[161] YAMAMOTO, CHON, IZUMI, KANG & WU, RACE, RIGHTS AND REPARATION, *supra* note 15, at 343–50; *see* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 188–89.

[162] YAMAMOTO, CHON, IZUMI, KANG & WU, RACE, RIGHTS AND REPARATION, *supra* note 15, at 343–50.

[163] *Id.* at 348–49; *see* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 188–89. Japanese American incarceration survivor Amy Iwasaki Mass recounted, "[t]he pain, trauma, and stress of the incarceration experience was so overwhelming we used the psychological defense mechanism of repression, denial, and rationalization to keep us from facing the truth." Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L. J. 5, 17 (2009). For 40 years, another survivor could not speak of the mass incarceration. But the successful coram nobis court challenges and prospects for redress "freed [her] soul[.]" Eric K. Yamamoto, *Friend, or Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INTL'L L. & POL'Y 223, 227 (1992) [hereinafter Yamamoto, *Friend, or Foe or Something Else*].

interests – a measure of healing for those suffering for decades while bolstering U.S. legitimacy as a democracy at the crucial moment it worked to tear down the Iron Curtain, showing that a viable democracy admits its transgressions and repairs the damage.[164]

In a parallel fashion, in 2018 President Moon Jae-in rejuvenated South Korea's commitment to healing the 4.3 wounds. He extended "sincere condolences" to the "people of Jeju, surviving victims and bereaved families who voiced the pain and truth about the April 3 (uprising)."[165] His profound apology promised a "complete resolution" by "implement[ing] Government measures to heal the wounds and pain of the victims."[166] By apologizing again for its government's responsibility for 4.3 carnage and triggering additional reparative acts of reconstruction, South Korea actively advanced the Jeju 4.3 social healing initiative – actualizing its commitment as a democracy to human rights.[167]

What remained missing in President Moon's powerful apology was mention of the United States' partial responsibility for the 4.3 carnage.[168] As detailed earlier, despite the expressed calls for U.S. participation by families,

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[164] *See* Yamamoto, *Friend, or Foe or Something Else*, *supra* note 163, at 223, 231 (identifying that "reparations enabled decisionmakers to enhance somewhat the United States' image as a country committed to human rights"). After years of delayed justice for Japanese American World War II incarceration survivors, meaningful redress finally materialized during a pivotal point in the Cold War. The United States belatedly admitted their historic human rights transgressions to uplift itself as a democracy, signaling that democracy was superior to communism. *See id.*

[165] He-suk Choi, *Moon Apologizes for State Oppression in Jeju*, KOREA HERALD (Apr. 3, 2018); *see* Rahn Kim, *Moon Vows Fact-Finding for Jeju Massacres*, KOREA TIMES (Apr. 3, 2018) [hereinafter Kim, *Moon Vows Fact-Finding for Jeju Massacres*], https://www.koreaherald.com/view.php?ud=20180403000639.

[166] Jae-in Moon, Remarks by President Moon Jae-in at a Memorial Ceremony in Honor of Victims of the Jeju April 3 Incident (Apr. 3, 2018) [hereinafter Moon, *Remarks at Memorial Ceremony*], https://www.korea.net/Government/Briefing-Room/Presidential-Speeches/view?articleId=156640.

[167] *See* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 187 (assessing President Moon's 2018 Apology as "part of efforts to resume (or continue) steps toward enduring social healing").

[168] *See id.* ("[A]s the [South Korean] president's words indicated, and as journalists, artists and community advocates have demonstrated, comprehensive and enduring 4.3 social healing still remains 'unfinished business.'"); Moon, *Remarks at Memorial Ceremony*, *supra* note 166.

advocates, researchers and scholars, the United States' total absence from the reparative process hovered as a ghost haunting Jeju 4.3 social healing.

2. *United States International Law Apologies*

In the recent past, the United States formally apologized for its agency's violation of non-U.S. citizens' human rights off U.S. soil – similar in that respect to the Jeju 4.3 Tragedy. In the 1940s the U.S. Public Health Service studied the progression of deadly sexually transmitted diseases by intentionally infecting and withholding treatment from hundreds of unwilling Guatemalans, including many institutionalized men.[169] The United States Public Health Service shielded these human rights violations from public view until 2010 when President Barack Obama and Secretary of State Hillary Clinton finally authorized an investigation into the horrific abuse. They subsequently issued a joint U.S. apology to acknowledge the enduring physical and emotional harm to foreign nationals in their homeland and further committed the United States to just medical-ethical standards to obviate future health-research travesties in America and abroad.[170]

Congressional acknowledgement of U.S. responsibility might also engender an appropriate apology and reparative action. In 1993 Congress passed the Native Hawaiian "Apology Resolution" signed by President Bill Clinton.[171] The Resolution apologized for the United States' role in the 1893

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[169] Donald G. McNeil Jr., *U.S. Apologizes for Syphilis Tests in Guatemala*, N.Y. TIMES (Oct. 1, 2010), https://www.nytimes.com/2010/10/02/health/research/02infect.html (discussing the Guatemalans forcibly infected with deadly sexually transmitted diseases through prostitutes, spinal injections and artificial wounds).

[170] *Id.* Beginning in 1932, the United States also violated human rights on U.S. soil through the Tuskegee "experiment." The U.S. Public Health Service harnessed hundreds of Black male subjects for syphilis research. The USPHS "actively deceiv[ed] the men into think[ing] that they were being treated," while withholding curative treatment. SUSAN M. REVERBY, EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY 51 (Waldo E. Martin Jr. & Patricia Sullivan, eds., 2009). In response to mounting condemnation – after the study remained hidden from the public for decades – the U.S. Department of Health, Education and Welfare established the Tuskegee Syphilis Ad Hoc Advisory Panel. U.S. PUB. HEALTH SERV., FINAL REPORT OF THE TUSKEGEE SYPHILIS STUDY AD HOC ADVISORY PANEL (1973). Based on its inquiry and U.S. Senate hearings, the study participants settled a class-action lawsuit with the U.S. government for $10 million and lifetime medical benefits for all living subjects. In 1997, twenty-three years after the lawsuit, President Bill Clinton issued a formal public apology and committed the United States to reconstructive efforts in bioethics. *The U.S. Public Health Service Syphilis Study at Tuskegee*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tuskegee/index.html (last updated Nov. 3, 2021).

[171] Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993); *see* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 106, at 41; Andrade, *Legacy in Paradise*, *supra* note 107, at 278, 308 ("Congress specifically granted the President authority to reconcile with Native Hawaiians."); Yamamoto, *Race Apologies*, *supra* note 156, at 68.

illegal overthrow of the sovereign Kingdom of Hawai'i – a violation of international law – and for the persisting harms to Native Hawaiian people, land and culture. It also committed the United States to acts of reconciliation.[172]

III. A POTENTIAL UNITED STATES APOLOGY FOR ITS ROLE IN THE JEJU 4.3 TRAGEDY

Employing any one of the reparative justice vehicles just mentioned, United States engagement with the 4.3 reparative initiative would likely begin with an inquiry into the events and present-day consequences of Jeju 4.3 and an assessment of appropriate responsibility. It might start with scrutiny of the South Korea National 4.3 Investigative Committee's extensive findings and recommendations.

A formal U.S. apology might well emerge from that inquiry as an impactful reparative step.[173] While dependent on the dynamics of domestic culture and international politics, a resonant apology might prove to be the simplest and most "immediately realistic"[174] demonstration of the United States' acceptance of appropriate responsibility for healing the Tragedy's persisting wounds.

A. *Cross-Cultural Views of Apologies*

A multidisciplinary glimpse at the value of apologies sheds light.[175] Varying disciplines highlight a genuine apology as an affirmative step toward social healing.[176] Cross-cultural social-psychological studies reveal that

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[172] Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993); *see* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 106, at 41; Andrade, *Legacy in Paradise*, *supra* note 107, at 278, 308.

[173] *See generally* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 182 (highlighting the significance of formal apologies for those still suffering from the 4.3 events); *see also* MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 3–4 (2019) (examining when legal officials and institutions can and should promote forgiveness).

[174] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 207 (acknowledging that a proposed U.S.-Jeju 4.3 Truth Committee may be too multifaceted).

[175] *See* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 193–98 (discussing the diverse cultural perceptions of apologies embedded in the American and Japanese legal systems). This article's glimpse at diverse disciplines' treatment of apologies provides only a very general overview, without attention to nuance or development.

[176] *See* GEIKO MUELLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION 5, 25 (1997); Joseph V. Montville, *The*

when sincere, the act of apologizing bears significant remedial value for a damaged relationship.[177] Political science peace studies also stress "the importance of group apologies for redressing human rights abuses."[178] Christian and Buddhist theological precepts recognize an expression of contrition as an opening path to reconciliation.[179] And Jewish theology, through *teshuvah*,[180] recognizes that an apology – encompassing the acknowledgment of harms (*hakarah*), remorse (*charata*), promise of compensation (*peira'on*), public truth telling and guarantees of non-repetition of the harm (*azivat ha-chet*) – bears the potential to "complete . . . the satisfaction of injured parties."[181] Psychology of Religion studies reveal that Islam theology, too, values an apology "as a basic requirement for forgiveness" and rebuilding damaged relationships.[182]

Healing Function in Political Conflict Resolution, *in* CONFLICT RESOLUTION THEORY AND PRACTICE INTEGRATION AND APPLICATION 112–17 (Dennis J. D. Sandole & Hugo van der Merwe eds., 1993) (discussing the healing function in political conflict resolution). For instance, for Native communities suffering from historical trauma, an apology may well facilitate the process of healing. In 2000 Department of the Interior Assistant Secretary of Indian Affairs Kevin Gover extended "a formal apology to Indian people for the historical conduct of this agency." Tsosie, *The BIA's Apology to Native Hawaiians*, *supra* note 106, at 186. This apology, that "clearly acknowledge[d] the painful history and contemporary injustices that the Native people suffer." *Id.* at 197. As related to social healing, it "opened the door to an intercultural dialogue on reconciliation, and thus, started the process of healing." *Id.* at 207. *See also* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 153–71 (discussing the four dimensions in interracial justice).

[177] *See* Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States,* 20 L. & SOC'Y REV. 461, 461 (1986) [hereinafter Wagatsuma & Rosett, *The Implications of Apology*] (describing Japanese and American cultural differences and their effects on approaches to legal dispute resolution).

[178] *See* Mark O'Keefe & Tom Bates, *Sorry About That*, PORTLAND OREGONIAN, July 23, 1995, at F1 [hereinafter O'Keefe & Bates, *Sorry About That*].

[179] *See* Rebecca French et al., *Law, Buddhism and Social Change: A Conversation with the 14th Dalai Lama*, 55 BUFFALO L. REV. 635, 732 (2007); *see also* Alex Hudson, *Can Forgiveness Ever be Easy*, BBC NEWS (Apr. 22, 2011). For some Christian believers, forgiving those who harmed them can be a first step toward meaningful healing. *See* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 185; *see also Karma*, BBC NEWS (Nov. 17, 2009). At least one branch of Buddhism broadly parallels this approach. *See* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 191–98 (identifying forgiveness as a most powerful response to an appropriate and complete apology accompanied by some meaningful form of reparations).

[180] A Jewish reparations framework that "carries the meaning of return to wholeness through acts of repair." Gottlieb, *Making Reparations after Churban*, *supra* note 152.

[181] *See id.*

[182] Etienne Mullet & Fabiola Azar, *Apologies, Repentance, and Forgiveness: A Muslim-Christian Comparison*, 19 INT'L. J. FOR PSYCH. RELIGION 275, 277 (2009) (assessing

Nicolas Tavuchis' sophisticated sociological study – intersecting philosophy, sociolinguistics, social psychology, anthropology, philology, law and religion – affirmed the cross-cultural healing power of apologies as responses to group-based grievances.[183] His study describes an apology's potential to restore group membership[184] which "depends on validation by other community members."[185] Unless collectively addressed, immediate "conflicts and underlying grievances"[186] retain the potential for severing community relationships.[187]

According to Tavuchis, to fix the shattered relational glass, an apology appropriately starts with "a call for urgent remembering and for an expression of regret" and then seeks forgiveness for the harmful acts of the past. It may then begin to heal the specific relationships within the group as well as the community as a whole.[188] Especially in more collectivist cultures,[189] group harmony – that is forward-looking and relationally-directed – weighs more heavily in healing significance than claims of individual rights.[190] An apology aimed at salving the wounds of individuals and repairing tears in the communal fabric is "a special kind of enacted story whose remedial potential . . . stems from the acceptance by the aggrieved party of [the other's sincere] admission of iniquity" and openness to reparative action.[191]

With these views broadly in mind, a genuine United States apology to the Jeju 4.3 victims and descendants, and to the larger Jeju community, would likely mark a major social healing step.[192] It would be especially poignant in

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repentance and apologies, as factors of forgiveness, for Lebanese Muslim, Lebanese Christian and French Christians).

[183] NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 8 (1991) [hereinafter TAVUCHIS, MEA CULPA].

[184] *Id.*

[185] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 191; *see generally* TAVUCHIS, MEA CULPA, *supra* note 183.

[186] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 191; *see generally* TAVUCHIS, MEA CULPA, *supra* note 183.

[187] *See generally* TAVUCHIS, MEA CULPA, *supra* note 183.

[188] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 191; *see generally* TAVUCHIS, MEA CULPA, *supra* note 183.

[189] *See infra* Part III.B. for more discussion on the significant healing potential of apologies in collectivist cultures.

[190] *See* O'Keefe & Bates, *Sorry About That*, *supra* note 178.

[191] *Id*.

[192] Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 182 (highlighting the

light of the United States' total 4.3 silence to date. It bears acknowledging, though, that the American conflict resolution ethos tends to undermine apologies, principally as legal remedies.[193] A cross-cultural social-psychological study revealed that some Americans hold a salutary view of apologies while others tend to view apologies as unnecessary self-expressions.[194] This latter view derives in part from the American legal system's general translation of psychic hurts into losses compensable by monetary payments. If a party to a legal conflict in America were "to seek an apology . . . as part of the settlement of a serious dispute, such an apology would probably be perceived as either insincere, personally degrading, or obsequious."[195] An apology for social transgressions, though, removed from the formal legal setting, sometimes galvanizes a healing process.[196]

In comparison, generally cast, a sincere apology in Asian countries often possesses strong healing potential.[197] One explanation for the differing approaches rests on how "culture affects notions of [an] apology."[198] In 2011 scholars from France, Japan and the United States undertook a cross-cultural study into the import of apologies.[199] They concluded, "an apology in one cultural context can have very different functions, meanings, and consequences in another culture, and can exacerbate or ameliorate conflict depending on whether [the apology is] conveyed and interpreted appropriately."[200]

"significance of formal apologies for those still suffering from the wrongful mass military tribunal convictions and imprisonment during 4.3 events").

[193] Wagatsuma & Rosett, *The Implications of Apology*, *supra* note 177, at 465 (researching the significance of apologies for American and Japanese people).

[194] *Id.* at 462 (finding that expressions of contrition are often unnecessary for Americans because they tend to rely on legal adjudication and court pronouncements to determine rights and duties).

[195] *Id.*

[196] *See* Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1, 52 (2005) [hereinafter Lee, *The Law and Culture of the Apology*], (addressing the impact of an apology in South Korean, Japanese and American civil dispute settlement, drawing from past U.S.-Japan comparative studies); YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 153–71.

[197] Wagatsuma & Rosett, *The Implications of Apology*, *supra* note 177, at 492–96.

[198] Lee, *The Law and Culture of the Apology*, *supra* note 196, at 10 (quoting V. LEE HAMILTON & JOSEPH SANDERS, EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES 46 (1992) (the "[a]pology, and the role it plays in dispute resolution, is best understood as a part of a society's culture.").

[199] William Maddux, Peter Kim, Tetushi Okumura, & Jeanne Brett, *Cultural Differences in the Function and Meaning of Apologies*, 16 INT'L. NEGOT. 405, 406 (2011) (discussing the import of apologies for resolving disputes and repairing trust).

[200] *Id.* at 420.

In some East Asian cultures, for example, Confucianism pervades social and political ideology.[201] Professor and South Korean Judge Sang Hyun Song observed that Confucianism "molded the minds and behaviors of the people in . . . Korea and Japan for many centuries."[202] Explaining that subtle yet significant effect, Professor Edward T. Hall's study observed that Confucian beliefs influence how people perceive information.[203] In more high-context communication cultures, including Japan and South Korea, communication remains less direct and information-laden because of an emphasis on values of group harmony and stability in interpersonal relationships and an expectation of a shared knowledge-base.[204] In these cultures, a sincerely conveyed apology might at times "carry with it the implied presence of unspoken elements" that signal contrition and forthcoming reparative acts, with brief words and gestures initiating the "healing function."[205] A culturally-attuned apology might tap subtly, yet meaningfully, into those "unspoken elements."

By contrast, in low-context communication cultures like the United States, the transmitted message itself bears most – if not all – information conveyed.[206] This communication difference explains in part why an apology in East Asian cultures, which infuses the broader cultural context and relational understandings, might possess healing potential beyond the bare words conveyed or an unadorned offer of monetary payment.[207]

For instance, with a high-context ethos at play, Japanese society tends to emphasize harmonious relationships and conciliation.[208] Professors Hiroshi Wagatsuma and Arthur Rosett maintained that those cultural values explain the "Japanese tendency to apologize when one's actions have resulted in the

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[201] *See* Lee, *The Law and Culture of the Apology*, *supra* note 196, at 17–18.

[202] *See id.* (quoting INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA 43 (Sang Hyun Song ed., 1983)); *see also* EDWARD T. HALL, BEYOND CULTURE 79 (1976).

[203] *See* Lee, *The Law and Culture of the Apology*, *supra* note 196, at 10–11. Professor Edward T. Hall, an American anthropologist, studied cultural differences in communication. *Id.*

[204] *See id.*

[205] *Id.* at 9, 12 (quoting Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1139 (2002)).

[206] *See id.* at 10.

[207] *See id.*

[208] *See, e.g.*, RICHARD D. LEWIS, WHEN CULTURES COLLIDE: MANAGING SUCCESSFULLY ACROSS CULTURES 81–83 (1999).

significant injury of another."[209] In recognizing that the "apology is an important ingredient in resolving conflict,"[210] the Japanese dispute resolution system values "repairing harm to both the relationship and the social order" more than monetary compensation.[211] At times an apology alone is enough. And, conversely, an "offer to compensate or accept punishment without an apology is considered insincere."[212]

B. *South Korean Apologies*

The South Korean conflict resolution culture, too, "may well prefer an apology" to the individual and the community as a reparative remedy.[213] According to researchers, South Korean ideology, rooted in Confucianism, generally emphasizes group harmony and collectivism,[214] placing less value on self-autonomy and individual preferences.[215] This emphasis underscores the frequency and gravity of apologies in South Korean society.[216]

In 2002, for example, a South Korean politician sought an apology from the United States President after a U.S. armored vehicle crushed two South Korean girls to death.[217] The public remained dissatisfied with U.S. military officers' and diplomats' perfunctory apologies.[218] Two weeks later, the continuing uproar compelled President George W. Bush to express "deep

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[209] Lee, *The Law and Culture of the Apology*, *supra* note 196, at 1–2 (recognizing that the "Japanese legal institutions have reinforced the societal use of the apology and integrated it into their justice system"); *see* Wagatsuma & Rosett, *The Implications of Apology*, *supra* note 177, at 461–62.

[210] Wagatsuma & Rosett, *The Implications of Apology*, *supra* note 177, at 493.

[211] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 194; *see also* Wagatsuma & Rosett, *The Implications of Apology*, *supra* note 177, at 478–88 (describing the stark cultural differences between the impact of apologies in the American and Japanese legal systems).

[212] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 193–94.

[213] Lee, *The Law and Culture of the Apology*, *supra* note 196, at 52.

[214] HARRY C. TRIANDIS, INDIVIDUALISM AND COLLECTIVISM 2 (1995) (defining collectivism as "a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, co-workers, tribe, nation) . . . [and] are willing to give priority to the goals of these collectives over their own personal goals . . . [to] emphasize their connectedness to members").

[215] *See id.*

[216] *See* Lee, *The Law and Culture of the Apology*, *supra* note 196, at 24; *see also* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 190 (recognizing that "delivering a sincere, official apology to the individual [Jeju] petitioners . . . would be a vital piece of this remedy – the continuing reparative justice effort").

[217] *See* Min-Ku Kim, *Civic Groups Shun Demanded US Apology*, CHOSUN ILBO (Nov. 27, 2002), http://english.chosun.com/w21data/html/news/200211/200211270037.html.

[218] *See id.*

sadness and regret" to the President of South Korea[219] – belatedly fostering a measure of social healing for the girls' families and the nation as a whole.[220] Similarly, as mentioned, President Moon's "profound apology" to the Jeju people in April 2018 helped revitalize the 4.3 social healing initiative, energizing the push for broadscale reparations.[221] In squarely facing the painful history of the Jeju Tragedy, Moon's renewed commitment to 4.3 social healing emphasized the salience of "reconciliation[,] . . . peace and human rights" for Jeju residents and the South Korean nation.[222]

Further illuminating the import of apologies for social healing in South Korea, cross-culture researcher and Professor Ilhyung Lee found that South Korea culturally "is deeply influenced by [the same] Confucian ethics . . . that have shaped the frequent use of the apology in Japan."[223] He also determined that its "legal system is [] in transition regarding the treatment of the apology"[224] – now reflecting a narrower, more American conceptualization of the apology. This preliminary finding, though, remained specific to legal system apologies and did not undermine the socio-cultural significance of political apologies in South Korea, particularly for large-scale injustice.

Even with differences in how American and South Korean cultural systems conceptualize and perceive the impact of apologies, generally speaking, two key cross-cultural commonalities emerge. First, a genuine apology bears significance for ameliorating social or political controversies.[225] Second, apologies are complex, and an apology will likely

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[219] *Bush Apologizes to Koreans for Killing of 2 Girls by G.I.'s*, N.Y. TIMES (Nov. 28, 2002), https://www.nytimes.com/2002/11/28/world/bush-apologizes-to-koreans-for-killing-of-2-girls-by-gi-s.html.

[220] Lee, *The Law and Culture of the Apology*, *supra* note 196, at 3–5 (discussing how President Bush's apology illustrated "the Korean understanding of the apology in situations where a member of the society suffers harm of injury as a result of the actions of another").

[221] Moon, *Remarks at Memorial Ceremony*, *supra* note 166.

[222] *Id.*

[223] Lee, *The Law and Culture of the Apology*, *supra* note 196, at 52. Professor Lee conducted a survey on a small sample of nine attorneys and seven judges. *Id*. at 35. The survey results are more anecdotal than empirical – given the small sample size – but are nevertheless illuminating. *See id.* at 35–37.

[224] *Id.* at 52.

[225] *See generally* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 136, at 191–98; *see also Basic Principles and Guidelines on Reparation*, *supra* note 18, ¶ 22(e). The human rights reparative justice regime, emanating from the United Nations' Basic Principles for Reparation, highlights a "public apology" as a key to the *satisfaction* principle. *See id*.

be most effective when it infuses cultural norms and values[226] and is shaped by social healing principles.[227]

C. *Prospects for a United States 4.3 Apology*

Pressing geopolitical challenges admittedly pose barriers to a formal U.S. apology.[228] Yet, the United States' renewed commitment to human rights uplifts a strong U.S. interest in engaging in the final stages of the 4.3 reparative justice initiative – not only in doing what is morally "right,"[229] but also in re-instilling national and global confidence in the United States as a leading democracy committed to the rule of law.[230]

In 2018 Professor Eric K. Yamamoto and researchers Rachel Oyama and Katya Katano surmised that the Jeju 4.3 survivors' and the Jeju communities' *han*,[231] or enduring pain, could "last forever" if unredressed, damaging United States-Korea relations.[232] Their research revealed that meaningful redress for the Jeju people might emerge first in the form of a "sincere and complete" United States apology.[233] A resonant apology to the survivors and Korean public would "accept[] [appropriate] responsibility for the injustice, and . . . lay[] the foundation for forgiveness and for building a productive new relationship"[234] – all providing an "opportunity for redemption for past wrongs."[235] In 2022 Jeju survivors voiced again a strong desire for a meaningful U.S. apology with Ko Wan-Soon declaring, "I don't need any

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[226] Lee, *The Law and Culture of the Apology*, *supra* note 196, at 52–53.

[227] Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 191 (highlighting "an apology incorporating social healing through justice principles could potentially foster comprehensive and enduring Jeju 4.3 social healing – as the U.S. presidential apology for the World War II mass incarceration similarly did for Japanese Americans").

[228] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 206 (envisioning "U.S. 4.3 engagement will depend in part on the domestic political climate, geopolitical dynamics in Asia and American's global stature on matters of international security").

[229] *See id.* at 206, 245.

[230] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, Chapter 12.

[231] BOO-WOONG YOO, KOREAN PENTECOSTALISM: ITS HISTORY AND THEOLOGY 221 (1988) (describing Han as a "feeling of unresolved resentment against injustices suffered, a sense of helplessness because of the overwhelming odds against one, a feeling of total abandonment, a feeling of acute pain in one's guts and bowels making the whole body writhe and squirm, and an obstinate urge to take revenge and to right the wrong – all these combined").

[232] Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 184.

[233] *Id.* at 185.

[234] *Id.*

[235] *Id.* at 190.

money after all this time. The massacre happened when I was 9. I'm 83 now. What I need is a truthful human apology, a willingness to come and hold my hands."[236]

Initiated by words of acknowledgement, this kind of "truthful human apology" would likely entail corresponding "promises of actions to repair the damage" and to assure against future recurrence.[237] To the extent appropriate – and while reflecting social healing principles of mutual engagement, acceptance of responsibility and healing the individual and the collective – a U.S. apology would feature the United States' acknowledgment of its role in the tragedy and convey empathy for the persisting suffering of Jeju people through generations cast culturally in term of *han*.[238] It might also express words of contrition and convey an appropriate "admission of fault [and] a promise of future restraint."[239]

The prospects for U.S. engagement in the Jeju 4.3 reparative initiative in this fashion, though, would depend on shifting political realities.[240] A major impediment to comprehensive and enduring 4.3 social healing to date has been the United States' refusal to participate in the reconciliation initiative.[241] Those doubting prospects for future U.S. participation might cite an apparent absence of Jeju 4.3 on America's geopolitical radar. An oversimplified

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[236] Anthony Kuhn, S*urvivors of a Massacre in South Korea are Still Seeking an Apology from the U.S.*, NAT'L PUB. RADIO (Sept. 7, 2022), https://www.npr.org/2022/09/07/1121427407/survivors-of-a-massacre-in-south-korea-are-still-seeking-an-apology-from-the-u-s.

[237] Trudy Govier & Willhelm Verwoerd, *The Promise and Pitfalls of Apology*, 33 J. SOC. PHIL. 67, 67 (2002); *see also* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 185.

[238] *See* Yamamoto, Oyama & Katano, *Reconciliation Revitalized Through an Official Apology for the Wrongful Jeju 4.3 Mass Convictions*, *supra* note 136, at 184.

[239] *Id.* at 185 (describing how a genuine apology might be guided by the recognition, responsibility and reconstruction dimensions and working principles of social healing through justice); *see* Lee, *The Law and Culture of the Apology*, *supra* note 196, at 12, 34.

[240] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 70–71 (discussing the *darkside* principle – the final working principle of social healing through justice). That principle warns against the "danger of incomplete, insincere acknowledgments and ameliorative efforts – how words of recognition without economic justice and institutional restructuring can mask continuing oppression." *Id.* at 70. It also cautions against political backlash and stiff resistance to the social healing process. *Id.*

[241] *See id*. at 161 (stressing that "the United States – a key participant in the 4.3 events and stakeholder in 4.3 reconciliation – has been largely absent from the reparative justice process. No *mutual engagement*").

supporting utilitarian argument holds that the U.S. government maintains circumscribed international political capital[242] and that the Jeju initiative fails to ascend the political-economy hierarchy.

This article, however, does not advocate for vaulting Jeju social healing to a top U.S. domestic and international priority.[243] Rather, it highlights crucial engagement in the Jeju 4.3 reparative justice initiative as a U.S. opportunity to both do the right thing and help rebuild its tarnished democratic legitimacy – at home and abroad.[244]

Rebuilding America's stature as a leading democracy presents a myriad of challenges. The Trump administration regularly undermined efforts to uphold internationally-recognized human rights.[245] In 2019, then-Secretary of State Mike Pompeo convened a decidedly conservative Task Force to re-evaluate human rights.[246] The Task Force's actual mission belied its purported efforts to improve human rights enforcement. Discarding any pretense of non-partisan inquiry, the Task Force strategically suggested drastic curtailment or even elimination of most rights, supporting only freedom of religion (particularly concerning abortion) and a right to property

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[242] *See* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 487–88, 494 (1998); *see* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, Chapter 12.

[243] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 279.

[244] Mark Hannah, *America's Image Around the World Is Being Tarnished by the Violent Federal Response in Portland*, BUS. INSIDER (July 26, 2020) [hereinafter Hannah, *America's Image Around the World Is Being Tarnished*], https://www.businessinsider.com/americas-image-around-world-worse-portland-police-violence-federal-agents-2020-7; *see* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 265–66.

[245] *See* Rogin, *The Supreme Court has Undermined U.S. Credibility on Human Rights*, *supra* note 90 (adding further context to the Pompeo Commission's strategic narrowing of human rights, and highlighting Trump's erosion of U.S. democratic legitimacy). In reinstating the Global Gag Rule consistently waived by Democratic presidents and reinstated by Republicans, "[t]he Trump administration went further than any of its predecessors by drastically expanding the scope of the restrictions to cover more than $7 billion worth of U.S. global health programs . . . . [These restrictions on abortion-related services] had disastrous effects on health outcomes for women and girls, especially in the LGBTQ, rural, poor and other marginalized communities." *Id. See also* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 281 (highlighting the Trump administration's "bald hypocrisy" in "disparaging selected countries [for human rights abuses] . . . while overlooking harsh abuses of momentarily favored countries").

[246] Elisa Massimino & Alexandra Schmitt, *Pompeo's New Commission Undermines Universal Human Rights – Just as Planned*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/opinions/2020/07/17/pompeos-new-commission-undermines-universal-human-rights-just-planned/.

(concerning development deregulation).[247] Human rights observers chastised the Trump administration and the United States for their sharply regressive stance on crucial international constraints on grossly abusive government conduct.[248]

In 2020, the "marked disparity between the Black Lives Matter demonstrators' actions and the disproportionate federal response sparked domestic and international outrage."[249] Liz Throssell, the United Nations Human Rights Council spokesperson, "called early on for the United States to halt the 'arbitrary arrest[s] or detention[s]' of protestors and also to stop the 'unnecessary disproportionate or discriminatory use of force or . . . other violations of their rights'" on U.S. soil.[250] In full view of international communities, the United States' human rights violence against its own people – spurred by the Trump administration – further tarnished America's stature as a democracy.[251]

After 9/11, the Iraq War and two decades into the prolonged war on terror, observers "from the United States and beyond expressed grave doubts about contemporary U.S. commitment to democratic values, particularly whether the country (through its leaders) is genuinely dedicated to human rights . . . ."[252] According to Mark Hannah, opinion writer for *Business Insider*, "if a

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[247] Michael R. Pompeo, *Opinion: American Diplomacy Must Again Ground Itself in the Nation's Founding Principles,* WASH. POST (July 16, 2020), https://www.washingtonpost.com/opinions/2020/07/16/pompeo-oped-commission-unalienable-rights/.

[248] Kenneth Roth, *Beware the Trump Administration's Plans for 'Fresh Thinking' on Human Rights*, WASH. POST (July 11, 2019), https://www.hrw.org/news/2019/07/11/beware-trump-administrations-plans-fresh-thinking-human-rights (revealing Pompeo's appointment of only conservative commissioners and marking a "superficially laudable step . . . fraught with threats to the very human rights that it purports to strengthen").

[249] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 265.

[250] *Id.* (quoting Siobhan O'Grady, *U.N. Human Rights Office Calls on U.S. Police to Limit Use of Force*, WASH. POST (July 24, 2020), https://www.washingtonpost.com/world/2020/07/24/un-human-rights-office-calls-us-police-limit-use-force/).

[251] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 265–68; Hannah, *America's Image Around the World Is Being Tarnished*, *supra* note 244 (discussing how the Trump administration undermined public trust when ordering federal forces – who abused and detained peaceful protestors – to Black Lives Matter protests in Portland).

[252] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 265.

country's international influence derives in part from the attractiveness of its values, that influence is diminished when it's seen discrediting those values through capricious acts of violence against its own people."[253] Hannah aptly identified the Trump administration's and earlier presidents' damage to the United States' global stature as a leading democracy. The "allure of America's values is critical to the success of its foreign policy objectives, and the desertion of those values [is] . . . not just a moral failing, but a geopolitical blunder too."[254]

In addition to these and other geopolitical blunders, at home, divisive issues of spiraling gun violence, eviscerated reproductive and LGBTQIA rights, voter disenfranchisement, along with nasty inflation and accelerating climate change challenge American leadership.[255] Abroad, authoritarian regimes work to undercut the United States and its allies.[256] Hot controversies and cold war struggles extend from China's aggressive military and economic overreaching in Asia, to North Korea's bellicose pronouncements and missile tests,[257] to Russia's unilateral attack on Ukraine and the rise of authoritarian leaders in North Korea, Turkey, the Philippines and Brazil.[258]

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[253] *Id.* (quoting Hannah, *America's Image Around the World Is Being Tarnished*, *supra* note 244).

[254] Hannah, *America's Image Around the World Is Being Tarnished*, *supra* note 244 (spotlighting the consequences of the United States' tarnished stature as a democracy on its capacity to maintain effective international alliances and exert its influence in world affairs).

[255] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 252–60.

> In 2020, the United States again found itself in a hotbed of criticism. From the Trump administration's reported cozying up to dictators, to a botched coronavirus response, to misinformation surrounding voting campaigns and groundless attacks on the 2020 presidential election, the United States as a democracy faced intensifying reproach for its actions and doubt about its stature as a global leader.

Id. at 254.

[256] *See, e.g.*, Antony J. Blinken, U.S. Sec'y of State, The Administration's Approach to the People's Republic of China, Speech at The George Washington University (May 26, 2022), https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/.

[257] Michelle Ye Hee Lee, *North Korea Fires Intercontinental Ballistic Missile*, WASH. POST. (Nov. 19, 2022) https://www.washingtonpost.com/world/2022/11/18/north-korea-missile-icbm-launch/ (discussing North Korea firing an intercontinental ballistic missile in November of 2022 "as tensions between Pyongyang and Washington escalated further amid U.S. efforts to strengthen coordination with its allies in Seoul and Tokyo").

[258] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 279.

This article acknowledges that in this milieu Jeju 4.3 social healing will not rise to the upper echelon in U.S. political significance.[259] But, by accepting responsibility and redressing America's human rights "shortcomings"[260] – as the President promised – the United States would do what is right and just for Jeju communities in a way that potentially uplifts America's stature as a democracy actually committed to the rule of law and particularly the reparative justice precepts of the international human rights regime.[261]

IV. CONCLUDING THOUGHTS: CONVERGING INTERESTS FOR THE UNITED STATES, SOUTH KOREA AND JEJU COMMUNITIES

With the geopolitical benefits derived from the U.S. Civil Liberties Act of 1988 generally as backdrop, U.S. engagement in 4.3 reparative justice presents a potential valuable international political opportunity.[262] The United States would buoy ally South Korea's started-stalled-rejuvenated efforts to heal the persisting wounds of Jeju families, communities and South Korea itself.[263] U.S. engagement would also further buttress South Korea's catalyzing Jeju court retrials and its National Assembly's recent commitment to broadscale individual 4.3 compensation.[264] Most important for the United States, a resonant, culturally-attuned Jeju 4.3 apology for America's transgressions – including a human rights promise that "it" would never happen again in Korea or elsewhere – would timely uplift U.S. stature as a democracy on the world stage.[265]

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[259] *Id.* at 206.

[260] Blinken, Human Rights Remarks, *supra* note 81.

[261] *See* Rogin, *The Supreme Court has Undermined U.S. Credibility on Human Rights*, *supra* note 90 (emphasizing the importance of uplifting the United States' legitimacy as a democracy through its demonstrated commitment to human rights, civil liberties and the rule of law); *see generally* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 265–66 (examining the need for a renewed U.S. emphasis on repairing the Trump administration's damage to America's stature as a democracy).

[262] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 4, at 249–52.

[263] *See id.* at 278–87.

[264] *See id.* at 214.

[265] *Id.* at 224–26; *see* Ho-Joon Heo, *Japanese Event Commemorating Jeju April 3 Incident Draws Hundreds*, HANKYOREH (June 23, 2022), https://www.hani.co.kr/arti/english_edition/e_international/1048265.html (highlighting the calls for U.S. accountability for Jeju 4.3). Association of Contemplating Jeju April 3

Professor Yamamoto assessed in 2021 that by "engaging forthrightly and transparently with the [Jeju 4.3] social healing process," the United States, along with South Korea, "stand[s] to benefit by enhancing democratic legitimacy at home and abroad."[266] By "committing to participate in enduringly righting the wrongs of the Jeju 4.3 tragedy, the United States would send a powerful message to the international community that the Trump-era of U.S. unilateralism, isolationism and xenophobic populism has ended."[267]

All this begs the question: will the United States answer the mounting calls for America to engage in key – if not final – stages of the Jeju 4.3 initiative to *comprehensively* and *enduringly* heal the wounds of families and communities and to repair the damage to South Korea itself? And in doing so, will the United States reinvigorate its global stature as a democracy demonstrably committed to the rule of law and particularly human rights? If not now, when?

representative Dyong-hyeon Cho casted light on the failure "to extract an apology from the US." *Id.*

[266] *Id.* at 287.

[267] *Id.*

Codifying Ecocide as an International Atrocity Crime: How Amending Ecocide into the Rome Statute Could Provide Vietnamese Agent Orange Victims Access to Justice

Madison P. Bingle*

ABSTRACT

The United States military's use of Agent Orange in Vietnam has left a haunting legacy on the Vietnamese environment and people. While military veterans have won legal battles for compensation, Vietnamese and other Southeast Asian victims have been unsuccessful in their legal claims. However, recent developments in the international criminal field sparks new hope for these overlooked victims. This Article argues that the reverberatory effects of codifying ecocide as the fifth internationally recognized atrocity crime could promulgate new avenues of relief for Vietnamese Agent Orange victims. Further, this Article asserts that these avenues could become possible because the use of Agent Orange in Vietnam would be officially recognized as an atrocity crime backed by international customary law. As a result, national courts with domestic statutes prohibiting ecocide could serve as a potential forum of justice for victims. Lastly, the ecocide movement could generate international political and diplomatic pressure resulting in the United States finally providing reparations for all Southeast Asian victims.

* * *

I. INTRODUCTION

> "The use of Agent Orange in Vietnam is the greatest ecocide and chemical warfare in history but remains a tragedy that is still too little known."[1]
>
> — Trần Tố Nga

The Vietnam-American War ended in 1975, but the legacies of the United States military's herbicide campaign during the War continues to affect the Vietnamese people and environment well into the twenty-first century.[2]

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* Madison P. Bingle, Assistant District Attorney at the Brooklyn District Attorney's Office; JD/MA in International Affairs, 2022, American University; Fulbright Fellow, Vietnam, 2018–2019; B.A. in History and Sociology, 2018, Coker University. My passion for seeking justice for victims of toxic exposure results from my experiences working with people affected by Agent Orange and other legacies of the Vietnam-American War. This Article is dedicated to them and all other people affected by the toxins and legacies of war. Finally, I am incredibly grateful for the meaningful edits from the University of Hawai'i Law Review team. All errors and views are my own.

[1] Ms. Trần is a victim of Agent Orange exposure and a leader in the chemical manufacture accountability movement in France. She is the plaintiff in a complaint that the French courts are reviewing on appeal. *See* Collectif Vietnam-Dioxine (@VietnamDioxine), TWITTER (July 16, 2020, 2:05 PM), https://twitter.com/vietnamdioxine/status/1283825213306818560 (quoting Ms. Trần's efforts to bring a claim against United States manufacturers for the health effects of Agent Orange exposure).

[2] I recognize that there are also persons in Cambodia and Laos that are victims of Agent Orange, but for the purpose and scope of this Article, I chose to focus on the Vietnamese

During the War, the United States military used several types of herbicides in Southeast Asia; however, the herbicide Agent Orange, which drew its name from the orange stripes on the barrels it was stored in, was the most widely sprayed herbicide used in the War.[3] The culprit of Agent Orange's lasting effects on Southeast Asia is the chemical compound 2,3,7,8-tetrachloro-dibenzo-para-dioxin — commonly known as dioxin — which forms a byproduct of the Agent Orange's manufacturing process.[4] Individuals exposed to dioxin experience a multitude of health effects, including, but not limited to, several types of cancers, autoimmune diseases, skin conditions, and reproductive issues.[5] Additionally, the health effects of dioxin have been identified in the descendants of those exposed because of how the human body stores dioxin and dioxin's ability to alter human genes.[6] Further complicating the issue, dioxin has had a residual effect on the environment in Southeast Asia with several parcels of land still heavily contaminated with dioxin, leading to new and continued cases of exposure

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population, in part because they have led most of the efforts of accountability, but also because there is little data on Cambodian and Laos victim populations. *See, e.g.*, George Black, *The Victims of Agent Orange the U.S. Has Never Acknowledged*, N.Y. TIMES (Mar. 22, 2021) [hereinafter Black, *U.S. Has Never Acknowledged*], https://www.nytimes.com/2021/03/16/magazine/laos-agent-orange-vietnam-war.html (discussing how the effects of Agent Orange on Laos have yet to be fully examined and the United States has never acknowledged the effects there as much as it has in Vietnam); Marjorie Cohn, *Barbara Lee Introduces Bill to Help Vietnamese Victims of Agent Orange*, TRUTHOUT (June 3, 2021), https://truthout.org/articles/barbara-lee-introduces-bill-to-help-vietnamese-victims-of-agent-orange/ (detailing an overlay of how Agent Orange has affected Vietnamese persons and Vietnamese land in the twenty-first century).

[3] *See Agent Orange*, HISTORY, https://www.history.com/topics/vietnam-war/agent-orange-1 (last visited Dec. 12, 2021); *A Short History of Agent Orange*, BERRY LAW (Apr. 24, 2017), https://ptsdlawyers.com/history-of-agent-orange/ ("In addition to Agent Orange, the military sprayed Agents White, Blue, Green, Purple and Pink. The 'Rainbow Herbicides' got their names from the colored stripes painted on the 55-gallon drums that the military used to store them."); *see also What is Agent Orange?*, ASPEN INST., https://www.aspeninstitute.org/programs/agent-orange-in-vietnam-program/what-is-agent-orange/ (last visited Dec. 17, 2021).

[4] *See What is Agent Orange?*, *supra* note 3 (explaining what Agent Orange is and how it has affected Vietnamese persons).

[5] *See infra* Part II.A. (discussing the various health effects that Agent Orange/dioxin exposure has on human health).

[6] *See infra* Part II.A. (explaining that at least four generations of victims have been exposed to Agent Orange).

amongst the Vietnamese population.[7] In total, at least three million Vietnamese persons have experienced health effects as a result of dioxin exposure.[8]

In the decades since the War, persons affected by Agent Orange exposure have fought for damages from the United States government and chemical manufacturers for the effects that the chemical has had on their health and the environment.[9] Thus far, only veteran groups have successfully pursued claims for the impact of the exposure and have been individually compensated by chemical manufacturers.[10] Despite the lull in new legal claims brought in the United States courts, the fight for justice for the legacies of Agent Orange exposure continues.[11] Most notably, in France, a Vietnamese-French activist, Trần Tố Nga, reignited calls for justice by filing new claims against United States chemical manufacturers in a French district court for the health effects that she and her children experience as a result of dioxin exposure.[12]

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[7] The risk of new exposures to dioxin for persons in Vietnam has been acknowledged by the United States government and there have been some efforts at cleaning up these areas. *See* George Black, *Fifty Years After, A Daunting Cleanup of Vietnam's Toxic Legacy*, YALE ENV'T 360 (May 13, 2019), https://e360.yale.edu/features/fifty-years-after-a-daunting-cleanup-of-vietnam-toxic-legacy-dioxin-agent-orange. However, the United States government has actively sidestepped addressing these issues in Cambodia and Laos, so it is unknown how much land is still contaminated, or how many persons are continually exposed in Cambodia and Laos. *See, e.g.*, *id.*; Charles Dunst, *The U.S.'s Toxic Agent Orange Legacy*, ATL. (July 19, 2019), https://e360.yale.edu/features/fifty-years-after-a-daunting-cleanup-of-vietnam-toxic-legacy-dioxin-agent-orange (detailing how the United States government has yet to deal with the legacies of Agent Orange in Cambodia and Laos).

[8] This figure does not include the number of Vietnamese-Americans, Cambodians, and Laos persons exposed to Agent Orange. *See e.g.*, Linh Pham, *Vietnam Demands Monsanto Compensate Agent Orange Victims*, HANOI TIMES (Mar. 29, 2019, 10:34 AM), http://m.hanoitimes.vn/vietnam-demands-monsanto-compensate-agent-orange-victims-1476.html.

[9] *See infra* Part III (discussing the efforts of Vietnamese Agent Orange victims to access justice).

[10] *See* Cohn, *supra* note 2 (noting that only United States veterans have received compensation for Agent Orange exposure); *see also* Aviva E. A. Zierler, *The Vietnamese Plaintiffs: Searching for a Remedy After Agent*

Orange, 21 TEMP. INT'L & COMP. L. J. 477, 478–79 (2007) [hereinafter Zierler, *Vietnamese Plaintiffs*] (providing an overview of the groups who have brought lawsuits and have been individually compensated for Agent Orange exposure).

[11] *See* Alexander Durie, *Agent Orange Case: After Defeat, Woman 79, Vows to Keep Up Fight*, AL JAZEERA (May 12, 2021), https://www.aljazeera.com/news/2021/5/12/agent-orange-case-after-defeat-woman-79-vows-to-keep-up-fight.

[12] *Id.*

While Ms. Trần seeks justice in France, a parallel international movement has been working to ensure that environmental destruction, known as ecocide, is codified under international criminal law.[13] While there has historically been efforts to recognize ecocide in international law dating back to the 1970s, there is now an effort to amend the Rome Statute, the constitutive document of the International Criminal Court (ICC), to include ecocide as the fifth enumerated atrocity crime.[14] The Independent Expert Panel for the Legal Definition of Ecocide ("Independent Expert Panel") is leading this effort.[15]

By codifying the definition of ecocide set forth by the Independent Expert Panel, the Rome Statute would criminalize "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[16] In turn, the codification of ecocide into the Rome Statute has the capacity to elevate the seriousness of the crime of ecocide, including the act of spraying of toxic herbicide, to the level of genocide.[17]

While most of the conversations on codifying ecocide in international criminal law have focused on the preventative effects that this crime would have on actors perpetuating climate change and other environmental destruction, the relationship between codifying ecocide and the ability of

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[13] Sam Meredith, *Ecocide: How a Fast-Growing Movement Plans to Put Environmental Destruction on a Par with War Crimes*, CONSUMER NEWS AND BUS. CHANNEL (June 22, 2021, 4:36 AM), https://www.cnbc.com/2021/06/22/how-a-growing-movement-plans-to-put-ecocide-on-a-par-with-war-crimes.html ("The term [ecocide] has been debated by academics, climate activists and legal professionals for more than half a century. However, it's only in recent years that the idea has become increasingly widespread, with Pope Francis, Swedish climate activist Greta Thunberg and French President Emmanuel Macron all endorsing the movement to recognize ecocide as an international crime.").

[14] *See id*.

[15] *See* Josie Fischels, *How 165 Words Could Make Mass Environmental Destruction an International Crime*, NAT'L PUB. RAD. (June 27, 2021, 8:00 AM), https://www.npr.org/2021/06/27/1010402568/ecocide-environment-destruction-international-crime-criminal-court.

[16] STOP ECOCIDE FOUND., INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE 5 (2021), http://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf.

[17] *See infra* Part IV.A. (discussing how the proposed definition of ecocide could be applied to the situation in Vietnam, which a court could determine is ecocide in accordance with the ecocide law).

Agent Orange victims to access justice against chemical manufacturers and the United States government has yet to be explored. In this Article, I argue that the reverberatory effects of codifying ecocide as the fifth internationally recognized atrocity crime can promulgate new avenues of relief for Vietnamese Agent Orange victims. I assert that these avenues can become possible because the use of Agent Orange in Vietnam would officially be recognized as an atrocity crime backed by international customary law, and national courts with statutes prohibiting ecocide could serve as a potential forum of justice for victims. Further, the ecocide movement could generate international political and diplomatic pressure resulting in the United States providing reparations for Vietnamese victims.

To set the stage, Part II of this Article provides a background of the United States military's use of Agent Orange in Southeast Asia, an outline of the international humanitarian law which supports the prohibition on the use of herbicides during war, and a brief recent history of the emergence of ecocide as a crime. To demonstrate the gaps in accountability for Agent Orange, Part III then transitions into a discussion on the historic efforts, as well as the ongoing efforts of Agent Orange victims to find accountability in judicial forums. Finally, Part IV discusses the ongoing movement to codify ecocide as the fifth atrocity crime and the effects that this codification could have on Vietnamese Agent Orange victims' ability to access justice.

II. BACKGROUND

The relationship between the United States military's use of Agent Orange in Southeast Asia and the emergence of ecocide as the fifth foremost international atrocity crime are directly related.[18] During the Vietnam-American War, traditional methods of war were bent and international humanitarian law had yet to catch up with the new techniques of war.[19] This meant that the existing framework of international humanitarian law did not expressly outlaw the use of herbicides, which was a newly innovated technique of war.[20] However, after the United States began using herbicides

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[18] *See generally* Katie Babson, *Ecocide: The Fifth International Crime*, CLIMATE CHANGE REV. (Apr. 12, 2022), https://www.ucsdclimatereview.org/post/ecocide-the-fifth-international-crime (explaining the movement behind making ecocide the fifth international crime).

[19] *See generally* Leslie H. Gelb, *The Essential Domino: American Politics and Vietnam*, 50 FOREIGN AFFS. 459, 459–66 (1972) (discussing the context of the Vietnam-American War at length).

[20] *See Herbicide*, ENCYC. BRITANNICA, https://www.britannica.com/science/herbicide (last visited Dec. 17, 2021) ("In the late 1940s new herbicides were developed out of the

to further its war efforts, scientists quickly pushed back against its usage, and claimed that the widespread and indiscriminate herbicide use on jungles and rice paddies throughout Southeast Asia were clear violations of well-founded rules of armed conflict, which led to the emergence of the term ecocide.[21]

To understand how the codification of ecocide may open avenues of relief for Agent Orange victims against chemical manufacturers, a background on the use of Agent Orange in Southeast Asia, the then-existing relevant international humanitarian law, as well as the subsequent emergence of ecocide as a term for environmental destruction, are necessary.

A. *Use of Herbicides in Southeast Asia*

The use of herbicides in war first began with the British in the 1950s.[22] During the British colonization of Malaya, the government weaponized herbicide to sporadically spray crops that were food sources to the Malayan communist insurgency groups.[23] However, it was not until 1962, during the Vietnam-American War, that the United States military, with the assistance and permission of the then-South Vietnamese government, used herbicides as part of a widescale military campaign known as Operation Ranch Hand.[24]

The United States military's overt purpose for using Agent Orange was to rid the Ho Chi Minh trail, the Northern Vietnamese Army's supply chain that ran in and out of Laos, Cambodia, and Vietnam, of its coveted foliage.[25] However, other sources demonstrate that the United States military knew

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research during World War II, and the era of the 'miracle' weed killers began. Within 20 years over 100 new chemicals were synthesized, developed, and put into use.").

[21] The Promise Institute for Human Rights, *Redefining Ecocide: Addressing Mass Damage and Destruction*, YOUTUBE (Apr. 15, 2021), https://www.youtube.com/watch?v=huxgGXSuIzo [hereinafter *Redefining Ecocide*] (describing that Galston and others created outcry against the United States government for using herbicides, which they found to be in violation of international humanitarian law).

[22] Clyde Haberman, *Agent Orange's Long Legacy, for Vietnam and Veterans*, N.Y. TIMES (May 11, 2014), https://www.nytimes.com/2014/05/12/us/agent-oranges-long-legacy-for-vietnam-and-veterans.html.

[23] WILLIAM A. BUCKINGHAM, JR., OPERATION RANCH HAND: THE AIR FORCE AND HERBICIDES IN SOUTHEAST ASIA 1961–1971 iii (1982).

[24] *Id.*

[25] *See* INST. OF MED., VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM 106 (1994) [hereinafter HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM] ("Military documents report the use of herbicides over areas of Laos, particularly near the Vietnam border and along the Ho Chi Minh Trail. The purpose of the operation in Laos was to expose foot trails, roads, and other lines of communication that led into Vietnam.").

about the devastating impacts that the herbicide had on agricultural-based people, like the Vietnamese.[26] Further, the United States military used Agent Orange to deprive the Northern Vietnamese Army and the Viet Cong (guerilla fighters)[27] of food sources through crop destruction, while also pushing the Viet Cong from villages by forcibly displacing civilians into southern controlled areas.[28] There is also evidence that the United States military knew that the herbicide could work as a weapon of psychological warfare on Northern Vietnamese sympathizers because the ominous spray made people sick and resulted in birth defects for babies born in sprayed areas.[29]

At the end of Operation Ranch Hand in 1971, the United States military had sprayed various parts of Southern Vietnam with an estimated 19 million gallons of herbicide defoliants containing the chemical compound dioxin.[30] In total, the United States military sprayed about twenty-five percent of the Vietnamese jungles and about thirty-six percent of Vietnam's mangrove forests.[31] Due to the secrecy around the United States involvement in Laos and Cambodia, the amount of herbicide used on the environment (as well as its continued impact on the land and people) are still unknown.[32]

The Agent Orange herbicide used in Southeast Asia was twenty times more concentrated than those approved for commercial use in the United States.[33] Studies estimate that between 2.1 million and 4.8 million Vietnamese were directly exposed to Agent Orange, and as many as 3 million

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[26] *See id.* at 27–32.

[27] *See Guerilla Tactics: An Overview*, PUB. BROAD. SERV., https://www.pbs.org/battlefieldvietnam/guerrilla/ (last visited Sept. 22, 2022) (explaining who the Viet Cong were and how they used guerilla tactics).

[28] *See* Pamela S. King, *The Use of Agent Orange in the Vietnam War and its Effects on the Vietnamese People* 37 (Oct. 13, 2010) (M.A. thesis, Georgetown University) (on file with Georgetown University Library).

[29] PETER SILLS, TOXIC WAR: THE STORY OF AGENT ORANGE 45 (2014) (noting that while there is no publicly available proof that the United States military used Agent Orange to create psychological warfare, there is plenty of circumstantial evidence).

[30] *See* HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM, *supra* note 25, at 106.

[31] *See* Diane Fox, *Waging Peace in Vietnam: Church of the Beatitudes Helps to Heal the U.S. Legacy of Agent Orange*, INDEP. (Aug. 8, 2016, 12:00 AM), https://www.independent.com/2016/08/08/waging-peace-vietnam/.

[32] *See* Black, *U.S. Has Never Acknowledged*, *supra* note 2 (discussing that there is still classified information around the secret war in Laos and the impact of Agent Orange on Laos people remains unknown).

[33] *What is Agent Orange?*, *supra* note 3.

Vietnamese are currently suffering from health conditions related to exposure.[34]

Agent Orange continues to be a legacy of the Vietnam-American War because Agent Orange contains the chemical compound dioxin.[35] Dioxin is a toxic chemical compound formed as a byproduct of the manufacturing processes used by chemical companies that were contracted by the United States Department of Defense.[36] Agent Orange could have been manufactured without producing dioxin if it was created by using lower temperatures and at a slower pace.[37] Exposure to dioxin in Agent Orange is extremely toxic to human health.[38] Exposure in undetectable amounts can alter a person's metabolism and in more significant amounts, dioxin exposure can lead to a litany of health effects on persons, including various types of cancers, skin diseases, circulatory diseases, neuromuscular diseases, and lipidemia.[39] The health effects may appear immediately or they can be latent and take years to appear.[40] This is because dioxin is stored in the fat tissue of both humans and animals, and dioxin has an extremely long biological half-life.[41] Further, if a person is exposed to high levels of dioxin, it can lead to

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[34] MICHAEL F. MARTIN, CONG. RSCH. SERV., RL34761, VIETNAMESE VICTIMS OF AGENT ORANGE AND U.S.-VIETNAM RELATIONS Summary (2009).

[35] *See generally id.* at 10–18 (explaining the effects of Agent Orange on Vietnam).

[36] *See* SILLS, *supra* note 29, at 29–30 (discussing how United States chemical companies ignored the research that higher pressure and temperatures of the manufacturing process created more dioxin).

[37] *See id*. at 30.

[38] *See id*. at 2–13 (discussing the tragic story of an Agent Orange victim).

[39] *See id.* at 30 (explaining a systematic skin disease, named Chloracne, caused by Agent Orange); Sang-Wook Yi et al., *Agent Orange Exposure and Prevalence of Self-Reported Diseases in Korean Vietnam Veterans*, 46 J. PREVENTATIVE MED. PUB. HEALTH 213, 213–14 (2013) (conducting a study on the various diseases Agent Orange victims had acquired); *see also Veterans' Diseases Associated with Agent Orange*, U.S. DEP'T VETERANS AFFS., https://www.publichealth.va.gov/exposures/agentorange/conditions/ (last visited Dec. 17, 2021) [hereinafter *Veterans' Diseases*] (listing diseases associated with Agent Orange and ones that the United States Department of Veteran Affairs considers as presumptive for Agent Orange exposure in veterans).

[40] *See Veterans' Diseases*, *supra* note 39.

[41] INST. OF MED., VETERANS AND AGENT ORANGE: UPDATE 2012 728 (2014) [hereinafter 2012 UPDATE ON VETERANS AND AGENT ORANGE]. Because TCDD is stored in fat tissue and has a long biologic half-life, internal exposure at generally constant concentrations may continue after episodic, high-level exposure to external sources has ceased. If a person had

generational exposure and alterations of gene expressions resulting in an exposed person's offspring having any number of the aforementioned health conditions.[42] For women, this exposure can also result in miscarriages, children born with cleft lips, spina bifida, and other diseases.[43] For both men and women, exposure may also result in infertility.[44]

Dioxin exposure can happen in several ways. Vietnamese people have been exposed to Agent Orange directly from the spraying that occurred during the Vietnam-American War.[45] Others continue to be exposed to dioxin from the existence of the herbicide in their environment.[46] The United States military's excessive spraying and the methods of storage have created dozens of dioxin "hotspots" in Vietnam, and in these areas, exposure to dioxin remains an imminent health hazard.[47] New exposure occurs from the food chain; for example, people may become exposed when they eat animals or fish that were exposed to water contaminated with dioxin, or when people get their drinking water from contaminated areas.[48] While the United States completed one major cleanup at the former Danang airbase[49] — over the

high exposure, there may still be large amounts of dioxins stored in fat tissue, which may be mobilized, particularly at times of weight loss. *Id.*

[42] *See* Matti Viluksela & Raimo Pohjanvirta, *Multigenerational and Transgenerational Effects of Dioxins*, 20 INT'L J. MOLECULAR SCI. 1, 14–15 (2019).

[43] Betty Mekdeci, *Agent Orange and Birth Defects*, BIRTH DEFECT RSCH. FOR CHILDREN, https://birthdefects.org/agent-orange/ (last visited Sept. 19, 2022).

[44] *See* 2012 UPDATE ON VETERANS AND AGENT ORANGE, *supra* note 41, at 675–77 (explaining the TCDD effects on male and female fertility and reproduction).

[45] *See* DAVID ZIERLER, THE INVENTION OF ECOCIDE: AGENT ORANGE, VIETNAM AND THE SCIENTISTS WHO CHANGED THE WAY WE THINK ABOUT THE ENVIRONMENT 2 (2011) [hereinafter ZIERLER, THE INVENTION OF ECOCIDE].

[46] *See* Cohn, *supra* note 2.

[47] *See id.* (explaining that "dozens of environmental hotspots continue to contaminate the soil, food, sediment, wildlife and livestock in Vietnam with dioxin"); Lauren Quinn, *Toxic Byproducts of Agent Orange Continue to Pollute Vietnam Environment, Study Says*, UNIV. ILL. URBANA-CHAMPAIGN (Feb. 27, 2019), https://aces.illinois.edu/news/toxic-byproducts-agent-orange-continue-pollute-vietnam-environment-study-says.

[48] *Dioxins and Their Effects on Human Health*, WORLD HEALTH ORG. (Oct. 4, 2016), https://www.who.int/news-room/fact-sheets/detail/dioxins-and-their-effects-on-human-health; *see* Quinn, *supra* note 47 (discussing how the "persistence of dioxin continues to affect soils, water, sediment, fish, aquatic species, the food supply, and Vietnamese health").

[49] MICHAEL F. MARTIN, CONG. RSCH. SERV, R44268, U.S. AGENT ORANGE/DIOXIN ASSISTANCE TO VIETNAM 15 (2021).

course of ten years — it has only begun to address the numerous other hotspots, such as the former United States airbase at Bien Hoa.[50]

The environmental destruction and consequential human rights violations that occurred through the United States military's use of Agent Orange gave rise to the need for a specific crime, like ecocide,[51] to address how war had evolved. And while ecocide was a new term, the prohibition on the use of ecocide, specifically with respect to the United States military's use of chemical defoliants in Vietnam, is actually rooted in longstanding international customary law and international humanitarian law principles.[52]

B. *International Customary and Humanitarian Law Supporting the Prohibition on the Use of Herbicides*

The use of herbicides for purposes of war was not expressly stated in the then-existing international humanitarian law (because herbicides had only just recently been invented); however, the international humanitarian law that did exist at the time of the United States military's herbicide program in Vietnam can be interpreted as protecting against the use of Agent Orange in Vietnam.[53]

When the United States sprayed Agent Orange in Southeast Asia, it was not yet a party to the Geneva Protocol of 1925 ("Geneva Protocol").[54] The Geneva Protocol prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world . . . [and the Protocol] extend[ed] this prohibition to the use of bacteriological methods of warfare."[55] And while the Protocol was not legally binding on the United States, there is evidence that the provisions of the Protocol were actually crystallized international customary law that was in effect prior to the start of the Vietnam-American War.[56]

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[50] *Id.* at 1–5 (providing background on the remediation projects and existing areas still contaminated with dioxin).

[51] *See* ZIERLER, THE INVENTION OF ECOCIDE, *supra* note 45, at 67.

[52] *See id.* at 19.

[53] *See id.*

[54] *See* Zierler, *Vietnamese Plaintiffs*, *supra* note 10, at 501.

[55] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

[56] *See* Zierler, *Vietnamese Plaintiffs*, *supra* note 10, at 503.

In accordance with the Restatement (Third) of the Foreign Relations Law of the United States, for there to be an international customary law, there must be general and consistent state practice as well as evidence of *opinio juris*, meaning that states act in a way because they have a sense of legal obligation to do so.[57] At the time, when prohibitions and limitations on the use of chemical weapons in war were emerging into international customary law, the United States did not invoke its persistent objector right.[58] Rather, the United States led many efforts to help steer the development of these treaties and laws.[59] Prior to the Geneva Protocol, state practice and international treaties came into effect that ensured the prohibition on chemicals during war dating back to 1863, in addition to the Lieber Code, which bans "the use of poison in any way" even in the face of claims of "military necessity."[60] This continued on until World War I (WWI) with the development of the Convention with Respect to the Laws and Customs of War on Land, which limited the use of chemical weapons.[61] Then, post-WWI, the status of the norm was challenged because of the use of mustard gas during WWI and the additional international treaties that were formed in response.[62] For instance, the creation of the Washington Treaty in 1922 — which the United States ratified — prohibited "[t]he use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world."[63] Additionally, the United States signed a similar treaty with Central American nations, in which it stated that the use of chemical weapons were "contrary to humanitarian principles and to international law[.]"[64] And finally, with the creation of the Geneva Protocol in 1925, the prohibition of chemical weapons during war officially became codified in

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[57] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102 (AM. L. INST. 1987).

[58] *See* Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495, 495–96 (2005) (explaining that according to the doctrine of the persistent objector, "if a state persistently objects to the development of a customary international law, it cannot be held to that law when the custom ripens").

[59] *See* Zierler, *Vietnamese Plaintiffs*, *supra* note 10, at 505.

[60] *See* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 8, 23 (1863) (stating that "the use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare").

[61] *See* Laws and Customs of War on Land, art. 23, July 29, 1899, 32 Stat. 1803.

[62] *See* Zierler, *Vietnamese Plaintiffs*, *supra* note 10, at 506.

[63] *Id.* (citing Treaty Relating to the Use of Submarines and Noxious Gases in Warfare art. 5, Feb. 6, 1922, 25 L.N.T.S. 202).

[64] *Id.* at 507 (citing STOCKHOLM INT'L PEACE RSCH. INST., THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE: VOLUME I THE RISE OF CB WEAPONS 245 (1971)).

international law.[65] Moreover, during World War II (WWII), there was only one instance of chemical warfare, and the parties and most nonparties to the Geneva Protocol abstained from using chemicals, which validates the emergence of this international customary principle of law.[66] The prohibition was again affirmed through the Nuremberg Charter and the Nuremberg Principles, which criminalized the use of chemical weapons by the German Nazis.[67]

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[65] *See id.* at 497.

[66] *See id*. at 508.

[67] *See generally* STOCKHOLM INT'L PEACE RSCH. INST., THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE: VOLUME III THE RISE OF CBW AND THE LAW OF WAR 29 n.3 (1973) ("The Nuremberg Charter envisaged only crimes against humanity committed 'in execution of, or in connexion with any crime within the jurisdiction of the Tribunal,' which would mean a crime against peace or a war crime."). The Nuremberg Principles are:

> Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
>
> The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
>
> The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
>
> The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
>
> Any person charged with a crime under international law has the right to a fair trial on the facts and law.
>
> The crimes hereinafter set out are punishable as crimes under international law:
>
> a) Crimes against peace
>
> b) War crimes
>
> c) Crimes against humanity
>
> Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle 6 is a crime under international law.

Since herbicidal chemical warfare not only affects plants, but also affects people, their food, water, and health, the use of chemical herbicides cannot be meaningfully distinguished between the prohibitions on poisonous gases and chemicals.[68] This is especially true considering that the United States knew that the herbicide was causing children to be born with disabilities after it began using it.[69] Likewise, the United States military knew before using the herbicide that it contained high levels of dioxin well beyond commercial concentrations of herbicides and there is evidence that they intentionally allowed dioxin to be incorporated in the mixture during the manufacturing stage.[70]

The United Nations General Assembly ("UNGA") Resolution 2603, proposed by Sweden, reinforces the argument that the use of herbicides was embedded within an already existing customary international norm.[71] Before the UNGA, the United States delegates attempted to defend the constructivist view of herbicide use by stating that herbicides did not exist at the time that the 1925 Geneva Protocol was in existence.[72] However, the provisions of the Geneva Protocol, even if customary international law, did not apply because herbicides do not target people.[73] In countering this assertion, Sweden proposed in Resolution 2603 to officially interpret the Geneva Protocol as "chemical agents of warfare as a 'chemical substance' — whether gaseous, liquid or solid — which might be employed because of the direct toxic effects on man, animals or plants," meaning herbicides as well.[74] The resolution's nearly universal passage demonstrated that the international customary law

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Nuremberg Principles, NUREMBERG FILM, http://www.nurembergfilm.org/trial_nuremberg_principles.shtml (last visited Sept. 19, 2022).

[68] *See Redefining Ecocide*, supra note 21.

[69] *See* David Burnham, *Dow Says U.S. Knew Dioxin Peril of Agent Orange*, N.Y. TIMES (May 5, 1983), https://www.nytimes.com/1983/05/05/us/dow-says-us-knew-dioxin-peril-of-agent-orange.html; *see also* Brief for the Center for Constitutional Rights, EarthRights and the International Human Rights Law Clinic at the University of Virginia School of Law, as Amici Curiae Supporting Petitioners, Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2008) (No. 05-1953-cv).

[70] *See* Burnham, *supra* note 69.

[71] *See generally* G.A. Res. 2603 (XXIV), at 16 (Dec. 16, 1969) ("[T]he Geneva Protocol embodies generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical development.").

[72] *See* Zierler, *Vietnamese Plaintiffs*, *supra* note 10, at 510–11.

[73] *See id*. at 501.

[74] *Id.* at 511.

principle on the prohibition of chemicals in warfare included herbicide defoliants.

The crystallization of the prohibition on the use of herbicides in international customary law and international humanitarian law were also followed by a separate movement that sought to equate the United States military's actions in Vietnam to those of genocide.[75] During the Vietnam-American War, and in the decades that followed, the term ecocide emerged as a proposed international atrocity crime.[76]

C. *Emergence of Ecocide as an Atrocity Crime*

The emergence of ecocide as a term stems directly from the United States military's use of Agent Orange and the immediate outcry from the scientific community that followed.[77] After the United States military instituted Operation Ranch Hand, scientists lobbied the United States Department of Defense to stop its usage and to conduct toxicological studies on the effects of Agent Orange.[78] These scientists discovered in their own research that the chemical affected not only ecological niches, such as the mangroves, but also humans.[79] In 1971, the United States military finally banned the use of Agent Orange after its studies with chemical manufacturers confirmed that Agent

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[75] *See* Hugo Adam Bedau, *Genocide in Vietnam? The Line Between Legal Argument and Moral Judgment*, 17 WORLDVIEW 40, 40 (1974) (discussing how "Bertrand Russell and his Peace Foundation organized a nongovernmental 'International War Crimes Tribunal,'" with its aim to "determine whether the U.S. Government was committing crimes in violation of international law in its conduct of the Indochina [W]ar").

[76] *See* Babson, *supra* note 18.

[77] *See* Heather Alberro & Luigi Daniele, *Ecocide: Why Establishing a New International Crime Would be a Step Towards Interspecies Justice*, THE CONVERSATION (June 29, 2021, 10:27 AM), https://theconversation.com/ecocide-why-establishing-a-new-international-crime-would-be-a-step-towards-interspecies-justice-162059.

[78] *See* Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest*

or Moral Imperative?, 30 FORDHAM ENV'T L. REV. 1, 8–9 (2019) (discussing the historical emergence of the term ecocide); *see also In Memoriam: Arthur Galston, Plant Biologist, Fought Use of Agent Orange*, YALE NEWS (July 18, 2008) [hereinafter *Galston*], https://news.yale.edu/2008/07/18/memoriam-arthur-galston-plant-biologist-fought-use-agent-orange (discussing Galston's toxicology research on Agent Orange).

[79] *See Galston*, *supra* note 78 (discussing Galston and the scientific community's efforts to stop the use of Agent Orange in Vietnam).

Orange caused birth defects in mice, which demonstrated that Agent Orange had an effect on people as well.[80]

Arthur Galston, an American botanist and Yale professor, led the movement to stop the use of Agent Orange and to create a new term for this type of environmental destruction.[81] Galston was the first person to coin the term "ecocide"[82] in his 1970 speech at the Conference on War and National Responsibility.[83] To demonstrate that the United States was committing ecocide, Galston looked to precedent that the United States set during the Nuremberg trials, which established that the "willful destruction of an entire people and its culture" was an international atrocity crime.[84] He analogized the situation in Vietnam with Nuremberg precedent by stating that the United States military's acts should be recognized as both "a crime against humanity" and ecocide because the use of herbicide in Vietnam is willfully and permanently destroying the environment, which Vietnamese people live in.[85]

After Galston's speech, the issue of ecocide in Vietnam came into focus again in 1972 at the United Nations Conference on Human Environment in Stockholm ("Stockholm Conference"), the first major international conference on the environment.[86] During the Stockholm Conference, then-Swedish Prime Minister, Olof Palme, announced in his opening speech that the War in Vietnam was "ecocide."[87] More specifically, Palme stated that "[t]he immense destruction brought about by indiscriminate bombing, by large-scale use of bulldozers and herbicides, [was] an outrage . . . [and should

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[80] *See* Burnham, *supra* note 69 ("Dow says in court papers that by 1969 the company and the Government were aware of a National Cancer Institute study showing that dioxin caused birth defects in mice.").

[81] *See Galston*, *supra* note 78 (highlighting that Galston was "known for helping bring a halt to the use of the herbicide Agent Orange in Vietnam").

[82] *. . . and a Plea to Ban 'Ecocide,'* N.Y. TIMES (Feb. 26, 1970), https://www.nytimes.com/1970/02/26/archives/and-a-plea-to-ban-ecocide.html ("Taking his cue from the Convention on Genocide, a Yale biologist has proposed a new international agreement to ban 'Ecocide' — the willful destruction of the environment.").

[83] Greene, *supra* note 78, at 8 (noting that Galston proposed an international agreement on ecocide).

[84] *See id*. at 8–9.

[85] *See id*. at 8.

[86] *Id*. at 10.

[87] *See* Gladwin Hill, *U.S., at U.N. Parley on Environment, Rebukes Sweden for 'Politicizing' Talks*, N.Y. TIMES (June 8, 1972), https://www.nytimes.com/1972/06/08/archives/us-at-un-parley-on-environment-rebukes-sweden-for-politicizing.html.

only be] described as ecocide."[88] While the Stockholm Conference focused on broader environmental issues, such as transnational pollution, ecocide and the United States' destruction in Vietnam remained an integral part of the discussions.[89] The emphasis on ecocide is reflected in, for example, Principle 6 of the Stockholm Declaration:[90]

> The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported.[91]

In addition to ecocide making its mark on the Stockholm Declaration, the topic became the subject to several separate unofficial events that occurred in tandem with the Stockholm Conference.[92] At the People's Summit, the stakeholders agreed to the creation of a Working Group on the Law against Genocide and Ecocide, which then led to an official draft of an Ecocide Convention which would be submitted to the United Nations for consideration in 1973.[93] A member of this meeting, Professor Falk, later drafted and published a separate International Convention on the Crime of Ecocide, which was the first document to propose an outline of the specific elements required for legal ecocide.[94] These efforts led to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to formally propose amendments to the Genocide Convention, which included cultural genocide and ecocide as enumerated acts.[95] The Sub-Commission

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[88] *Id*.

[89] *See* Greene, *supra* note 78, at 10–11.

[90] U.N. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, 4, U.N. doc. A/CONF.48/14/Rev.1, (1973).

[91] *Id.*

[92] *See* Greene, *supra* note 78, at 11; Tord Björk, The Emergence of Popular Participation in World Politics: United Nations Conference on Human Environment 1972 (Fall 1996) (unpublished seminar paper, University of Stockholm).

[93] *History*, ECOCIDE L., https://ecocidelaw.com/history/ (last visited Dec. 18, 2021).

[94] *Id*.

[95] Benjamin Whitaker, Special Rapporteur on the Economic and Social Council, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of

defined ecocide as "adverse alterations, often irreparable, to the environment — for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest — which threaten the existence of entire populations, whether deliberately or with criminal negligence."[96] Following the work of the Sub-Commission in 1985, then-UN Special Rapporteur on genocide, Benjamin Whitaker, advocated for the definition of genocide to include ecocide.[97] While the Genocide Convention was ultimately not amended,[98] the emergence of ecocide after the Vietnam-American War is foundational to the current international movement. This movement has also ebbed and flowed with the efforts of Vietnamese Agent Orange victims seeking access to justice.[99]

III. THE FIGHT FOR JUSTICE BY VIETNAMESE AGENT ORANGE VICTIMS

Vietnamese persons were not alone in their fight to find justice for the health effects of Agent Orange exposure; however, the Vietnamese have yet to successfully prevail in courts.[100] In contrast, several groups, including American veterans and American allies, such as South Koreans veterans, have filed lawsuits against chemical manufacturers for the health effects of Agent Orange and had successful outcomes.[101] For example, in 1984 United States veterans won a $180 million (USD) class action settlement and

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Genocide, ECOSOC, ¶ 33, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985); *see also* Greene, *supra* note 78 (discussing the evolution of the term ecocide).

[96] Greene, *supra* note 78, at 14 (quoting Whitaker, *supra* note 95).

[97] Lindsay Norton, *The Movement to Recognize Ecocide as an International Crime*, VILL. ENV'T L. J. (Apr. 26, 2022), https://villanovaelj.scholasticahq.com/post/1486.

[98] *See* Greene, *supra* note 78, at 14 (noting that "the proposal to include 'ecocide' within the Genocide Convention never gathered speed").

[99] *See, e.g.*, Phan Xuan Dung, *Agent Orange: Vietnam's 'Struggle for Justice' Continues*, FULCRUM (Feb. 9, 2021), https://fulcrum.sg/agent-orange-vietnams-struggle-for-justice-continues/; Trang chủ, *Agent Orange Victims: Journey to Seek Justice*, VAVA, https://vava.org.vn/news/agent-orange-victims-journey-to-seek-justice-125.html (last visited Sept. 19, 2022); Cohn, *supra* note 2.

[100] *See* Vân Nguyễn, *Vietnamese French Citizen's Long Standing Battle for Justice Carries on*, VIỆT NAM NEWS (May 31, 2021), https://vietnamnews.vn/society/961129/vietnamese-french-citizens-long-standing-battle-for-justice-carries-on.html (discussing how Ms. Trần continues to fight for justice despite the court dismissing her lawsuit).

[101] *See* Zierler, *Vietnamese Plaintiffs*, *supra* note 10, at 478–79 ("In addition to the Vietnamese persons and American veterans who have filed lawsuits relating to exposure to Agent Orange, military veterans of nations allied with the American [W]ar effort in Vietnam, including Australia, South Korea, and New Zealand, have claimed health effects from wartime exposure.").

consequently,[102] the United States Veterans Administration now provides several benefits, including health care, for American veterans and their families if they can demonstrate that they were in the United States military during the timespan that the United States military used Agent Orange in Southeast Asia.[103] For South Korean veterans, in 2013, the South Korean Supreme Court ruled that United States chemical manufacturers must pay $61 million (USD) to veterans who served in Vietnam.[104] While the companies have yet to pay,[105] it marked an important step in recognizing the long-term effects and the corporate responsibility of the companies that produced Agent Orange. Further, on the United States front, in 2012, West Virginians who live near a now defunct factory that was used for producing Agent Orange filed lawsuits against Monsanto and won a settlement for their health effects resulting from chemical exposure from Agent Orange production.[106] There is also a growing movement in Oregon to recover damages from corporations that used Agent Orange to spray industrial forests and watersheds that supply drinking water.[107]

However, for the Vietnamese, all challenges against the United States government and the chemical manufacturers have yielded case dismissal, and the subsequent actions of the United States government to mitigate Agent

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[102] *Id.* at 479.

[103] *See generally*, Beena Raghavendran, *A "Bittersweet" Moment: Court Says VA Was Wrong in Denying Vietnam Veterans Benefits*, PROPUBLICA (Feb. 1, 2019, 5:24 PM), https://www.propublica.org/article/vietnam-blue-water-veterans-court-says-va-was-wrong-denying-benefits (stating that the "boots on ground" standard is expanded to those in the military at the time that Agent Orange was used, and the time afterwards).

[104] 이우영, *Seoul Court Orders Review of Compensation Ruling on Vietnam War Defoliant Victims*, KOREA HERALD (July 12, 2013, 8:56 PM), http://www.koreaherald.com/view.php?ud=20130712000786 ("South Korea's top court on Friday partly reversed a lower court ruling that said two U.S. producers of a toxic chemical should compensate most of the South Korean Vietnam War veterans who sued the firms for their exposure to the defoliant.").

[105] *See* Xinhua, *S.Korean Veterans Demand Unpaid Combat Allowance During Vietnam War*, ASIA & PAC. (May 27, 2019), http://www.xinhuanet.com/english/2019-05/27/c_138094146.htm.

[106] Jeff Brady, *Monsanto Reaches Settlement on Agent Orange Class-Action Suit*, NAT'L PUB. RAD. (Feb. 23, 2012, 5:27 PM), https://www.npr.org/sections/thetwo-way/2012/02/23/147302639/monsanto-reaches-settlement-on-agent-orange-class-action-suit.

[107] *See generally* THE PEOPLE VS. AGENT ORANGE (Public Broadcasting Service June 28, 2021) (documenting the fight for justice in the Pacific Northwest for the health effects of Agent Orange).

Orange's legacy in Southeast Asia have been minimal in comparison to the damage.[108] In total, the United States government has provided about $390 million (USD) to Agent Orange clean-up sites and to organizations that support persons with disabilities resulting from Agent Orange exposure in Vietnam.[109] However, to avoid acknowledging guilt, the United States government stipulates that these funds are for *all* persons with disabilities, without regard to those affected by Agent Orange, and these funds do not provide specific individuals compensation for the health effects of herbicide exposure.[110] In Cambodia and Laos, the United States government has ignored the existence of Agent Orange victims.[111]

A. *Previous Efforts*

The efforts for justice for Vietnamese persons affected by Agent Orange began in 2004, in *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co*.[112] Vietnamese plaintiffs filed a class action civil suit in the United States District Court for the Eastern District of New York seeking damages against the chemical manufacturers that developed Agent Orange.[113] Because ecocide is not a law recognized by the United States Code, the plaintiffs' civil suit was filed under the Alien Tort Claims Act ("ATCA") against Dow Chemical, Monsanto, and several other companies for aiding and abetting the United States military in international legal violations, including war crimes.[114] The complaint alleged that because chemical manufacturers developed Agent Orange, which contains poison,

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[108] Phan Xuan Dung, *Agent Orange: Vietnam's 'Struggle for Justice' Continues*, FULCRUM (Feb. 9, 2021), https://fulcrum.sg/agent-orange-vietnams-struggle-for-justice-continues/ (discussing that there has not been justice for Vietnamese victims and this struggle continues).

[109] *See generally* MARTIN, *supra* note 49, at summary ("Congress appropriated nearly $390 million to address" the issues of "environmental and health damage attributed to a dioxin contained in Agent Orange and other herbicides sprayed over much of the southern portion of the country during the Vietnam War.").

[110] *See id.* at 19 ("[The] U.S. government has provided over $100 million in assistance to disabled Vietnamese, regardless of the cause of the disability. The flyer does not mention Agent Orange, dioxin, or areas sprayed with Agent Orange."); Black, *U.S. Has Never Acknowledged*, *supra* note 2.

[111] *See* Black, *U.S. Has Never Acknowledged*, *supra* note 2.

[112] Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 113 (2d Cir. 2008).

[113] *Id.* at 107–08.

[114] Complaint ¶ 1, Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 2004 WL 2411069 (E.D.N.Y. 2004) (No. 04CV00400).

they were also responsible for the health and reproductive issues of exposed Vietnamese persons, and also for the degradation of their natural environment, including the destruction of the coastal mangrove forests.[115] However, before the District Court reviewed the case on the merits, it dismissed the claims on the grounds that international law did not prohibit the use of herbicides in war.[116] Further, the Court found the defendants had a valid affirmative defense giving way to the dismissal of a claim under the ATCA because the chemical manufacturers were contractors of the United States Department of Defense.[117]

On appeal, the United States Second Circuit affirmed the United States District Court's decision, and similarly found that the government contractors and the chemical contractors were protected from liability.[118] The Second Circuit judges stated that "[a]lthough the herbicide campaign may have been controversial . . . [the record demonstrated the United States military used the chemical defoliants as herbicide] and not as poison designed for or targeting human populations."[119] After the Second Circuit dismissed the case, the plaintiffs appealed the case to the United States Supreme Court; however, the Supreme Court refused to hear the case.[120] This effectively ended the potential for Vietnamese Agent Orange victims to recover for damages in United States courts under the existing legal framework.[121]

B. *Ongoing Efforts*

While the dismissal of the class action suit brought by Vietnamese plaintiffs had a chilling effect on Vietnamese citizens bringing claims in United States courts, in France, Ms. Trần rekindled efforts for justice for Agent Orange victims by filing a case in French courts in 2014.[122] Ms. Trần,

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[115] *See id*. ¶¶ 49, 219, 229, 230.

[116] *Viet. Ass'n for Victims of Agent Orange*, 517 F.3d at 108.

[117] *Id*.

[118] *Id*.

[119] *Id.* at 119.

[120] Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 555 U.S. 1218 (2009).

[121] *See* Zierler, *Vietnamese Plaintiffs*, *supra* note 10, at 522.

[122] *See* Hannah Thompson, *French-Vietnamese Woman in 'Fight of Her Life' on War Chemicals*, CONNEXION (Jan. 25, 2021, 2:18 PM), https://www.connexionfrance.com/French-news/French-Vietnam-woman-in-fight-of-her-life-on-war-chemicals-opens-case-in-France; *see also* BBC News Tiếng Việt, *Bà Trần Tố Nga 'một mình đi kiện các đại công ty' - BBC News Tiếng Việt*, YOUTUBE (May 20, 2021), https://www.youtube.com/watch?v=GItsLMT4AM0 (interviewing her on her life story and her advocacy efforts).

eighty-years-old, was born in Vietnam in 1942 and worked as a journalist for the National Liberation Front (the Viet Cong) during the Vietnam-American War.[123] During this time, she said that she was sprayed with Agent Orange several times.[124] Consequently, Ms. Trần now suffers from various health conditions, including terminal cancer, which medical tests have confirmed are the result of Agent Orange exposure.[125] Ms. Trần also had three children, one who died shortly after birth, and two other children who have severe health conditions that her grandchildren have also inherited.[126]

Ms. Trần began contemplating efforts at seeking justice for these conditions in 2009; however, it was not until 2013, when a French law was amended to allow for French citizens to sue a third party, that Ms. Trần's legal case began.[127] In her complaint, Ms. Trần lists 26 multinational chemical manufacturers which were the main suppliers of Agent Orange to the United States military, including Dow Chemical and Monsanto.[128] She asserts that these companies owe her damages for the health effects that Agent Orange has had on herself, her children, and her grandchildren.[129] At the trial level, Ms. Trần's lawyers planned to argue that the companies intentionally misled the United States government by failing to disclose how toxic the herbicide actually was.[130] In the lead up to the lower court's trial, the companies allegedly attempted to delay the date of the trial and offered damages to Ms. Trần privately; however, she refused such offers and has stated that her objective with the lawsuit is "to demand justice for me and my family" but also to create a "legal precedent so that all victims of agent orange — not only in Vietnam, in other countries too — have a path in front of them to get justice for themselves."[131] Ms. Trần stated that she hopes to create a precedent for the international crime of ecocide.[132]

However, in May of 2021, the French court ruled that it did not have jurisdiction over the case because the subject matter pertained to "wartime

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[123] *See* Thompson, *supra* note 122; BBC News Tiếng Việt, *supra* note 122.

[124] THE PEOPLE VS. AGENT ORANGE, *supra* note 107.

[125] *See* BBC News Tiếng Việt, *supra* note 122.

[126] *See* Thompson, *supra* note 122.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Vietnam War: French Court to Hear Landmark Agent Orange Case*, BRIT. BROAD. CORP. (Jan. 25, 2021), https://www.bbc.com/news/world-europe-55795651.

[131] Thompson, *supra* note 122 ("[T]he companies have attempted to delay the date of the trial several times, and have offered Ms. Nga damages, but she has refused.").

[132] *Id*.

actions of the [United States] government."[133] In response to the dismissal, chemical companies claimed that they were acting on the orders of the United States government and that the United States government was engaged in a "sovereign act."[134] Ms. Trần has since appealed the case, and her lawyers will argue that the companies were not coerced into producing Agent Orange and that the lower court misinterpreted state sovereignty protection.[135]

IV. CODIFYING ECOCIDE & ITS EFFECTS ON VIETNAMESE AGENT ORANGE VICTIMS FINDING RELIEF

Since ecocide has only been recognized as a crime in a few domestic jurisdictions, and never at the international level, Agent Orange victims have never been able to use ecocide as the basis for seeking relief in courts, and instead have had to rely on national tort laws.[136] For example, in Ms. Trần's case, since ecocide is not a recognized crime in France, Ms. Trần must instead rely on the health effects resulting from the environmental destruction as the bases for her claims.[137] However, as the Independent Expert Panel makes strides to amend the Rome Statute to include ecocide,[138] the reverberatory effects of elevating ecocide to an atrocity crime has the potential to forge new avenues of relief for Vietnamese and other Agent Orange victims by influencing states to domestically enact ecocide laws, and by setting a normative standard for treating ecocide as seriously as other atrocity crimes, including genocide. Further, the shaming effect of the ICC

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[133] *French Court Dismisses Case Over Agent Orange Use in Vietnam War*, FRANCE 24 (May 10, 2021, 12:30 PM), https://www.france24.com/en/live-news/20210510-french-court-dismisses-case-over-agent-orange-use-in-vietnam-war.

[134] *Id*.

[135] *See* Anne Bagamery, *France Dismisses Agent Orange Lawsuit, Citing 'Sovereign Immunity,'* AM. LAW. MEDIA INT'L LTD. (May 10, 2021, 2:58 AM), https://www.law.com/international-edition/2021/05/10/france-dismisses-agent-orange-lawsuit-citing-sovereign-immunity/?slreturn=20211118120152 (discussing the sovereignty argument).

[136] *See supra* Part II (discussing the previous ways that Agent Orange Vietnamese victims brought claims in courts).

[137] *See* Marina Strauss, *Trần Tố Nga's Last Stand Against Agent Orange Manufacturers*, DEUTSCHE WELLE (May 5, 2021), https://www.dw.com/en/agent-orange-lawsuit-france-monsanto-bayer-dow-chemical-vietnam-war/a-57485400; *see also Ecocide Law in National Jurisdictions*, ECOCIDE L., https://ecocidelaw.com/existing-ecocide-laws/ (last visited Dec. 18, 2021) [hereinafter *Ecocide Law*] (listing the current jurisdictions that recognize ecocide in their national legislation, in which France is not included).

[138] *See* Fischels, *supra* note 15.

could catalyze diplomatic pressure on the United States to finally deal with the legacies of Agent Orange in Southeast Asia, either through executive or congressional action.

A. *International Movement to Codify Ecocide as an Atrocity Crime*

Since the emergence of ecocide as a term, there has been a growing movement to ensure that ecocide is an integral part of international criminal law.[139] The campaign to define ecocide and to officially amend the Rome Statute to include ecocide became more concerted when the world recognized the scientific evidence demonstrating a correlation between greenhouse gases and the destruction of ecosystems.[140] This context gave way to the 2020 Stop Ecocide Foundation, in which an Independent Expert Panel, comprised of twelve international lawyers from diverse backgrounds and expertise, convened to set a legal definition of ecocide for the Rome Statute.[141] The Independent Expert Panel's proposed definition of ecocide reads as follows:

> "[E]cocide" means unlawful or *wanton* acts committed with knowledge that there is a substantial likelihood of *severe* and either *widespread* or *long-term* damage to the *environment* being caused by those acts.
>
> . . . a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
>
> b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
>
> c. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;

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[139] *See generally* Greene, *supra* note 78 (discussing the new campaign to make ecocide an atrocity crime).

[140] *See* STOP ECOCIDE FOUND., *supra* note 16, at 2.

[141] *Id.*

> d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
>
> e. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.[142]

Further, according to the proposed definition, in order for the ICC to investigate a situation for ecocide, two thresholds must be met.[143] First, "there must exist a substantial likelihood that the conduct (which includes an act or omission) will cause severe and either widespread or long-term damage to the environment."[144] Second, proof is required to show "that the acts are unlawful or wanton."[145] If ecocide was successfully amended into the Rome Statute, then the crime would be a part of the "the most serious crimes of concern to the international community as a whole," including the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[146]

The proposed definition only provides for individual criminal responsibility, and not corporate responsibility, which aligns with the Rome Statute's current jurisdictional limits.[147] The Independent Expert Panel stated that the focus on individuals is key to accountability for ecocide because "corporate decisions are ultimately made by individuals" and "[a]ll too often those decision makers are able to hide behind the 'corporate veil.'"[148]

In applying the proposed definition of ecocide to the situation regarding the United States military's use of Agent Orange in Vietnam and chemical manufacturers producing poisonous herbicides for the United States government, a prosecutor at the ICC could determine that officials within the

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[142] *Id*. at 5 (emphasis added).

[143] *Id*. at 7.

[144] *Id.*

[145] *Id.*; *id*. at 10 (discussing 'unlawful or wanton acts').

[146] Sara K. Phillips, *Unpacking "Ecocide": A Note of Caution for International Criminalization*, STOCKHOLM ENV'T INST. (July 9, 2021), https://www.sei.org/perspectives/unpacking-ecocide-international-law/.

[147] *See id.*

[148] M. Apelblat, *Climate Change: Universal Jurisdiction Against Individuals Who Commit Genocide*, BRUSSELS TIMES (Dec. 11, 2021), https://brusselstimes.com/world-all-news/197393/climate-change-universal-jurisdiction-against- individuals-who-commit-ecocide.

United States government as well as the decision makers of the chemical manufacturers could be prosecuted for ecocide.[149] First, there is evidence that the United States military and chemical manufacturers perpetuated widespread and long-term environmental damage to an agriculturally based culture and people by destroying jungles, forests, and crops with poisonous substances.[150] Second, the United States military wantonly sprayed[151] Agent Orange in Southeast Asia because it carried out the spraying in an indiscriminate manner that disregarded the cost of human and environmental consequences in relation to the war-time benefits.[152] The damage was also severe to the environment, the people, and the culture because it forced population movements, destroyed important ecological systems, and led to severe health problems for the Vietnamese people.[153] Moreover, the long-term and irreversible damage on the people and land has pervaded well into the twenty-first century.[154] Thus, under the proposed ecocide definition, Vietnamese Agent Orange victims would have a claim for ecocide under an amended Rome Statute, which would include the definition of genocide that the Independent Expert Panel proposed.[155]

While the proposed definition of ecocide would provide Vietnamese Agent Orange victims an ecocide claim under international law, the ICC cannot provide Vietnamese or other Agent Orange victims a forum of justice over chemical manufacturers or the United States government because the ICC would likely not interpret ecocide to apply retroactively in accordance with Article 121(5).[156] Since the Rome Statute took effect in 2002, and the

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[149] *See* Kate Mackintosh, *How Long Until the Planet's Destruction is an International Crime?*, BLOOMBERG L. (Mar. 17, 2022, 10:00 PM), https://news.bloomberglaw.com/environment-and-energy/how-long-until-the-planets-destruction-is-an-international-crime (explaining how criminalizing ecocide would work in practice).

[150] *See supra* Part II.A. (outlining the environmental and health damages that Agent Orange has had on Vietnam).

[151] *See* STOP ECOCIDE FOUND., *supra* note 16, at 10 (defining wanton).

[152] *See id.*; *supra* Part II.A.

[153] *See supra* Part II.A.

[154] *See* STOP ECOCIDE FOUND., *supra* note 16, at 5.

[155] *See supra* Part II.A.; *Making Ecocide a Crime*, STOP ECOCIDE INT'L, https://www.stopecocide.earth/making-ecocide-a-crime (last visited Sept. 18, 2022).

[156] *See* Rome Statute of the International Criminal Court art. 121(5), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002); Donna Minha, *The Possibility of Prosecuting Corporations for Climate Crimes Before the International Criminal Court: All Roads Lead to the Rome Statute?*, 41 MICH. J. INT'L L. 491, 529 (2020) (stating that "even if States Parties agree to amend the Statute, it will take time, and the amendment will most probably not apply retroactively").

environmental destruction in Vietnam took place well before that, the ICC would not have jurisdiction over the case.[157] Further, the United States is not a state party to the Rome Statute.[158] Thus, the ecocide amendment would not provide Vietnamese victims the ICC as a forum of justice.[159] Rather, it is the reverberatory effects of codifying ecocide as a major international atrocity crime that would spark new opportunities for justice through domestic venues, regional courts, and diplomatic channels.

B. *Ecocide's Effect on Promulgating Avenues of Justice for Vietnamese Victims*

While the ICC cannot serve as a forum to Vietnamese Agent Orange victims, national and regional courts may fill an important void in accountability and the gap in justice by enacting ecocide liability laws and providing a basis of liability for Vietnamese persons and other victims.[160] Since ecocide would be considered an atrocity crime rooted in international customary law, national courts could determine that ecocide can apply retroactively and find that there is universal jurisdiction over these cases.[161] For example, several crimes against humanity cases before the European Court of Human Rights ("ECrHR"), the ECrHR have upheld retroactive application of crimes against humanity by interpreting Article 7(2) of the European Convention on Human Rights ("ECHR") to allow for jurisdiction over atrocity crimes committed in the past and in the future; but states like

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[157] *See* Minha, *supra* note 156, at 529–30 (stating that "the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute").

[158] *Q&A: The International Criminal Court and the United States*, HUM. RIGHTS WATCH (Sept. 2, 2020, 12:00 AM), https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states.

[159] *See generally id*. ("There are limited situations in which the ICC has jurisdiction over the nationals of countries, such as the US, that have not joined the Rome Statute.").

[160] *See generally* Rachel Killean, *The Benefits, Challenges, and Limitations of Criminalizing Ecocide*, GLOB. OBSERVATORY (Mar. 30, 2022), https://theglobalobservatory.org/2022/03/the-benefits-challenges-and-limitations-of-criminalizing-ecocide/ (noting that although the ICC getting involved for ecological justice is step forward, other tools, such as laws, should be utilized to achieve systematic change).

[161] *See Universal Jurisdiction*, INT'L JUST. RES. CTR. https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/ (last visited Sept. 18, 2022) ("'[U]niversal jurisdiction' refers to the idea that a national court may prosecute individuals for serious crimes against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual [s]tates may act to protect.").

the Netherlands and Norway have rejected a non-retroactive application of atrocity crimes, such as crimes against humanity.[162] Further, several ongoing cases of universal jurisdiction for these types of crimes are being carried out in European states, such as Germany and Sweden.[163] Moreover, the international normative effect of the ICC's incorporation of ecocide into its subject matter jurisdiction can generate international diplomatic pressure on the United States government to address the victims of Agent Orange who have yet to find relief.[164]

1. *Domestic & Regional Legislation*

Few states have enacted domestic legislation outlawing ecocide and no state has enacted domestic laws which would elevate the commission of environment destruction — like ecocide — to the status of the other major atrocity crimes, such as genocide.[165] Since the ICC is the court of last resort, meaning that it does not prosecute cases that are being handled sufficiently

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[162] *See, e.g.*, Touvier v. France, App. No. 29420/95, Eur. Ct. H.R. (1997) (upholding France's application of the crimes against humanity statute despite the statute being enacted twenty years after the application when Touvier committed crimes during the Holocaust); Kolk and Kislyiy v. Estonia, Eur. Ct. H.R App. Nos. 23052/04 and 24018/04, Decision on Admissibility (2006) (upholding an Estonian court's ruling that crimes against humanity could be charged against defendants when acts they had committed in 1949 had not been crimes against humanity under international law yet); *see also* Thorvardarson, Retroactive Application of International Criminal Law at the Domestic Level - The case of Iceland 14–15 (July 14, 2017) (LL.M. thesis, University of Amsterdam) (https://dspace.uba.uva.nl/server/api/core/bitstreams/44ddb960-66a8-4537-9478-4350316f46e3/content) (discussing how Dutch and Norwegian courts and rejected retroactive application of crimes against humanity retroactively).

[163] *See, e.g.*, Oberlandesgerichte Frankfurt, July 12, 2016, [OLG] [Higher Regional Court, Frankfurt Am Main, 5-3 StE 2/16 - 4 - 1/16 (Ger.) (prosecutor convicted the defendant for war crimes in Syria); Tingsrätt [TR] [District Court] B- 15255-19 (2016) (Swed.), https://www.domstol.se/en/nyheter/2022/07/iranian-citizen-sentenced-to-life-in-prison-for-executions-of-political-prisoners-in-iran-in-1988/ (defendant was charged and convicted for atrocity crimes for his role executing Iranian citizens in 1988); Tingsrätt [TR] [District Court] V 2639-16 (Swed.), https://www.legal-tools.org/doc/59def0/pdf/ (defendant was charged and convicted of committing atrocity crimes in Syria). *See also* Beth Van Schaack, *National Courts Step Up: Syrian Cases Proceeding in Domestic Courts*, SOC. SCI. RSCH. NETWORK 1, 16–17, 27–28 (2019) (outlining domestic courts that have begun prosecuting atrocity crimes under universal jurisdiction).

[164] *See generally* OLYMPIA BEKOU ET AL., WORKSHOP ENVISIONING INTERNATIONAL JUSTICE: WHAT ROLE FOR THE ICC? 28 (2021) (recommending applying political pressure to non-member states to support and comply with the ICC).

[165] *See Ecocide Law*, *supra* note 137 (listing the few jurisdictions that have codified ecocide).

in domestic courts, state parties to the treaty are required to enact domestic legislation that provides liability to the ICC's crimes in each state's domestic legislation.[166] Therefore, by amending the Rome Statute, state parties would be required to ensure that there is liability for ecocide in their own laws.[167]

The power of movement to amend the Rome Statute to include ecocide has already begun to take effect on some states and regional systems.[168] For example, in Belgium, the Belgian parliament adopted a resolution recognizing the international crime of ecocide, and further, the parliament called on the government to draft a convention on the prosecution of ecocide.[169] The European Union (EU) Commission also recently proposed new criminal offenses to fulfill the European Green Deal, which would require member states to enact legislation ensuring the protection of the environment through criminal and other areas of law.[170] Also, different from the ICC, domestic jurisdictions can provide a multitude of remedies for ecocide victims, including civil, criminal, and administrative remedies to prevent, prosecute, and hold accountable those who commit ecocide.[171]

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[166] *See Joining the International Criminal Court: Why Does it Matter?*, INT'L CRIM. CT. https://www.icc-cpi.int/Publications/Joining-Rome-Statute-Matters.pdf (last visited Dec. 18, 2021).

[167] Sophie Yeo, *Ecocide: Should Killing Nature be a Crime?*, BRIT. BROAD. CORP. (Nov. 5, 2020), https://www.bbc.com/future/article/20201105-what-is-ecocide ("By adding a fifth crime of ecocide to the Rome Statute of the International Criminal Court, the perpetrators of environmental destruction would suddenly be liable to arrest, prosecution and imprisonment.").

[168] *See* Mélissa Godin, *Lawyers are Working to Put 'Ecocide' on Par with War Crimes. Could an International Law Hold Major Polluters to Account?*, TIME (Feb. 19, 2021, 7:56 AM), https://time.com/5940759/ecocide-law-environment-destruction-icc/.

[169] *See* Proposition De Résolution visant à inclure le crime d'écocide dans le Statut de Rome de la Cour pénale internationale et le droit pénal belge [Motion for a Resolution to include ecocide in the Rome Statute of the International Criminal Court and Belgian Criminal Law] M.B. July 8, 2020, https://www.lachambre.be/FLWB/PDF/55/1429/55K1429004.pdf; *see also* Apelblat, *supra* note 148.

[170] *European Green Deal: Commission Proposes to Strengthen the Protection of the Environment Through Criminal Law*, EUR. COMM'N (Dec. 15, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6744 ("The proposal intends to make protection of the environment more effective by obliging Member States to take criminal law measures. It defines new environmental crimes, sets a minimum level for sanctions and strengthens the effectiveness of law enforcement cooperation.").

[171] *See Reinforcing Civil and Criminal Liability to Respond to Environmental Harm*, PARLIAMENTARY ASSEMBLY (May 19, 2021), https://pace.coe.int/en/news/8305.

Unlike the ICC, domestic courts could determine that ecocide applies retroactively if the court finds that the use of Agent Orange during the Vietnam-American War was in violation of international customary law and international humanitarian law at the time that the United States military sprayed Southeast Asia.[172] The most notable case of a tribunal employing this logic to prosecute a crime that did not explicitly exist at the time of the acts commission was during the Nuremberg Tribunal.[173] Since then, domestic courts and regional systems, such as the ECtHR, have grappled with retroactive application of legislation on international atrocity crimes, such as crimes against humanity.[174] Although some domestic courts have rejected the Nuremberg's retroactive application of the law, others have justified their application of atrocity laws based on the international community's collective commitment to prevent and punish atrocity crimes.[175] However, it should be noted that the retroactive application of atrocity laws to criminal liability cases tend to be more scrutinized by domestic courts than civil liability because "retroactive application of international criminal law on the domestic level clearly touches upon fundamental human rights of the accused" and the general principle of the law usually does not find international customary law to be a strong basis for criminal liability.[176] Further, the ECtHR, and other national courts, such as those in France, Germany and the Baltic states, have determined that the "prima facie retroactive application of law criminalizing international crimes is not in violation" of the prohibition on retroactive application of laws that did not exist at the time of penalty as long as it was found within international customary law.[177] Given that the use of herbicides in Vietnam could be interpreted as violating international customary law at the time of their use, a state could ground a decision to hear an Agent Orange case based on this argument.[178]

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[172] *See* Yarik Kryvoi & Shaun Matos, *Non-Retroactivity as a General Principle of Law*, 17(1) UTRECHT L. REV. 46, 49 (2021).

[173] *See* Thorvardarson, *supra* note 162, 14 ("On the international level the principle [of non-retroactivity] has been interpreted by various international tribunals, ever since the Nuremberg trials, where a strict interpretation of the principle was rejected as it would be unjust to allow the atrocities to go unpunished.").

[174] *Id*. at 14–15.

[175] *Id*. at 15–16.

[176] *Id*. at 16.

[177] *Id*. at 18.

[178] *See supra* Part II.B.

While it may be difficult for Vietnamese Agent Orange victims to convince a national court that ecocide implies criminal liability for United States government officials and corporate employees of chemical manufacturers that played decision making roles in employing Agent Orange, a court could certainly argue that herbicidal warfare violated well-founded international customary law at the time that it was used in Southeast Asia, thus mandating civil tort liability for ecocide in a national court.[179]

Moreover, with respect to a domestic court permitting jurisdiction over a case with no link between the tort or underlying crime and the forum state, international law permits universal jurisdiction over both criminal and civil tort claims in cases involving the major atrocity crimes.[180] Several states' national courts have already permitted civil, and a few criminal cases, to go forward for these types of crimes.[181] Therefore, if the ICC amended ecocide as the fifth major atrocity crime, the reverberatory effects on the domestic laws of courts could provide Vietnamese Agent Orange victims, such as Ms. Trần, a forum of jurisdiction in national courts that reject retroactive application arguments and exercise universal jurisdiction over atrocity crimes.[182]

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[179] *See generally* Tarini Mehta, *Symposium Exploring the Crime of Ecocide: Accountability for Environmental Destruction–Ecocide in National and International Law (Part II) the Way Forward*, OPINIO JURIS (Sept. 25, 2020), http://opiniojuris.org/2020/09/25/symposium-exploring-the-crime-of-ecocide-accountability-for-environmental-destruction-ecocide-in-national-and-international-law-part-ii-the-way-forward/ (stating that perpetrators of acts of ecocide should be held to strict and absolute liability, a derivative of tort law, for their acts).

[180] AMNESTY INT'L, UNIVERSAL JURISDICTION: THE SCOPE OF CIVIL UNIVERSAL JURISDICTION 1 (2007), https://www.amnesty.org/en/wp-content/uploads/2021/07/ior530082007en.pdf ("International law permits the exercise of adjudicative universal jurisdiction over civil tort claims, including those based on genocide, crimes against humanity, war crimes, torture and other crimes under international law without requiring a link between the tort or underlying crime and the forum state.").

[181] *See*, *e.g.*, *id.* at 5–6 (noting that Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and Argentina permit domestic plaintiffs to bring civil claims with underlying criminal acts under universal criminal jurisdiction).

[182] *See FAQs - Ecocide & the Law*, STOP ECOCIDE, https://www.stopecocide.earth/faqs-ecocide-the-law (last visited Sept. 19, 2022).

2. *Diplomatic & International Pressure*

Given the normative powers of the ICC, the incorporation of ecocide as an atrocity crime in the Rome Statute could also mount international political and diplomatic pressure on the United States and chemical manufacturers to officially acknowledge that they committed ecocide in Southeast Asia.[183] In turn, this pressure could prompt official efforts to provide reparations to Vietnamese Agent Orange victims as well as other affected groups.[184] ICC plays an important role in "mobil[izing] extralegal pressures" and "shap[ing] social expectations about what constitutes justice more broadly."[185] While there are critiques about the functionality, focus, and preventative effects of the court, it has unequivocally helped name and shame perpetrators of atrocity crimes and set a normative standard through its investigations, prosecutions, and through its treaty.[186]

Thus, by codifying ecocide into the Rome Statute, a chain reaction could occur, which could spark national and regional mechanisms to likewise incorporate ecocide as a core atrocity crime.[187] This could then draw more attention to the acts of the United States and chemical manufacturers, highlighting them as perpetrators of widescale ecocide. This could force executive and legislative portions of the United States government to grapple with their own pasts in committing ecocide and the legacies of this crime in

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[183] *See* Greene, *supra* note 78, at 28 ("Signatories to the Rome Statute are expected to enact similar laws at the national level, so enacting the ecocide amendment would create pressure for countries to quickly implement the crime at the national level.").

[184] *See generally* TOM BUITELAAR, THE ICC AND THE PREVENTION OF ATROCITIES 14 (2015), https://www.thehagueinstituteforglobaljustice.org/wpcontent/uploads/2015/10/The_ICC_and_The_Prevention_of_Atrocities.pdf (critiquing the preventative effects of the ICC, but acknowledging that "it can contribute to the prevention of atrocities by focusing on the long-term, transformative process that can lead to the internalization of norms and the creation of self-regulating communities").

[185] *Id*. at 13.

[186] Matthew Krain, *J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politcides?*, 56(3) INT'L STUD. Q. 574, 585–86 (2012). ("At minimum, naming and shaming takes away the excuse of policymakers that they 'did not know' that mass killing was occurring, or that they 'did not fully appreciate' the extent of the killing. At their most effective, transnational advocacy networks can bring atrocities to light, frame perpetrators as pariahs and hurt their international reputations, activate powerful bystanders who can and sometimes do impose costs on perpetrators, and ultimately help lead to changes in the murderous policy.").

[187] *See* Greene, *supra* note 78, at 28.

Southeast Asia.[188] For example, the effects of the movement to codify ecocide have already made their way into proposed United States legislation.[189] In May 2021, United States Representative Barbara Lee introduced the Agent Orange Relief Act of 2021 to the United States House of Representatives.[190] The proposed legislation "would expand benefits to children of veterans exposed to Agent Orange; expand research on Agent Orange and its effects on the health of exposed individuals; and provide medical, housing and poverty reduction assistance to Vietnamese individuals affected by exposure as well as their children. . . . It would also provide environmental remediation for areas in Vietnam exposed to Agent Orange and conduct a needs assessment on the Vietnamese American community."[191] Such a piece of legislation could provide comprehensive relief to Vietnamese victims of Agent Orange, and international pressure from the international recognition of ecocide as an atrocity crime could bolster such a bill to be passed in the United States Congress.

It is important to note that the United States has recently taken steps to recognize the effects of toxics on U.S. veterans that served in Southeast Asia by passing major legislation. In August 2022, Congress passed the Honoring our Pact Act ("the Act"), which provides for expanded access for U.S. veterans to receive medical care for exposure to toxics that took place during military service, but also the Act provides additional funding for research, and creates a clear presumption of exposure to toxics based on a veteran's location of service and timing.[192] The Act unfortunately provides no recognition or remedy for those in Vietnam or those in Vietnamese-American communities who similarly suffer from the effects of Agent Orange and other toxic exposure from the War.[193]

United States legislation or executive actions that include acknowledgement and reparations for the harm done in Southeast Asia may also be the most victim-centered approach to justice for all Vietnamese

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[188] S*ee Agent Orange: What Efforts are Being Made to Address the Continuing Impact of Dioxin in Vietnam? Before the Subcomm. on Asia, the Pac. and the Glob. Env't*, 111th Cong. 52–54 (2009) (statement of Rick Weidman, Executive Director, Policy & Government Affs., Vietnam Veterans of America).

[189] *See* Victims of Agent Orange Relief Act of 2021, H.R. 3518, 117th Cong. (2021).

[190] *Id.*

[191] Cohn, *supra* note 2.

[192] Honoring our Pact Act of 2022, H.R. 3967, 117th Cong. (2021).

[193] *See id.*

persons.[194] In Vietnam, there is an overwhelming understanding that the array of health effects that stem from dioxin exposure was caused by the United States military's spraying of Agent Orange.[195] However, because a majority of Vietnamese people practice a mix of animism and Buddhism, there remains a cultural perception that the health effects of Agent Orange, such as physical disabilities, are directly related to a person's past-life actions or is someone's fate for previous wrongdoings of their family.[196] This has resulted in added challenges for persons with disabilities and their families living in Vietnam, although conditions are improving.[197] If international pressure mounted and the United States took internal actions to address ecocide in Vietnam, it could proactively change the situation for persons with disabilities in Vietnam by acknowledging the United States military's and chemical manufacturers' wrongdoings.

V. CONCLUSION

Vietnamese Agent Orange victims have struggled for decades to find justice for the health effects that resulted from the United States military's environmental destruction. Working in parallel to the efforts of the Vietnamese Agent Orange victims' fight for justice is a reemergence of a campaign to recognize ecocide as the fifth atrocity crime amended in the Rome Statute of the ICC. While an amended Rome Statute would only provide the ICC jurisdiction over the future commission of ecocide crimes, the normative effects of the amended Rome Statute on regional and national jurisdictions could give rise to a new fora of justice mechanisms for Vietnamese and other Agent Orange victims. Additionally, the recognition of ecocide as an international atrocity crime that is as egregious as genocide could spark meaningful international pressure that would force the United States government to provide comprehensive relief for Vietnamese victims of Agent Orange.

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[194] *See generally A Victim-Centered Approach*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/en-us/victim-care.html (last visited Sept. 19, 2022) ("Victim-Centered Approach is a way of engaging with victims that prioritizes listening, avoids re-traumatization, and systematically focuses on their safety, rights, well-being, expressed needs and choices.").

[195] *See* Black, *U.S. Has Never Acknowledged*, *supra* note 2.

[196] Peter Cody Hunt**,** *An Introduction to Vietnamese Culture for Rehabilitation Service Providers in the U.S.*, CTR. FOR INT'L REHAB. RSCH. INFO. & EXCH. (Mar. 12, 2021), http://cirrie-sphhp.webapps.buffalo.edu/culture/monographs/vietnam.php#s3.

[197] *See generally* CHAU, BEYOND THE LINES (Cynasty Films 2015) (documenting the challenges of persons living with disabilities in Vietnam).

Protecting Traditional and Customary Rights from Cruel and Unusual Punishment: An Argument to Keep Incarcerated Kānaka Maoli Home

Harley Broyles*

> Hawai‘i is . . . one of a handful of states that has been selling our imprisoned people to the lowest bidders, who run dungeons of misery thousands of miles away from families, friends, and for most of the incarcerated, far from their ancestral lands. This works well for some parts of our society, while it sows wholesale destruction to certain communities that have been relegated to the margins.[1]
>
> - Kat Brady, Coordinator for Community Alliance on Prisons

I. INTRODUCTION

The Hawai‘i prison trade is a model for saving the state money at the cost of an individual's familial and spiritual relationships, and happiness. The State of Hawai‘i saves about 100 dollars per incarcerated person[2] per day by

* J.D., Class of 2022, University of Hawai‘i at Mānoa William S. Richardson School of Law. First, I would like to express my gratitude to the University of Hawai‘i Law Review team for your patience, constructive criticism, and assistance in this publishing process. Second, mahalo nui to Justice Sabrina S. McKenna of the Hawai‘i Supreme Court for your insight, mentoring, and for inspiring me with your relentless commitment to fighting against injustices throughout your legal career. Third, thank you to my ‘ohana, Iokepa, and Waiawakuikaa for your unwavering love and support in every activity I take on, I love you all with all of me. This article is dedicated to those our society has far too often pushed aside, stigmatized, and forgotten–the men and women in our incarceration system. May the world begin to see the person behind the prison sentence. Mahalo nui.

[1] Kat Brady, *Prisons—Has COVID-19 Offered Hawai‘i the Road to Redemption?*, *in* 3 THE VALUE OF HAWAI‘I: HULIHIA, THE TURNING 241, 242 (Noelani Goodyear-Ka‘ōpua et al. eds., 2020).

[2] This paper will use the language recommended by THE MARSHALL PROJECT in referring to incarcerated people. *See* Akiba Solomon, *What Words We Use — and Avoid — When Covering People and Incarceration*, Marshall PROJECT (Apr. 12, 2021, 6:00 AM), https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration. Throughout this paper, I will avoid using terms like "inmate," "felon," "offender," and "prisoner," and instead use "incarcerated/imprisoned

shipping people out of state to the Saguaro Correctional Center in Arizona ("Saguaro").[3] While the state saves money by shipping individuals away, these incarcerated men[4] and their families are the ones who pay the price.[5] Native Hawaiian men are sent to Saguaro in high numbers, depriving them of the only thing that they may have ever known: their ancestral land and their families. ‘Āina[6] and ‘ohana[7] relationships are traditional and customary rights inherent in Kānaka Maoli[8] practices. This is evident in numerous works: the Kumulipo,[9] the story of Hāloa,[10] the concept of aloha ʻāina,[11] and simply looking at familial structures in Native Hawaiian stories and culture.[12]

Maintaining one's relationship with the land and one's family is an integral aspect of Native Hawaiian culture, and therefore, should be considered a traditional and customary right under the Hawai‘i Constitution, Article XII, section 7.[13] By transferring these kānaka out of state, the state deprives these kānaka of the option of exercising their traditional and customary practices on the land that these practices belong to. Even worse, they are sent nearly 3,000 miles away from their ‘ohana and, with the high cost of living in Hawai‘i coupled with statistics showing many Native Hawaiians live below

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person/people" and "person/people in prison/jail" because such terms are not neutral and are dehumanizing. *See id.* The use of such unneutral terms promotes the idea that these individuals are separate and different from those in society in general. *See id.*

[3] Kirstin Downey, Looks Like We'll Still Be Using Private Prisons on the Mainland for a While, Honolulu Civ. Beat (Feb. 4, 2019), https://www.civilbeat.org/2019/02/looks-like-well-still-be-using-private-prisons-on-the-mainland-for-awhile/ ("According to a recent legislative task force report, it costs $82.61 a day to house an inmate at Saguaro, compared to $182 a day here in Hawaii . . .").

[4] For purposes of this paper, I will focus on the state's action of transferring men to Saguaro Correctional Center.

[5] *See* Brady, *supra* note 1, at 242.

[6] "'Āina" translates to land or earth. Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 11 (rev. ed. 1986).

[7] "'Ohana" translates to family. Id. at 276.

[8] "Native Hawaiian," "Kānaka Maoli," or "Maoli" as used in this paper, refer to individuals that can trace their ancestry back to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. "Kanaka" is the singular, while "kānaka" is the plural. *Id.* at 127.

[9] The Kumulipo A Hawaiian Creation Chant 58, 187 (Martha Warren Beckwith ed., trans., University of Hawaii Press 1972) (1951).

[10] Lilikalā Kameʻeleihiwa, Native Land and Foreign Desires: Pehea Lā E Pono Ai? 24 (1992).

[11] *See* Mari Matsuda, *The Next Aloha ʻĀina, in 3 The Value of Hawai‘i: Hulihia, the Turning* 278, 279 (Noelani Goodyear-Kaʻōpua et al. eds., 2020).

[12] I would like to emphasize that moʻolelo and other Native Hawaiian related concepts are mentioned very briefly in this article. To read more about these concepts, please visit sources mentioned in the preceding footnotes.

[13] *See, e.g.*, Beckwith, *supra* note 9, at 58, 187; HAW. CONST. art. XII, § 7.

the poverty line, their families are often unable to make the trip to see their incarcerated loved ones.[14]

The Hawai‘i Constitution prohibits the state from imposing "cruel or unusual punishment[s]."[15] It is important to note that Hawai‘i uses "or" instead of "and," which may allow more protection, especially when considering provisions from other states as well as our State Constitution's preamble.[16] Hawai‘i courts use a proportionality test to evaluate whether punishment is cruel and unusual under the federal constitution.[17] Although Hawai‘i courts have adopted this proportionality standard, the actual text of Hawai‘i's Constitution leaves this provision open to interpretation,[18] and there is still a strong argument that kānaka should not be transferred out of state to other carceral facilities. It is both cruel and unusual punishment, and the transfer violates the state's promise to protect traditional and customary rights under the Hawai‘i Constitution.[19]

Part I will discuss the background of prison transfers and a general overview of Kānaka Maoli relationships with the ‘āina and ‘ohana. Part II will analyze Hawai‘i's cruel or unusual punishment provision and argues that prison transfers are a cruel and unusual punishment for incarcerated people, as supported by Hawai‘i's traditional and customary rights principles and laws. Part III discusses other factors which exacerbate the issue of prison

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[14] *See* Anita Hofschneider, *Poverty Persists Among Hawaiians Despite Low Unemployment*, Honolulu Civ. Beat (Sept. 19, 2018), https://www.civilbeat.org/2018/09/poverty-persists-among-hawaiians-despite-low-unemployment/.

[15] Haw. Const. art. I, § 12.

[16] *See id.;* HAW. CONST. pmbl.; *In re Individuals in Custody of the State*, No. SCPW-21-0000483, 2021 WL 4762901, at *20–21 (Haw. Oct. 12, 2021) (McKenna, J., concurring and dissenting) (comparing provisions from other states' constitutions).

[17] The proportionality test considers whether the "prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community." State v. Guidry, 105 Hawai‘i 222, 237, 96 P.3d 242, 257 (2004) (quoting State v. Kumukau, 71 Haw. 218, 226-27, 787 P.2d 682, 687 (1990)).

[18] *See In re Individuals in Custody of the State*, 2021 WL 4762901, at *16 (McKenna, J., concurring and dissenting).

[19] The argument in this Article raises potential equal protection issues, should the state actually stop the transfer of kānaka incarcerated people but continue this practice with other individuals. To comply with both the cruel and unusual punishment and the equal protection provisions, the state should stop transfering all incarcerated people. This Article does not address the potential equal protections issue, but instead, poses an argument that is a first step to stop all of the transfers of our incarcerated people. This Article only focuses on the cruel or unusual punishment provision as supported by traditional and customary rights. *See* HAW. CONST. art. I, § 5; HAW. CONST. art. XII, § 7; U.S. CONST. amend. XIV.

transfers and possible steps forward. Prison transfers deprive kānaka of their traditional and customary right to engage in relationships with their ʻāina and their ʻohana. This must end to ensure that all kānaka – incarcerated or not – have the opportunity to engage in the practices they are entitled under Hawaiʻi law.

II. BACKGROUND

A. The Prison Trade

States are permitted to partake in the "trade" of their incarcerated people based on an Interstate Corrections Compact, which is an agreement or contract that permits a "prisoner exchange" between the participating states.[20] The Interstate Corrections Compact is nationwide with 30 member states.[21] Hawaiʻi participates in the Western Interstate Corrections Compact ("Compact") with fourteen other member states.[22] This Compact permits Hawaiʻi to transfer its incarcerated people across state lines to other states.[23] The Compact is governed by Hawaiʻi Revised Statutes (HRS) Chapter 355, which outlines the procedures and guidelines regarding prisoner transfers, and clearly provides that the "receiving state shall not deprive any [incarcerated person] of any legal rights which said [incarcerated person] would have had if confined in an . . . institution of the sending state."[24] In addition to the Compact, Hawaiʻi has separate contracts with fourteen states detailing the logistics of transfers.[25] For Saguaro, Hawaiʻi has a contract with

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[20] Rui Kaneya, *How Hawaii's Prisoners Are Ending Up in Facilities All Over the Country*, HONOLULU CIV. BEAT (Jan. 12, 2017) [hereinafter Kaneya, *Ending Up in Facilities*], https://www.civilbeat.org/2017/01/how-hawaiis-prisoners-are-ending-up-in-facilities-all-over-the-country/.

[21] See id.

[22] HAW. REV. STAT. § 355-1 (2015). The other states in the Western Corrections Compact include Alaska, Arizona, California, Colorado, Guam, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Id. The statute defines Guam as a state for the purposes of the Compact. Id.

[23] *Id*.

[24] *Id*. § 355-1, art. 4(e). The full language of this subsection of the statute states:

All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

[25] Kaneya, Ending Up in Facilities, supra note 20.

CoreCivic[26] to house its incarcerated people at the for-profit prison in Arizona.[27]

The State of Hawai‘i has been shipping its incarcerated people to the continental United States since 1995.[28] What started as a temporary measure to ease overcrowding has now evolved into an opportunity for the state to save money, as a cheap alternative to housing incarcerated people in prisons within the state.[29] By 2005, Hawai‘i had a higher percentage of its incarcerated people in out-of-state facilities compared to any other state.[30] Hawai‘i remains one of only five states that houses at least twenty percent of its detained population in private prisons outside of the state, despite it no longer leading the country in the usage of private prisons.[31]

Hawai‘i is not transparent in sharing its policies and procedures on the Compact, especially about the circumstances that can trigger transfers.[32] Furthermore, while the state's insists that it is cheaper to house incarcerated people in facilities out of state, it fails to provide any direct clarification regarding how much money the state saves annually by partaking in the transfers or the overall costs that the Hawai‘i Department of Public Safety (DPS) spends in these transfers.[33] According to its 2021 contract, Hawai‘i pays CoreCivic a per diem rate of $81.66 per incarcerated person, and by

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[26] CoreCivic is a "government-solutions company," "the nation's largest owner of partnership correctional, detention, and residential reentry facilities," and believes itself to be the "largest private owner of real estate used by government agencies." CORECIVIC, *About Us*, https://www.corecivic.com/about (last visited Sept. 17, 2022). *See also* DEP'T OF PUB. SAFETY, STATE OF HAW., PSD 21-ID/MB-28, CONTRACT FOR HEALTH AND HUMAN Services: Competitive Purchase of Services (2021) [hereinafter CONTRACT WITH CORECIVIC], https://dps.hawaii.gov/wp-content/uploads/2021/10/21-IDMB-28-21-28-K-Executed_Redacted.pdf.

[27] Contract with CoreCivic, *supra* note 26.

[28] Downey, *supra* note 3.

[29] *See id.* ("Hawaii began shipping prisoners to the mainland . . . as a temporary measure to ease overcrowding during the administration of Gov. Ben Cayetano.").

[30] HCR 85 Task Force, Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai‘i Legislature 57 (2018), https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf.

[31] Id.

[32] Kaneya, *Ending Up in Facilities*, *supra* note 20. Hawai‘i makes little to no effort to share information on its policies for prison transfers with the public, unlike states like Virginia that have detailed and outlined how transfers are made in its operating procedures, readily accessible by the public. Id. See also Va. Dep't of Corr., Operating Procedure 020.2: Compact for Interstate TRANSFER OF INMATES (2022), https://vadoc.virginia.gov/files/operating-procedures/020/vadoc-op-020-2.pdf.

[33] Rui Kaneya, *Is Hawaii Really Saving Millions By Using A Mainland Prison?*, HONOLULU CIV. BEAT (May 25, 2016) [hereinafter Kaneya, *Saving Millions*], https://www.civilbeat.org/2016/05/is-hawaii-saving-millions-by-using-a-mainland-prison/.

contrast, the state pays an average of $137 per person a day at the Halawa Correctional Facility.[34] Beyond the per diem rate, however, the state must expend funds for the costs of transporting the incarcerated people, conducting site inspections, administrative costs, litigation expenses, and more, all while remaining 3,000 miles away.[35]

The criteria for who is sent to Saguaro is ambiguous. In assessing an incarcerated person's eligibility for transfer, DPS considers the following factors:

> 1. Custody level of inmate is Medium or Closed[36]
>
> 2. Must be medically cleared
>
> 3. Must be cleared by criminal justice agencies and have no pending charges, no open felony court cases.[37]

Despite these three simple criteria, the selection process is much more complex. According to a DPS spokeswoman, incarcerated persons are sent to the mainland only after being screened to make sure that they are in "good health and not prone to management problems."[38] Private prisons cherry-pick and avoid housing individuals who may cost more or need more resources, like individuals with health issues.[39]

Most people are in the dark about how these transfers happen, including the incarcerated individuals themselves. Incarcerated people do not find out about their transfer until immediately before it happens – for "security reasons."[40] HRS section 706-606[41] outlines the factors considered when

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[34] CONTRACT WITH CORECIVIC, *supra* note 26, at 58. The state likely pays much more a day to house a person at Halawa today, as the CoreCivic rates since 2016 have dramatically increased (from $70.46 to $81.66). *See* Kaneya, *Saving Millions*, *supra* note 33.

[35] Kaneya, *Saving Millions*, *supra* note 33. Kaneya goes on to pose that, although it might still cost less overall to house incarcerated people at Saguaro than in Hawai'i, that is because the "payroll and other operations costs are so high at the State's four prisons." *Id.* He also highlights that Hawai'i misses out on resident based federal funds by incarcerating individuals out of state. *Id.* The U.S. Census Bureau determines residence based on "where a person lives and sleeps most of the time." *Id.* Thus, according to the U.S. Census Bureau, incarcerated people are counted as residents in the state where they are incarcerated. *See id.*

[36] Interview with Howard Komori, Adm'r, Hawai'i Dep't of Pub. Safety (Nov. 10, 2021) (describing that a "medium or closed" custody level applies to incarcerated people who have sentences forty-eight months or longer, or those who partake in serious misconduct that reclassify them to a higher custody level).

[37] Interview with Howard Komori, Adm'r, Hawai'i Dep't of Pub. Safety (Nov. 5, 2021).

[38] Kaneya, *Saving Millions*, *supra* note 33.

[39] Id.

[40] Interview with William Bento, Deputy Pub. Def., Office of the Pub. Def., State of Hawai'i (Nov. 12, 2021); Interview with Jon Ikenaga, Deputy Pub. Def., Office of the Pub. Def., State of Hawai'i (Nov. 17, 2021).

[41] HAW. REV. STAT. § 706-606 (2014). Factors considered in imposing a sentence include:

imposing a sentence. When discussing whether the sentence includes a transfer out of state, however, it seems that these factors do not apply, except when assessing safety.[42] Even those with careers in criminal law are unclear and have questions about various aspects of transfers.[43] Typically, incarcerated people are sent to Saguaro depending on their custody classification – maximum, close, medium, minimum, community.[44] Only

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) The need for the sentence imposed:
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
> (b) To afford adequate deterrence to criminal conduct;
> (c) To protect the public from further crimes of the defendant; and
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) The kinds of sentences available; and
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.
> This statute does not mention prison overcrowding or facility capacities as a factor in imposing sentences.

Moreover, when DPS was asked the criteria for transfer, they outlined the three criteria mentioned on page 6 and made no reference to HRS § 706-606. Interview with Howard Komori, *supra* note 36.

[42] *See* § 706-606.

[43] *See* Interview with William Bento, *supra* note 40; Interview with Jon Ikenaga, *supra* note 40.

[44] Interview with Jon Ikenaga, *supra* note 40; DEP'T OF PUBLIC SAFETY, STATE OF HAW., CORRECTIONS ADMINISTRATION Policy AND PROCEDURES 6–13 (2020), https://dps.hawaii.gov/wp-content/uploads/2012/10/COR.18.01.pdf. The Custody Levels are as follows:

> (a) Maximum custody [is] reserved for [incarcerated people] who have shown through their institutional behavior that they are unable to function appropriately in the general population, regardless of the amount of time left to serve. This will include the violent, predatory, chronically disruptive, and serious management problem inmates who disrupt the safe operation of a facility. . . .
> (b) [Close custody is] used for [incarcerated people] with long minimum sentences (21 years or longer), serious escape risks, and other types of characteristics that may require higher controls than in the general population. . . .
> (c) Medium custody is reserved for long term, moderate, low, or marginal risk [incarcerated people], or the incarcerated person's] conduct

people who are in high or medium security with more than two years left on their terms will get sent to Saguaro.[45] The only method of potentially contesting a transfer is through the DPS's mainland branch.[46] When contesting a transfer, the person is usually required to have a specific reason, such as a court hearing or medical concerns, although there is no formal mechanism for contesting transfer. [47] Relocating incarcerated persons also puts them at jeopardy of extended sentences out of state, because any crime committed within the facility is a crime committed in the State of Arizona, subjecting the individual to prosecution by Arizona and increasing the possibility that these individuals will be placed in other facilities or be forced to serve extended time in Saguaro when they could have been returned home.[48] In addition, although Hawai'i no longer permits capital punishment,[49] Hawai'i prisoners at Saguaro become potentially subject to the death sentence for crimes committed there.[50] DPS is required to return people to Hawai'i one year prior to the expiration of their maximum sentences, but

> and adjustment dictates a need for continuous control and frequent supervision. . . .
>
> (d) Minimum custody [is] reserved for those incarcerated people who pose a low risk, inmates who have forty-eight (48) months or less to parole/release eligibility, and jail inmates who have demonstrated through their institutional conduct and adjustment, a minimal need for control and supervision, inmates who have no felony hold or detainer, have not been involved in a violent episode within the last twelve (12) months, and have not escaped or attempted to escape from the department within the last seven years. . . .
>
> (e) Community custody is the lowest designation for low risk prison or jail inmates who have met the requirements for minimum custody, or for low risk prison inmates who are within twenty-four (24) months to discharge or parole eligibility. . . .

[45] Interview with Jon Ikenaga, *supra* note 40.

[46] *Id.*

[47] *Id.*

[48] Interview with William Bento, *supra* note 40.

[49] *See* HAW. REV. Stat. § 706-656 (2014).

[50] *See* Arthur Rizer & Camille Infantolino, The Death Penalty in Arizona, RSTREET (Sep 24, 2020), https://www.rstreet.org/2020/09/24/the-death-penalty-in-arizona/. Although Arizona has not executed any person on death row since 2014, "Attorney General Brnovich has proposed that the state resume the practice. Specifically, preparations are being made to resume executions by lethal injection . . . [and] the necessary drugs have been secured." *Id.* ee generally, Ariz. Rev. Stat. Ann. §§ 13-751 to -752 (Westlaw through 2022 Legis. Sess.); Prison Agreement Undercuts Hawaii Values on Death Penalty, Honolulu Civ. Beat (July 1, 2015), https://www.civilbeat.org/2015/07/prison-agreement-undercuts-hawaii-values-on-death-penalty/.

there is no information about whether this is properly carried out by DPS, nor are there statistics on how transfers to Saguaro impact recidivism.[51]

As of 2020, Saguaro housed 1,321 Hawai‘i incarcerated males.[52] Native Hawaiians have comprised the highest percentage of Hawai‘i’s incarcerated people in out-of-state facilities.[53] In the past, 29% of the 6,000 individuals under DPS custody were in facilities operated out-of-state, and "[o]f the people in out-of-state facilities, 41% [were] Native Hawaiians."[54] For Native Hawaiians, who make up 21% of Hawai‘i’s population, but 37% of the people incarcerated by the state, their separation from the islands and Hawaiian culture can be described as cruel and unusual punishment.[55]

B. Native Hawaiian Men and Their Connection to the ‘Āina and Their ‘Ohana

Native Hawaiians have an especially sacred relationship with their land and their families. In one mo‘olelo explaining the creation of kānaka, Papa (earth mother) and Wākea (sky father) gave birth to a daughter, Ho‘ohōkūkalani.[56] Wākea then coupled with his daughter, Ho‘ohōkūkalani, who gave birth to a stillborn child, Hāloa-naka.[57] Hāloa-naka was planted in the ground, and from his gravesite grew the first kalo.[58] Wākea and Ho‘ohōkūkalani then had another child, Hāloa, who was the first kānaka. He had the kuleana to take care of his elder brother, and in return, Hāloa-naka would take care of him.[59] The mo‘olelo of Hāloa demonstrates the relationship that kānaka have with the land – the land is like an elder sibling,

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[51] Interview with Jon Ikenaga, *supra* note 40; Rui Kaneya, *Hawaii Doesn't Know if Prisoners Sent to Mainland Are Likelier To Reoffend*, HONOLULU CIV. BEAT (June 20, 2016), https://www.civilbeat.org/2016/06/hawaii-doesnt-know-if-inmates-sent-to-mainland-are-likelier-to-reoffend/.

[52] DEP'T OF PUB. SAFETY, STATE OF HAW., ANNUAL REPORT FY 2021 70 (2021), https://dps.hawaii.gov/wp-content/uploads/2021/12/PSD-ANNUAL-REPORT-2021x.pdf. These statistics do not account for gender non-conforming individuals.

[53] Chad Blair, *Criminal Injustice* for *Native Hawaiians*, HONOLULU CIV. BEAT (Sept. 29, 2010), https://www.civilbeat.org/2010/09/5068-criminal-injustice-for-native-hawaiians/.

[54] Off. of Hawaiian Affs., The Disparate Treatment of Native Hawaiians in the Criminal Justice System 9 (2010) [hereinafter The Disparate Treatment of Native Hawaiians in the Criminal Justice System], https://static.prisonpolicy.org/scans/10-09_exs_disparatetreatmentofnativehawaiians_rd-ac.pdf.

[55] Downey, *supra* note 3.

[56] KAME‘ELEIHIWA, supra note 10, at 23.

[57] *Id.* at 24.

[58] Id.

[59] *See id.* at 24–25.

for which there is a reciprocal relationship of love for one's family and for the land.[60]

The importance of ‘āina relationships is thoroughly recognized in Hawai‘i case law and statutory law.[61] Hawai‘i is unique in the way that our courts have considered expert and kama‘āina testimonies detailing ‘āina relationships to support traditional and customary claims to the land.[62] Witness testimonies in the *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai‘i (OHA v. HCDCH)*, show that Hawai‘i courts have considered ‘āina relationships when deciding cases concerning Native Hawaiian issues.[63]

The court referenced testimony by David H. Getches, an expert in natural resources law, who described Native Hawaiian relationships with the ‘āina in the following way:

> It is the homeland. It provides the basis for self determination, self expression. It is a source of identity. Who we are. As people. As people have said it to me. It is a connection, as well, to one's cultural roots, going back to the ancestors that can be felt and who were known and the ancestors who were unknown and exist only in the spiritual world. . . . [I]t is important for spiritual fulfillment, something we as non native people don't feel, is the importance of place in a spiritual way. . . . And what is common among [indigenous cultures]. . . is, that there is a special spiritual connection with land among all native groups[.][64]

The opinion also cited Olive Pualani Kanaka‘ole Kanahele, a Native Hawaiian and kumu hula, who emphasized the importance of kānaka

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[60] *See id*; THE KUMULIPO: A HAWAIIAN CREATION CHANT 117–27 (Martha Warren Beckwith ed., trans., University of Hawaii Press 1972) (1951). The Hawaiian Creation Chant, the Kumulipo, also demonstrates the deeply rooted connection Native Hawaiians have with their land. The Kumulipo is 2,102 lines long and is the Hawaiian creation chant of all things; coral, animals, gods, kānaka, and more.

[61] *See* Ching v. Case, 145 Hawai‘i 148, 180, 449 P.3d 1146, 1178 (2019); Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw., 117 Hawai‘i 174, 214, 177 P.3d 884, 924 (2008) (quoting Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510) (recognizing "the importance of the land to native Hawaiians and to their continued 'cultural identity . . . spiritual and traditional beliefs, customs, practices, language, and social institutions'"), *rev'd*, 556 U.S. 163 (2009); Ka Pa‘akai O Ka‘Aina v. Land Use Comm'n, 94 Hawai‘i 31, 45, 7 P.3d 1068, 1082 (2000) (affirming statutory obligations "to preserve and protect customary and traditional practices of native Hawaiians"); *see also* HAW. CONST. art. XII, § 7.

[62] *See, e.g., Off. of Hawaiian Affs.*, 117 Hawai‘i 215–16, 177 P.3d at 925–26 (expert testimony supports the importance of the land to Native Hawaiians).

[63] See id.

[64] *Id.* at 215 (emphasis omitted).

maintaining relationships with the ʻāina when she testified, "[A]s man we need—we need land to live on. That is— that is our foundation. And for the native Hawaiian, more than the family, land is their foundation. Land is their identity."[65]

OHA v. HCDCH, and cases discussed further in this Article, illustrates the importance of kānaka and ʻāina relationships and how the Hawaiʻi legal system has made efforts to recognize and promote those relationships. Present day kānaka and ʻāina relationships further demonstrate why it is important to acknowledge and promote these relationships for incarcerated people.

When a kalo matures, it produces a corm. In ʻŌlelo Hawaiʻi, it is called an ʻohā.[66] This ʻohā can be removed from the parent plant, and the ʻohā can be replanted to start another life cycle.[67] The Hawaiian word for family, ʻohana, comes from the word ʻohā, demonstrating the pilina[68] between ʻohana and ʻāina.[69] "'Ohana [is] one of the most important formative forces in the lives of kāne."[70] Historically, "it [is] . . . the sacred kuleana of kāne to see the physical and spiritual care of his family."[71] In ancient times, kānaka had the hale mua where kāne learned and performed their responsibilities.[72] In the hale mua, boys learned and were disciplined within a close-knit community, and kāne were responsible for making daily offerings and prayers on behalf of the entire ʻohana.[73] The hale mua was one of the most important facets of the ʻohana system which shaped the lives of kāne.[74] "In recognition of men's roles as providers, [Mary Kawena] Pukui notes that the word 'kua,' which has connotations of a backbone or a support, was also used to refer to a

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[65] *Id.* (emphasis omitted)

[66] E. S. Craighill Handy & Mary Kawena Pukui, The Polynesian Family System in Ka-ʻu, Hawaiʻi 2-3 (1972).

[67] Id.

[68] "Pilina" may be defined as association, relationship, union, joining. MARY KAWENA PUKUI ET AL., THE POCKET HAWAIIAN DICTIONARY 138 (1975).

[69] *See* E. S. Craighill Handy & Mary Kawena Pukui, *The Hawaiian Family System*, 59 J. OF THE POLYNESIAN SOC'Y 170, 174–76 (1950).

[70] Off. of Hawaiian Affs., Kānehōʻālani: Transforming the Health of Native Hawaiian Men 9 (2017) [hereinafter Kānehōʻālani: Transforming the Health of Native Hawaiian Men], https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/Kane_Health_Report_Final_web-REV.pdf.

[71] *Id.* at 10.

[72] *See* Ty P. Kāwika Tengan, Native Men Remade Gender and Nation in Contemporary Hawaiʻi 35 (2008); Kānehōʻālani: Transforming the Health of Native Hawaiian Men, *supra* note 70, at 10.

[73] Kānehōʻālani: Transforming the Health of Native Hawaiian Men, *supra* note 70, at 10.

[74] Id.

husband."[75] The importance of kāne and their prominent role in 'ohana lives on in modern Native Hawaiian culture and families today.

For Native Hawaiians, relationships with the 'āina are almost synonymous as those relationships with one's 'ohana. Family visitation is important for an incarcerated individual's reentry to society.[76] Family connections while in prison can "offer an incarcerated person critical emotional and psychological support[,]" whereas "social isolation can encourage mental and physiological harm."[77] "[S]tudies have found that [incarcerated people] who maintain close ties with family, friends, and others from home are far less likely to commit another crime."[78] These familial relationships are even harder to maintain when loved ones are held in prison across the Pacific Ocean, with families spending thousands of dollars per trip to Arizona.[79] For low-income families with loved ones in prison, traveling out of state poses logistical and financial challenges.[80] Of the five largest race groups in Hawai'i, Native Hawaiians struggle the most – about sixteen percent living below the poverty line.[81] Native Hawaiian families make up about thirteen percent of Hawai'i's population of families who live in poverty, and Native Hawaiian individuals comprise around sixteen percent of people who live in poverty.[82] Not only are Native Hawaiians sent to Saguaro taken from their ancestral lands and

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[75] *Id.*

[76] See Amy Tryon, Keep the Family Close: Analyzing the Impact of Family Visitation on Outcomes for Young Adult Offenders, 72 ADMIN. L. REV. 127, 128 (2020); Emily Mooney & Nila Bala, The Importance of Supporting Family Connections to Ensure Successful Re-Entry, 63 R ST. SHORTS 1, 2–3 (2018), https://www.rstreet.org/wp-content/uploads/2018/10/Final-Short-No.-63-1.pdf.

[77] Mooney & Bala, *supra* note 76, at 2.

[78] Eli Hager & Rui Kaneya, The *Prison Visit That Cost My Family $2,370*, MARSHALL PROJECT (April 12, 2016), https://www.themarshallproject.org/2016/04/12/the-hawaii-prison-visit-that-cost-my-family-2-370.

[79] *See id*. *See generally*, *Booking a Round Trip Flight from Honolulu, Oahu to Phx, AZ*, HAWAIIAN AIRLINES, https://www.hawaiianairlines.com/ (last visited November 25, 2021). At the time of writing, a roundtrip ticket from Honolulu to Phoenix costs $1,377 per person, exclusive of additional costs such as airport transfer, lodging, neighbor island costs, or additional travel companions. *Id*.

[80] Hager & Kaneya, *supra* note 78.

[81] Dep't of Bus., Econ. Dev. & Tourism, State of Haw., Demographic, Social, Economic, and Housing Characteristics for Selected Race Groups in Hawai'i 13 (2018), https://files.hawaii.gov/dbedt/economic/reports/SelectedRacesCharacteristics_HawaiiReport.pdf.

[82] *Id.*; *see also* PARTNERS IN CARE, O'AHU CONTINUUM OF CARE, 2022 POINT IN TIME COUNT: COMPREHENSIVE REPORT 8 (2022), https://static1.squarespace.com/static/5db76f1aadbeba4fb77280f1/t/62c62130ccd2dc4cf406363f/1657151805818/2022+PIT+Count+Report+7.6.22.pdf. According to this annual report assessing O'ahu's houseless population, 52% of the overall count identified as Native Hawaiian and Pacific Islander ("NHPI"). *Id.*

separated from their families, but they may also never see their families because of the prohibitive high costs of travel.[83] As a result, Native Hawaiian incarcerated people in Saguaro can barely maintain their relationships with their ʻāina and their ʻohana — relationships that are traditionally and customarily held by Native Hawaiians. Without these relationships, these men struggle to maintain their cultural identity and often end up reoffending.[84] It is cruel for the State of Hawaiʻi to force Native Hawaiian incarcerated people out of state, away from ʻāina and ʻohana, because of the state's failure to address the issue of overpopulation in our state's prison facilities.

III. TRANSFERRING NATIVE HAWAIIAN INCARCERATED MEN OUT OF STATE IS BOTH CRUEL AND UNUSUAL PUNISHMENT

In 1983, in *Olim v. Wakinekona*, the Supreme Court of the United States held that states have "a nearly unrestricted right to transfer their [incarcerated people] to other states."[85] Delbert Wakinekona, a Native Hawaiian from Kalihi, experienced much adversity in his childhood as an at-risk youth and had various run-ins with the law beginning at a fairly young age.[86] At twenty-six years old, Delbert was convicted and sentenced to life in prison for first degree murder,[87] and was transferred from the Hawaiʻi State Prison (now

[83] *See* Hager & Kaneya, *supra* note 78.

[84] *See* OUT OF STATE (Ciara Lacy 2017).

[85] Robert K. Merce, *Delbert Wakinekona: The Man Behind the Supreme Court Case that Made Banishment Legal*, 8 HŪLILI 245 (2012); *see* Olim v. Wakinekona, 461 U.S. 238, 248 (1983). Prior to *Olim*, the Hawaiʻi Supreme Court held that an incarcerated person's transfer to a mainland penal institution did not violate the due process clauses of the United States and Hawaiʻi Constitutions, or applicable administrative law; however, rights of Native Hawaiians under Article XII of the Hawaii Constitution were not discussed by the court. *See generally Lono v. Ariyoshi*, 63 Haw. 138, 621 P.2d 976 (1981).

[86] *See* Merce, *supra* note 85, at 250.

[87] *Id.* at 251; *see* State v. Wakinekona, 53 Haw. 574, 581, 499 P.2d 678, 680 (1972). Delbert, in fact, did not actually murder anyone. Merce, *supra* note 85, at 251. Delbert participated in a robbery of XYZ Market on Nuʻuanu Avenue with his cousin and another man. *Id.* During the robbery, Delbert's cousin hit the store owner in the head with a gun, which killed him. *Id.* "[U]nder the "felony murder" law in effect at that time, Delbert was criminally liable for the death even though he did not cause it." *Id*. Delbert was also serving time for rape, robbery, and escape, although the principal charge was the murder. *Olim*, 461 U.S. 238, 240 (1983). With the help of the Native Hawaiian Legal Corporation, Delbert was compassionately released in 2011 after being incarcerated for four decades. He lived the remainder of his life in Makaha, until he lost his fight to terminal liver disease. Native Hawaiian Legal Corporation, FACEBOOK (Nov. 2, 2011), https://www.facebook.com/nativehawaiianlegal/photos/delbert-wakinekona-incarcerated-for-over-4-decades-by-the-hawaii-prison-system-h/241818992539254/.

known as O'ahu Community Correctional Center) to Folsom Prison in California under an interstate compact because he was considered dangerous and a security risk.[88] Wakinekona challenged this transfer in federal court and argued that the transfer was a violation of his due process rights arising out of a reclassification proceeding.[89] In a six to three decision, the court held that transferring an incarcerated person from one state to another did not violate the federal Constitution and that, despite the distance from the person's home, such transfers were not reviewable by federal courts.[90] In his dissent, Justice Thurgood Marshall wrote:

> There can be little doubt that the transfer of Wakinekona from a Hawaii prison to a prison in California represents a substantial qualitative change in the conditions of his confinement. In addition to being incarcerated, which is the ordinary consequence of a criminal conviction and sentence, Wakinekona has in effect been banished from his home, a punishment historically considered to be "among the severest." For an indeterminate period of time, possibly the rest of his life, nearly 4,000 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders. Surely the isolation imposed on him by the transfer is far more drastic than that which normally accompanies imprisonment.[91]

Justice Marshall essentially pointed out that transferring an incarcerated person to a location far from the person's home and family amounts to double punishment (although cruel or unusual punishment was not mentioned in the opinion).[92]

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel *and* unusual punishment."[93] States differ on their interpretation of the Eighth Amendment in their own constitutions, differing in the use of the conjunctive "cruel *and* unusual,"[94] disjunctive "cruel *or*

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[88] *See* Merce, *supra* note 85; *Olim*, 461 U.S. at 241.

[89] *Olim*, 461 U.S. at 241–43. The prison program committee held a reclassification hearing to review and determine whether Wakinekona's classification was still accurate, in addition to whether he should be transferred to another facility. *Id.* at 240.

[90] *Id.* at 248–51.

[91] *Id.* at 252–53.

[92] See id.

[93] U.S. CONST. amend. VIII (emphasis added).

[94] *See, e.g.*, ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; COLO. CONST. art. II, § 20; *see In re Individuals in Custody of the State*, 2021 WL 4762901, at *16 n.14.

unusual,"[95] both disjunctive and conjunctive forms of these words,[96] a single term with "cruel,"[97] or none of these words[98] at all. Article I, section 12 of the Hawai'i Constitution prohibits the infliction of "cruel or unusual punishment" for those convicted of crimes.[99] When applying Hawai'i's cruel or unusual punishment provision, Hawai'i courts consider the following:

> [t]he standard by which punishment is to be judged under the "cruel and unusual" punishment provision[ ] of the . . . Hawaii Constitution[ ] is whether[,] in the light of developing concepts of decency and fairness, the prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community.[100]

Thus, Hawai'i's case law does not seem to match up the text of Hawai'i's Constitution. The Hawai'i Constitution prohibits cruel *or* unusual punishment, not cruel *and* unusual punishment.[101] The Hawai'i Supreme

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[95] *See, e.g.*, ALA. CONST. art. I, § 15; CAL. CONST. art. I, § 17; HAW. CONST. art. I, § 12; *see In re Individuals in Custody of the State*, 2021 WL 4762901, at *16 n.14.

[96] *See, e.g.*, FLA. CONST. art. I, § 17; *see In re Individuals in Custody of the State*, 2021 WL 4762901, at *16 n.14.

[97] *See, e.g.*, Del. Const. art. 1, § 11; R.I. Const. art. I, § 8.

[98] *See* CONN. CONST. art. I, § 8; *In re Individuals in Custody of the State*, 2021 WL 4762901, at *16 n.14.

[99] HAW. CONST. art. I, § 12.

[100] State v. Guidry, 105 Hawai'i 222, 237, 96 P.3d 242, 257 (2004) (quoting State v. Davia, 87 Hawai'i 249, 258, 953 P.2d 1347, 1356 (1998)); *see also* State v. Long, 146 Hawai'i 232, 459 P.3d 791 (Ct. App. 2020); State v. Canosa, 142 Hawai'i 210, 416 P.3d 931 (Ct. App. 2018).

[101] HAW. CONST. art. I, § 12. In the 1950 Constitutional Convention, delegates explained that the provision "is taken from the [Eighth] Amendment to the [f]ederal Constitution, and will give this state the benefit of federal decisions construing the same." Despite apparently modeling Hawai'i Constitutional provision on the federal cruel and unusual punishment provision, the delegates elected not to mimic the exact wording of the federal Constitution. *See* State of Haw., PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 1950, at v, 302 (1960). Authors of a Hawai'i Constitutional Convention study downplayed the disjunctive language, stating that "the disjunctive construction of the phrase does not necessarily mean that delegates intended a broader or narrower scope of protection . . . "The phrase has remained unchanged since the 1950 Constitutional Convention where a report explained that it was modeled after the Eighth Amendment so that Hawaii would have the benefit of federal decisions construing the amendment." Legis. Reference Bureau, Hawaii Constitutional Convention Studies 1978: Article I: Bill of Rights, at 71 (1978). It is important to highlight that although the delegates adopted the federal Constitution's interpretation of this provision to be able to freely use federal precedent, they did not adopt the conjunctive language, thus, leaving the application of this provision open to interpretation. This idea is further supported by, for example, the Preamble of Hawai'i's Constitution and the acknowledgment of special

Court therefore applies a "proportionality test" as the standard to assess punishments under Hawai‘i's cruel or unusual punishment provision on a mistaken assumption.[102] This proportionality test considers whether the "prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community."[103] This is a higher standard than that which should be adopted based on Hawai‘i's disjunctive language.

Notably, our courts have recognized that individuals may be provided greater protection[104] under the Hawai‘i Constitution.[105]

The preamble of our State Constitution provides:

> We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."
>
> We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

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rights (traditional and customary rights) in Hawai‘i case law, as this Article argues. *See* id.; Legis. Reference Bureau, Hawaii Constitutional Convention Studies 1978: Introduction and Article Summaries, at 25–26 (1978).

[102] *In re Individuals in Custody of the State*, 2021 WL 4762901, at *16. (McKenna, J., concurring and dissenting) (citing *Guidry*, 105 Hawai‘i at 237, 96 P.3d at 257).

[103] *Guidry*, 105 Hawai‘i at 237, 96 P.3d at 257 (quoting State v. Kumukau, 71 Haw. 218, 226–27, 787 P.2d 682, 687 (1990)) This is unlike the federal interpretation of the Eighth Amendment which has no proportionality guarantee. *Id.* at 237, 96 P.3d at 257.

[104] *In re Individuals in Custody of the State*, 2021 WL 4762901, at *16 (McKenna, J., concurring and dissenting). Courts may look to other states for guidance on construing the disjunctive form, but that is not binding. For example, in California, delegates chose the disjunctive "or" to establish their intent that both cruel punishments and unusual punishments shall be outlawed. *See id.* at *17 (citing People v. Anderson, 493 P.2d 880, 884-85 (Cal. 1972)). In Michigan, the disjunctive form is used to encompass a broader range of punishments. *See id.* at *18 (citing People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992)). *But see* State v. Kido, 3 Haw. App. 516, 518, 654 P.2d 1351, 1353 n.3 (1982). According to the Hawai‘i Intermediate Court of Appeals, it appeared that the use of the disjunctive form is one of form and not substance, as at the time the provision was originally adopted, the delegates to the 1950 Constitutional Convention used the Eighth Amendment of the United States Constitution as a model. *Id.*; *see* sources cited *supra* note 101.

[105] State v. Lopez, 78 Hawai‘i 433, 445, 896 P.2d 889, 901 (1995) (citing State v. Quino, 74 Haw. 161, 170, 840 P.2d 358, 362) ("In exercising this authority, it is well-established that as long as we afford defendants the minimum protection required by the federal constitution, we are free to provide broader protection under our state constitution."); *In re Individuals in Custody of the State*, 2021 WL 4762901, at *20–21 (McKenna, J., concurring and dissenting). Justice McKenna highlighted the uniqueness of our state's Constitution and argued that "cruel or unusual punishment" should be interpreted as she described, in the preamble, "in a manner that is pono." *Id.* at *21.

> We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.[106]

It should be understood that the delegates and people of Hawai‘i intended our Constitution to be read and carried out with understanding and compassion, by "nurturing" Hawai‘i's people and preserving and perpetuating the Native Hawaiian culture.[107] This intent is further demonstrated by Article XII, section 7, which provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[108]

Here, the delegates, as confirmed by the electorate in 1978, have explicitly stated a commitment under Hawai‘i's Constitution to preserve the traditional and customary rights of Native Hawaiians.[109] Hawai‘i's case law regarding the above-mentioned sections also demonstrates the state's recognition of the important relationships between kānaka and the land.

A. Hawai‘i's Traditional and Customary Rights Case Law

Hawai‘i's case law on traditional and customary rights demonstrates how traditional and customary claims may be used as a shield and a sword to protect such rights. In *Kalipi v. Hawaiian Trust Co.*, a traditional and customary rights argument was used as a sword to attempt to protect Kalipi's

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[106] Haw. Const. pmbl.

[107] *See id.*; *In re Individuals in Custody of the State*, 2021 WL 4762901, at *21 (McKenna, J., concurring and dissenting).

[108] HAW. CONST. art. XII, § 7.

[109] *Id.*; HAW. REV. STAT. §§ 1-1, 7-1 (2009). HRS § 1-1 codifies a Hawaiian usage exception. HRS § 7-1 protects Native Hawaiian gathering rights to enumerated items, water, and the right of way. These statutes are central to the topic of Native Hawaiian traditional and customary rights, but it is difficult to apply these statutes to the topic of prison transfers because the relationship with ‘āina and one's ‘ohana has never been raised as the lone basis to enforce traditional and customary rights. The next paragraph further discusses how traditional and customary rights have been considered in the Hawai‘i courts. These statutes and case law are the vehicle to exercising traditional and customary rights under the Hawai‘i Constitution. *See* DAVID M. FORMAN & SUSAN SERRANO, NATIVE HAWAIIAN LAW A TREATISE 786–90 (Melody Kapilialoha MacKenzie et al. eds., 2015).

right to gather items for subsistence and medicinal purposes on Moloka'i.[110] Here, the Hawai'i Supreme Court established three conditions for asserting a right to gather under HRS section 7-1:

> 1) The tenant must physically reside within the ahupua'a from which the item is being gathered;
>
> 2) The right to gather can only be exercised upon undeveloped lands within an ahupua'a; and
>
> 3) The right must be exercised for the purpose of practicing Native Hawaiian customs and traditions.[111]

Kalipi did not satisfy these conditions because, although he sought to exercise his right to gather on undeveloped lands for the purpose of practicing Native Hawaiian customs and traditions, he did not physically reside in the ahupua'a in which he sought to gather.[112] Looking at these three factors, the difficulty in making a traditional and customary argument for the men in Saguaro is evident, especially in regard to the first condition, since these men no longer physically reside in Hawai'i. That is precisely why sending incarcerated persons out of state should be considered cruel and unusual – it completely deprives these individuals of the ability to exercise their Traditional and Customary rights under Hawai'i law by taking away their rights to reside within an ahupua'a where they may implement such practices.

In *State v. Hanapī*, traditional and customary rights were used as a shield in arguing against Hanapī's criminal charge of trespass.[113] There, Hanapī was on the subject property to perform religious and traditional ceremonies.[114] The Hawai'i Supreme Court established three factors that a defendant must present in arguing that his or her conduct is a constitutionally protected Native Hawaiian right:

> 1) The defendant must qualify as a "native Hawaiian . . . a descendant[] of Native Hawaiians who inhabited the islands prior to 1778 . . . regardless of blood quantum";[115]
>
> 2) The defendant must "establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice" – that is through expert or kama'āina witness testimony, connecting the claimed right

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[110] Kalipi v. Hawaiian Tr. Co., 66 Haw. 1, 3–4, 656 P.2d 745, 747 (1982).

[111] *See id.* at 7–9, 656 P.2d at 749–50; FORMAN & SERRANO, *supra* note 109, at 793.

[112] FORMAN & SERRANO, *supra* note 109, at 793.

[113] *See* State v. Hanapi, 89 Hawai'i 177, 182, 970 P.2d 485, 490 (1998).

[114] *Id.* at 181, 970 P.2d at 489.

[115] *Id.* at 185–86, 970 P.2d at 494–95 (quoting Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n *(PASH)*, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995).

> to a firmly rooted traditional or customary native Hawaiian practice;[116] and
>
> 3) The defendant must prove that "the exercise of the right occurred on 'undeveloped or less than fully developed property.'"[117]

Hanapī did not meet the second condition here.[118] Again, in looking at these three factors, individuals transferred out of state would have difficulty claiming their traditional and customary rights. Their exercise of the rights would not be based on any specific conduct already performed by an individual and, consequently, it would be difficult to satisfy the second condition. Therefore, the transfer to facilities on the continental United States completely deprives incarcerated Native Hawaiians of any opportunity to claim traditional and customary rights. There is no basis for the State of Hawai'i to completely deprive Native Hawaiians of their traditional and customary rights on the basis of imprisonment alone. The issue is that there is no avenue for Kānaka Maoli in Saguaro to claim such traditional and customary rights under *Kalipi* nor *Hanapī* – Kānaka Maoli are transferred out of state and completely deprived of their 'āina and 'ohana relationships, and are therefore deprived of their traditional and customary right to partake in those relationships.[119]

The state has previously shown the intent to preserve traditional and customary rights for incarcerated individuals, but under a freedom of religion legal reasoning. In 2012, Native Hawaiian men incarcerated in Saguaro brought suit in the attempt to protect their Native Hawaiian cultural practices, although this suit was settled before the claimants could have their day in court.[120] The 200 class members and several plaintiffs in this class action,

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[116] *Id.* at 186, 970 P.2d at 494.

[117] *Id.* at 186, 970 P.2d at 494 (quoting *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271).

[118] *Id.* at 187, 970 P.2d at 495.

[119] All of the kānaka transferred to Saguaro may not all be cultural practitioners or actively participating in cultural practices. With transfers, however, they are deprived of any opportunity to cultivate a relationship with their 'āina and 'ohana. 'Āina and 'ohana relationships are the basis of the traditional and customary practices, like those practiced by the petitioners in *Kalipi* and *Hanapī*, and without the ability the partake in the baseline relationships, there is no opportunity for further for engaging in further traditional and customary practices, especially when out-of-state. *See Kalipi*, 66 Haw. at 3, 656 P.2d at 747; *Hanapi*, 89 Hawai'i at 178, 970 P.2d at 486.

[120] Davis v. Abercrombie, No. 11-00144 (LEK-BMK), 2017 WL 2234175, at *1 (D. Haw. May 22, 2017); Rui Kaneya, *Settlement Protects Religious Rights for Hawaiian Prisoners*, HONOLULU CIV. BEAT (Feb. 6, 2017) [hereinafter Kaneya, Religious Rights],

Davis v. Abercrombie, were Native Hawaiian practitioners incarcerated in Saguaro who brought their lawsuit based upon the Religious Land Use and Institutionalized Persons Act (RLUIPA).[121] "The [plaintiffs] alleged that CoreCivic officials violated their constitutional rights by denying them free exercise of their Native Hawaiian religious practices — such as gathering for daily outdoor worship."[122] In 2016, CoreCivic asked the court to force the settlement and that proposal was ultimately granted by the court.[123] Under the settlement, incarcerated people at Saguaro are allowed to participate in outdoor worship classes, conduct certain observations of Makahiki, and have access to a spiritual advisor and religious items.[124] This made strides for Native Hawaiians incarcerated in Saguaro by permitting them to finally engage in cultural practices and speak their native language while serving time in Saguaro. However, this suit did not address the issue of transfers being cruel or unusual punishment, nor did it address the ability of incarcerated persons to engage in traditional and customary practices under the Hawai‘i Constitution.

The State of Hawai‘i may not transfer incarcerated Native Hawaiian people out of state because doing so deprives them of traditional and customary rights, which constitutes cruel and/or unusual punishment under the Hawai‘i Constitution. Hawai‘i's case law has not fully articulated the proportionality test, and the state's precedent on the actual cruel or unusual punishment provision is undeveloped.[125]

B. Applying the Proportionality Test

The first factor under the proportionality test considers whether the proscribed punishment is disproportionate to the defendant's conduct. It is indeed a disproportionate punishment for the State of Hawai‘i to sentence Native Hawaiian men out of state when their conduct does not require such safety measures be taken. Although there is not much information about the kinds of convictions that may lead to a transfer, it appears that even

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https://www.civilbeat.org/2017/02/settlement-protects-religious-rights-for-hawaiian-prisoners/.

[121] *Davis*, 2012 WL 130447918, at *2. RLUIPA protects individuals seeking to engage in religious practice and religious institutions from discrimination in zoning and landmarking laws. *See generally* 42 U.S.C. § 2000cc.

[122] Kaneya, *Religious Rights*, *supra* note 120.

[123] Id.

[124] Id.

[125] *See In re Individuals in Custody of the State*, 2021 WL 4762901, at *16, *20 (McKenna, J., concurring and dissenting) (arguing for a new test to be adopted based on the different language of the Hawai‘i Constitution).

convictions like assault[126] could trigger a transfer.[127] Committing rule violations or getting into altercations while incarcerated at a facility within the state may lead to a change in security classification, which may trigger a transfer.[128] These security classifications do not always mean that a person is actually a risk to society – someone with an accumulation of drug offenses may get a higher security classification or someone convicted of a violent crime, but the actual circumstances that led to conviction may not warrant a high security detention.[129] It is disproportionate punishment – with this ambiguity in what may contribute to a security classification change and the blanket application of transfers to specific classifications – especially for incarcerated people who may have a high security classification based on an accumulation of their offenses, non-violent offenses, or rule violations that occur while in prison. An argument can also be made that the transfer of healthy individuals is disproportionate as compared to the non-transfer of those with health conditions.

The second prong of the proportionality test considers whether the punishment is of a duration that would shock the conscience of a reasonable person[130] or outrage the moral sense of the community. Again, without more information on the length of sentences that men serve on average in Saguaro, it is hard to define a specific duration which violates this prong of the test. The Hawai‘i Supreme Court has assessed the duration of sentences on a case by case basis and has not identified any specific quantifiable duration that would constitute a duration that "shock[s] the conscience of a reasonable person."[131] The offenses of some of the incarcerated kānaka in Saguaro may

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[126] Hager & Kaneya, *supra* note 78; *see* Interview with Jon Ikenaga, *supra* note 40; OUT OF STATE, *supra* note 84.

[127] *See* Interview with Jon Ikenaga, *supra* note 40; OUT OF STATE, *supra* note 84; Merce, *supra* note 85, at 252. As mentioned previously, Wakinekona was charged with murder, but was actually an accomplice to a robbery that resulted in a murder.

[128] *See* Interview with Jon Ikenaga, *supra* note 40.

[129] *See* OUT OF STATE, *supra* note 84. In this film, one of the incarcerated males that the film focused on was in prison in Saguaro on drug charges.

[130] What constitutes a "reasonable person" makes this analysis even trickier. Considering the traditional and customary rights framework in conjunction with a cruel and unusual punishment analysis brings into question whether the court's interpretation is of a "reasonable person" in general, or a Native Hawaiian "reasonable person."

[131] *See, e.g.*, State v. Iaukea, 56 Haw. 343, 360, 537 P.2d 724, 735-36 (1975) (imposing a life sentence upon the defendant, who was a multiple offender convicted of rape, sodomy, robbery, and sexual abuse, did not violate this prong); State v. Melear, 63 Haw. 488, 500, 630 P.2d 619, 628 (1981) (finding that the imposition of a twenty-year sentence did not violate this prong for the defendant's conviction for burglary in the first degree); State v. Loa, 83 Hawai‘i 335, 339, 357, 926 P.2d 1258, 1262, 1280 (1996) (declaring two twenty-year terms

warrant lengthy sentences because of a violent conviction or because they may be a repeat violent offender, but being forced to spend that duration outside of their ancestral homelands is a *shock to the conscience* of a reasonable person and would outrage the moral sense of community. For any normal person who lives in Hawai‘i and has no desire to move away, being away from Hawai‘i for longer than two weeks may be terrifying, even more so if one’s family lives in Hawai‘i or if Hawai‘i has been the only place one has ever called “home.” This is even more damaging to Native Hawaiians who call these islands their ancestral lands. Spending the duration of one’s sentence outside of Hawai‘i, away from their ‘āina and ‘ohana, is basically double the punishment.[132] Community members have expressed disdain toward the transfer of incarcerated people from Hawai‘i to Saguaro, and this demonstrates that the community sees this act as outrageous to the moral sense of community.[133] The duration of an individual kānaka’s sentence may be proper, but to have to spend that duration away from this ‘āina is a complete shock to the conscience.

It is cruel and/or unusual punishment to transfer these kānaka because the state cannot overcome the court’s proportionality test. The criterion for transfer is not based on a defendant’s conviction alone. It is unjust for the incarceration system to impose transfers when the location where someone may serve their sentence is so integral to the sentence itself. However, the courts are not charged with considering location when implementing a sentence. The Hawai‘i Supreme Court should revisit the applicable test, as its proportionality test is based on a mistaken assumption that the Hawai‘i Constitution also prohibits cruel “and” unusual punishment.[134]

‘Ohana and ‘āina relationships are, in and of itself, a Native Hawaiian traditional and customary practice – ones that have not been assessed by Hawai‘i courts before. Transfers are like double punishment[135] for an incarcerated person. Considering the importance of ‘āina and ‘ohana relationships to kānaka,[136] prison transfers are disproportionate punishment

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of imprisonment and seven life terms of imprisonment did not violate this prong for the defendant’s convictions of attempted reckless manslaughter, robbery in the first degree, and six counts of sexual assault in the first degree).

[132] *See Olim*, 461 U.S. at 252–53 (Marshall, J., dissenting).

[133] See Kaneya, Saving Millions, supra note 33.

[134] *See In re Individuals in Custody of the State*, 2021 WL 4762901, at *16 (McKenna, J., concurring and dissenting) (citing State v. Guidry, 105 Hawai‘i 222, 237, 96 P.3d 242, 257 (2004)) (noting that case law has interpreted and applied the proportionality test incorrectly).

[135] *See Olim*, 461 U.S. at 252–53 (Marshall, J., dissenting).

[136] *See* FORMAN & SERRANO, *supra* note 109, at 791. “Native Hawaiians' cultural and spiritual identity derives from their relationship with the 'āina: the ‘āina is part of their ‘ohana . . .” *Id.*

for any kānaka because it deprives them of their traditional and customary right to the ʻāina and their ʻohana. This constitutes a separate and additional punishment outside of the one imposed by the court. Transfers inherently deprive kānaka of the opportunity to engage in a relationship with ʻāina, and frustrate the ability of kānaka to engage in relationships with ʻohana. Furthermore, it deprives incarcerated kānaka of the opportunity to engage in these traditional and customary relationships for a duration of time, which they would not be deprived of had they served their time in a facility within Hawaiʻi.

Hawaiʻi's Constitution,[137] statutes,[138] and case law[139] manifest the state's commitment to preserving the traditional and customary rights of all Native Hawaiians. The disproportionality between convictions and sentences including prison transfers is underscored by Hawaiʻi's commitment to the traditional and customary rights of Native Hawaiians. When Native Hawaiian incarcerated men are transferred to Saguaro, they are not only being deprived of their freedom,[140] but their ability to partake in their traditional and customary relationships with their ʻāina and their ʻohana. Native Hawaiian men incarcerated in Saguaro are deprived of their rights under Article XII, section 7 of the Hawaiʻi Constitution, despite the guarantees under the codified Compact that prohibit the deprivation of the legal rights that transferees would otherwise have in an in-state facility.[141] Traditional and customary rights have been used as a sword to protect traditional Native Hawaiian gathering practices and as a shield to protect traditional and customary rights from criminal liability. Here, it may be used like a dagger, a secret weapon and tool, in support of an overarching

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[137] *See* HAW. CONST. art. XII, § 7.

[138] *See* HAW REV. STAT. §§ 1-1, 7-1 (2009).

[139] *See, e.g.* Ka Paʻakai O Ka ʻAina v. State Land Use Comm'n, 94 Hawaiʻi 31, 45, 7 P.3d, 1068, 1082 (2000); *PASH*, 79 Hawaiʻi at 441–42, 903 P.2d at 1262–63 (1995); *Kalipi*, 66 Haw. at 7–8, 656 P.2d at 749–50 (1982).

[140] The term "freedom" here refers to freedom from confinement. To be deprived of one's freedom in relation to incarceration means to be confined in jail or prison. Although confinement deprives incarcerated people of their rights of freedom and personal liberty, incarcerated people still retain a variety of other rights like freedom of speech and religion. The argument here is that incarcerated Kānaka Maoli still retain their rights to their tradition and customs as guaranteed under the Hawaiʻi Constitution and law, despite being deprived of their freedom, because the Hawaiʻi Supreme Court has never ruled otherwise. *Freedom*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incarcerated (last visited Sept. 17, 2022); *In re Individuals in Custody of the State*, 2021 WL 4762901, at *22-23 (McKenna, J., concurring and dissenting).

[141] HAW. REV. STAT. § 355-1, art. 4(e) (2015).

argument to protect incarcerated kānaka from cruel and unusual punishment and to keep them within their homelands.

IV. CONCLUSION AND POSSIBLE STEPS FORWARD

The practice of sending our Kānaka Maoli men to Saguaro must end. The act of sending our Kānaka Maoli men, women, and gender non-conforming individuals to any facility outside of Hawai‘i to serve their sentences must stop. Prison transfers deprive kānaka of the ability to cultivate their ‘āina and ‘ohana relationships. ‘Āina and ‘ohana relationships are the basis of traditional and customary rights as recognized in Hawai‘i’s Constitution, statutes, and case law today. Without access to these relationships, kānaka are deprived of their traditional and customary rights. Prison transfers of Kānaka Maoli are cruel and unusual punishment because out-of-state sentences are disproportionate to all possible convictions. Additionally, any duration forcibly spent outside of one’s homelands is shocking to the conscience of a reasonable person and is outrageous to the moral sense of the community. This is further supported under the existing law that with prison transfers, kānaka are completely deprived of any opportunity to exercise or cultivate ‘āina and ‘ohana relationships, which are essentially traditional and customary rights guaranteed to them by the Hawai‘i Constitution.

This issue is only further exacerbated by a number of issues. First, COVID-19 has made prison transfers seem more ideal. Hawai‘i’s prisons are extremely overcrowded and COVID-19 rates have been high among incarcerated people.[142] More than 2,600 of Hawai‘i’s incarcerated people have tested positive for the coronavirus, and at least nine have died.[143] The conditions of Hawai‘i’s facilities have contributed to COVID-19 outbreaks in prisons, leading some incarcerated people to file suit.[144] Prison transfers were implemented as a temporary tool, to allow the state to catch up and explore reasonable alternatives to reduce overcrowding in our facilities.[145] However, this has been put off by the state time and time again, and the COVID-19 pandemic will only allow the state to continue to avoid the issue of overpopulation in our prisons and ending prison transfers.[146]

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[142] *See PSD Coronavirus (COVID-19) Information and Resources*, HAW. DEP’T OF PUB. SAFETY, https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/ (last visited Sept. 20, 2022); Kevin Dayton, *Covid-19 is Surging Again at Hawaii Prisons. The Oahu Jail is Especially Hard Hit*, HONOLULU CIV. BEAT (Aug. 26, 2021), https://www.civilbeat.org/2021/08/covid-19-is-surging-again-at-hawaii-prisons-the-oahu-jail-is-especially-hard-hit/.

[143] Dayton, *supra* note 142.

[144] *See* Chatman v. Otani, No. 21-00268, slip op. at 4 (D. Haw. Jul. 13, 2021).

[145] Downey, *supra* note 3; HCR 85 TASK FORCE, *supra* note 30, at 57.

[146] *See* Dayton, *supra* note 142; Kaneya, *Ending Up in Facilities*, *supra* note 20.

Another issue is the lack of public information on prison transfers and the absence of data. No federal agency keeps an up-to-date tally, let alone oversees how such transfers are made.[147] "The only formal research into the corrections compacts came in 2006, when the National Institute of Corrections, an agency under the U.S. Justice Department, sponsored a study after realizing that there was 'no literature' to be found on the subject."[148] Furthermore, Hawai'i did not partake in the study about interstate transfer, making Hawai'i one of only two states that failed to do so.[149] Not only does DPS fail to provide information to the community and incarcerated individuals about the process of prisoner transfers, but it also failed to partake in surveys that would provide the public with information about how these transfers impact Hawai'i's carceral system or recidivism.[150] The lack of data does not mean a problem does not exist, and has only allowed our state to act indifferent towards a problem it refuses to address.[151]

Some incarcerated people support being transferred because of overcrowding and receiving poor staff treatment in Hawai'i's prisons.[152] Incarcerated people differ on their views of transfers. OHA's 2010 report includes the views of incarcerated people who oppose transfer, quoted as saying,

> "Hawai'i is their home. When you take them away like that, you mess them up even more."
>
> "Most families can't fly up to Arizona to see their dad. They can't afford it, but we have roughly half of Hawai'i['s] prison population there."
>
> "I went up to the mainland and I lost my family–wife and kids."[153]

But the report also includes the testimony of incarcerated people who would rather be transferred:

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[147] Kaneya, Ending Up in Facilities, supra note 20.

[148] *Id.*

[149] *Id.*; U.S. DEP'T OF JUST. NAT'L INST. OF CORR., INTERSTATE TRANSFER OF PRISON INMATES IN THE UNITED STATES 13 (2006), https://www.prisonpolicy.org/scans/interstatetransfer.pdf.

[150] Telephone Interview with Ciara Lacy, Director and Producer of OUT OF STATE (Oct. 28, 2021); *see* Interview with William Bento, *supra* note 40; U.S. DEP'T OF JUST. NAT'L INST. OF CORR., *supra* note 149, at 13.

[151] *See* Telephone Interview with Ciara Lacy, *supra* note 150.

[152] *See id.*; Interview with William Bento, *supra* note 40.

[153] The Disparate Treatment of Native Hawaiians in the Criminal Justice System, *supra* note 54, at 38, 40, 56.

> "On the mainland, the officers are more professional in a lot of ways . . . . I feel safe."
>
> "When I got to the mainland, I found the ACOs [Adult Correctional Officers] more professional [than in Hawai‘i]. . . .They treat you like an adult, as long as you respect them, they respect you."[154]

Even if incarcerated people would rather be transferred, this only proves how extreme the problem is for Hawai‘i's incarceration system.[155] The people of Hawai‘i need a better system because people native to this land want to leave for out-of-state facilities for reasons of cleanliness, professional and nicer staff, and safety.[156] We know what is wrong with our system, and instead of putting off the problem with a temporary solution by transferring people out of Hawai‘i, we need to fix our system and focus on the futures of our incarcerated people staying in Hawai‘i.[157]

There are various avenues for moving forward to making a better system. In 2013, the Native Hawaiian Justice Task Force Report set forth a number of key recommendations:

> A. Collect and maintain data regarding Native Hawaiians in the criminal justice system.
>
> B. Make efforts to decrease the disproportionate representation of Native Hawaiians in the criminal justice system.
>
> C. Create prevention and early intervention programs for Native Hawaiians
>
> D. Improve the impact of work towards ending the State's contracting with non-state facilities on Native Hawaiians
>
> E. Fix issues in state-operated correctional facilities and their impact on Native Hawaiians
>
> F. Partake in restorative justice practices and their application to Native Hawaiians
>
> G. Fix the lack of services for Native Hawaiians who come into contact with the criminal justice system

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[154] *Id.* at 55.

[155] *See* Telephone Interview with Ciara Lacy, *supra* note 150.

[156] *See* The Disparate Treatment of Native Hawaiians in the Criminal Justice System, *supra* note 54, at 55.

[157] *See* Telephone Interview with Ciara Lacy, *supra* note 150.

H. Continuing state efforts to ameliorate the disproportionate representation of Native Hawaiians in the criminal justice system[158]

It is vital that we ensure that the State of Hawai‘i is making efforts to follow these recommendations.

One of the most recent efforts aligned with these recommendations was House Bill 424 (H.B. 424).[159] H.B. 424 provided that transfers must be done "in the interest of the security, management of the correctional institution where the inmate is presently placed, or the reduction of prison overcrowding," or "in the interest of the inmate," and that "no inmate shall be committed or transferred to any *for-profit* correctional institution."[160] Not only did H.B. 424 not pass, it did not even make it to a hearing.[161]

In 2021, the House introduced House Bill 1080 (H.B. 1080).[162] This bill "[r]equires the State to phase out the use of private correctional facilities to incarcerate Hawaii inmates."[163] H.B. 1080 passed in the House with amendments, but eventually was deferred to 2022 by the House Committee on Judiciary and Hawaiian Affairs.[164] Bills like H.B. 424 and H.B. 1080 are vital for ending out-of-state prison transfers for Hawai‘i's incarceration system, and with the high numbers of Native Hawaiians in Saguaro, such legislation is necessary to ensure kānaka can serve their time within their ancestral lands to maintain their connection with their ‘āina and ‘ohana.

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[158] *See* The Disparate Treatment of Native Hawaiians in the Criminal Justice System, *supra* note 54, at 15.

[159] H.B. 424, 30th Leg., Reg. Sess. (Haw. 2019).

[160] *Id.* (emphasis added). The current law, however, allows the transfer of inmates to for-profit private out-of-state institutions without any sunset provision. *See* HAW. REV. STAT. § 353-16.2(a) (2015).

[161] *2020 Archive of HB 424 Bill Status Page*, HAW. STATE LEGISLATURE, https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=424&year=2020 (last visited Sept. 17, 2022). H.B. 424 was scheduled to be heard by the Public Safety, Veterans, and Military (PVM) Committee in the House of Representatives. *Id.* Notably, this legislative session was impacted by the COVID-19 pandemic which may have constrained the legislature's ability to consider bills like this one. *Hawaii Legislature Shuts Down Indefinitely amid COVID-19 Pandemic*, HAW. TRIBUNE HERALD, (Mar. 16, 2020, 1:24 PM), https://www.hawaiitribune-herald.com/2020/03/16/hawaii-news/hawaii-legislature-shuts-down-indefinitely-amid-covid-19-pandemic/.

[162] H.B. 1080, 31st Leg., Reg. Sess. (Haw. 2021).

[163] *Id.* The Hawai‘i Correctional Oversight Commission is a five-member, independent commision created in 2019 by the Hawai‘i State Legislature, intended "to help improve the corrections system, including prison overcrowding." About us, Haw. Corr. Oversight Comm'n, https://hcsoc.hawaii.gov/about-us/ (last visited Jan. 4, 2023).

[164] *Id.*

Alternatively, we could start by holding DPS accountable by requiring DPS to be more transparent about the prison transfer system and encouraging it to begin measuring how prison transfers affect incarcerated people and recidivism. Residents should also confront the state by drawing attention to the fact that prison transfers, a measure that was intended to be temporary, has now become a normal practice. The state must take steps forward in exploring ways to decrease overpopulation in our incarceral system to end prison transfers. Challenges should also be made in our state courts, as the issue of whether transfer to mainland prisons violates constitutional rights other than the Due Process Clause of the Hawai‘i Constitution has never been addressed. Whatever avenue is pursued, there must be steps taken to stop the transfer of kānaka out of state to work towards improving Hawai‘i’s incarceral system.

Mai Kēia Manawa ā Mau Loa Aku: Kānaka Maoli Governance Through Nearshore Fisheries Management in Moʻomomi[1]

Tehani M. Louis-Perkins[*]

[1] In the Hawaiian language, "mai kēia manawa ā mau loa aku" translates to "from now to eternity" and "from now on and forever." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 241 (rev. and enlarged ed. 1986) [hereinafter HAWAIIAN DICTIONARY].

[*] J.D., University of Hawaiʻi William S. Richardson School of Law, Class of 2022. First, my deepest mahalo to the lawaiʻa of Hawaiʻi who continue to raise us in the way of our ancestors. Mahalo nui to the staff of the *University of Hawaiʻi Law Review* and the many kumu who have provided invaluable guidance, in particular Kapua Sproat, Melody Kapilialoha MacKenzie, Malia Akutagawa, and David M. Forman. Mahalo piha to my ʻohana and kūpuna for everything, and to Duke Quitevis for his constant love and support. Finally, this article is dedicated to the lawaiʻa of Waialua, who have been a constant beacon of guidance and inspiration for all the work that I do.

* * *

I. INTRODUCTION

'Āina[2] serves as a central organizing concept for Kānaka Maoli[3] narratives.[4] This term in itself "evoke[s] powerful sensory and emotional connections [for Kānaka Maoli] as they associate[] certain 'āina with particular activities . . . , family members or relationships . . . , events," or genealogical histories.[5] Maoli scholar and Hawaiian Language Professor Katrina-Ann R. Kapā'anaokalāokeola Nākoa Oliveira writes:

> The fact that Kānaka had a very close connection to the 'āina in ancestral times is evident in our 'ōlelo makuahine.[6] Terms such as 'āina, aloha 'āina (love for the land), and kua'āina (the people who carry the burden of land on their backs) all reflect an undeniable bond between 'āina and kānaka.

[2] In the Hawaiian language, 'āina means "land" or "earth." *Id.* at 11.

[3] "Native Hawaiian," "Kānaka Maoli," or "Maoli" as used in this article, refers to individuals that can trace their ancestry back to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. HAW. CONST. art. XII, § 7. "Kanaka" is the singular, while "Kānaka" is the plural. HAWAIIAN DICTIONARY, *supra* note 1, at 127. Both "Native Hawaiian" and "Indigenous" are capitalized in this article to represent the unique legal and political status of these groups.

[4] *See* Erin Kahunawaika'ala Wright & Brandi Jean Nālani Balutski, *Ka 'Ikena a ka Hawai'i: Toward a Kanaka 'Ōiwi Critical Race Theory, in* KANAKA 'ŌIWI METHODOLOGIES: MO'OLELO AND METAPHOR 86, 100 (Katrina-Ann R. Kapā'anaokalāokeola Nākoa Oliveria & Erin Kahunawaika'ala Wright eds., 2015) [hereinafter METHODOLOGIES].

[5] *Id.*

[6] In the Hawaiian language, 'ōlelo makuahine means "mother tongue" and is often used to refer to the Hawaiian language. HAWAIIAN DICTIONARY, *supra* note 1, at 284.

> Kānaka knew their places so intimately that they were able to describe their kulāiwi[7] apart from other places.[8]

The root of the word ʻāina is the word "ai" which means "to eat."[9] ʻAi as the core term emphasizes that Kānaka not only live off the land but also eat its resources, and this is a concept that still holds true today.[10] Kānaka Maoli do not distinguish themselves from the land in the way that westerners do.[11]

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[7] In the Hawaiian language, kulāiwi means "native land" or "homeland." *Id.* at 179.

[8] KATRINA-ANN R. KAPĀʻANAOKALĀOKEOLA NĀKOA OLIVERIA, ANCESTRAL PLACES: UNDERSTANDING KANAKA GEOGRAPHIES 92 (2014). ʻĀina is used by kānaka to provide "literal mapping of place and time," "describe[] the places they were born and raised," and "retrace the journeys of their ʻohana throughout the generations as they traversed Hawaiʻi." METHODOLOGIES, *supra* note 4. Kānaka Maoli have an intimate relationship with the elements. *See* COLLETTE LEIMOMI AKANA WITH KIELE GONZALEZ, HĀNAU KA UA: HAWAIIAN RAIN NAMES xv (2015). In the Maoli epistemology, to connect to one's home is to know its stories, legends, landmarks, winds, rains, and famous aliʻi. *See id.* at xvii. Kānaka Maoli were keen observers and had a nuanced understanding of the rains and winds of their home:

> They knew that one place could have several different rains, and that each rain was distinguishable from another. They knew when a particular rain would fall, its color, duration, intensity, the path it would take, the sound it made on the trees, the scent it carried, and the effect it had on people.

Id. at xv.

[9] HAWAIIAN DICTIONARY, *supra* note 1, at 9. In the Hawaiian language, ʻai means "food or food plant, especially vegetable food as distinguished from iʻa, meat or fleshy food; often ʻai refers specifically to poi," "to eat," "destroy or consume as by fire," "to taste, bite, take a hook, grasp, hold on to," "edible," "to rule," "score," "dancing style," "stroke or hold in lua," or "stone used in the kimo game." *Id.*

[10] *See* METHODOLOGIES, *supra* note 4, at 101.

[11] There is an intergenerational quality to indigenous identity that is closely linked to traditional lands and resources . . . . [O]nly those who have experienced this environment over centuries can really know what the relationship entails. Indigenous peoples and the lands that sustain them are closely linked through ancient epistemologies that organize the universe quite differently than Western epistemology does.

Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1677 (2007). The origin stories of indigenous peoples, including Kānaka Maoli, illustrate the complex spiritual and cultural relationship between the native communities and natural resources:

> The Kumulipo explains that Maoli descend from akua (ancestors or gods) and are physically related to all living things in the Hawaiian archipelago. As younger siblings, Native Hawaiians are bound to their extended family and have a kuleana (responsibility and privilege) to care for Hawaiʻi's natural and cultural resources. Given the familial relationship between Maoli and the native environment, elder siblings support younger ones by providing the resources necessary to sustain human and other life. In return, Kānaka Maoli care for their elder siblings by managing those resources as a public trust for present and future generations.

D. Kapuaʻala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV'T. L.J. 157, 167–68 (2016).

Instead, Kānaka Maoli emphasize the often quoted mantra of "I am this land, and this land is me."[12]

For Kānaka Maoli, the concepts of "mālama ʻāina" and "aloha ʻāina" encompass the deep emotional understanding of the word ʻāina.[13] "Mālama ʻāina" is seen as caring for the land while "aloha ʻāina" is a feeling of aloha or love for the land. These terms emphasize the intergenerational relationship of ʻāina to kānaka that extend back to time immemorial.[14] To mālama ʻāina does not mean only to care for the land; it also means to care for the freshwater, estuaries, air, oceans, and more.

Lawaiʻa, fisher people, are the protectors and key embodiment of mālama ʻāina in the ocean.[15] Traditionally, to Kānaka Maoli, lawaiʻa are people of extensive knowledge and are highly honored.[16] Lawaiʻa knowledge is passed down typically from elders within their respective community.[17] Those who inherit this knowledge have a significant responsibility to continue its intergenerational transfer.[18] This responsibility includes understanding and teaching methods of capture, seasonal spawning, fish habitats, and schooling seasonalities.[19] Lawaiʻa are especially revered for having particular knowledge associated with "kilo" or observation.[20] Through kilo, lawaiʻa quantify their inherited experiences, knowledge, and observations into effective fisheries management.[21]

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[12] Pualani Kanahele, *I Am This Land, and This Land is Me*, 2 HULILI: MULTIDISCIPLINARY RESEARCH ON HAWAIIAN WELL-BEING 21, 23 (2005).

[13] *See* METHODOLOGIES, *supra* note 4.

[14] *See* METHODOLOGIES, *supra* note 4, at 101; *see, e.g.*, Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. REST. & ENV'T 37, 37 (2007) ("The land, like a cherished relative, cared for the Native Hawaiian people and, in return, the people cared for the land. The principle of *mālama ʻāina* (to take care of the land) is therefore directly linked to conserving and protecting not only the land and its resources but also humankind and the spiritual world as well.").

[15] *See* MARGARET TITCOMB WITH MARY KAWENA PUKUI, NATIVE USE OF FISH IN HAWAII 5 (2nd ed. 1972) [hereinafter NATIVE USE OF FISH]. In the Hawaiian language, lawaiʻa means "fishermen," "fishing technique," "to fish or catch." HAWAIIAN DICTIONARY, *supra* note 1, at 197.

[16] *See* NATIVE USE OF FISH, *supra* note 15.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See id.* In the Hawaiian language, kilo means "stargazer," "reader of omens," "seer," "astrologer," "necromancer," "examine," "observe," or "forecast." HAWAIIAN DICTIONARY, *supra* note 1, at 151.

[21] *See* NATIVE USE OF FISH, *supra* note 15, at 5–6 (discussing the required skills of the poʻo lawaiʻa).

Fisheries management in Hawaiʻi has strayed from reliance on lawaiʻa.[22] Up until recently, the State of Hawaiʻi did not utilize knowledge held by lawaiʻa to effectuate proper fisheries management.[23] Today, the State of

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[22] *See* ʻŌiwi TV, *Nā Loea: The Masters, Mac Poepoe: Mālama Moʻomomi* (Apr. 1, 2014), http://oiwi.tv/oiwitv/na-loea-malama-moomomi./ (describing the "hold" of commercialism on attitudes toward fishing on Moloka'i, shifting ideals surrounding providing for one's family, resource depletion, and other economic drivers of fishing on the island).

[23] *See* Brooke Kumabe, *Protecting Hawai'i's Fisheries: Creating an Effective Regulatory Scheme to Sustain Hawai'i's Fish Stocks*, 29 U. Haw. L. Rev. 243, 257 (2006); *but see* MaryAnn Wagner, *From Observations to Action: How Kelson "Mac" Poepoe Feeds the Community, Environment and Spirit* (Apr. 18, 2022), https://indigenousaquaculture.org/1769/.

Uncle Mac helped lead the effort to bring small fishing communities throughout Hawai[ʻ]i together to share traditional practices. In the early 2000s, he helped envision and bring to life Kuaʻāina Ulu ʻAuamo (KUA), the organization that supports a network of community based natural resources managers to restore Hawaiʻi communities' traditional role as caretakers of their ʻāina (land or earth – literally, "that which feeds"). In his Moʻomomi community, he worked to unite local fishermen and subsistence practitioners. Together, this group – the Hui Mālama O Moʻomomi – organized, proposed, and passed legislation for a mile-long stretch of community based subsistence fishing area designated for subsistence communities on the northwestern shore of Molokaʻi, part of a larger community-based fishing area program across Hawaiʻi.

Id.; Kaʻūpūlehu Marine Life Advisory Committee, Try Wait: Proposal to Rest Kaʻūpūlehu's Reef and Restore Abundance (2020), https://www.kalaemano.com/uploads/1/1/8/3/118343418/kaupulehu-try-wait-faqs-2016.pdf.

The [Kaʻūpūlehu Marine Life Advisory Committee] has been working for 17 years to take care of Kaʻūpūlehu's ocean and coastline. Initially, [Kaʻūpūlehu Marine Life Advisory Committee] created educational materials to try and establish a voluntary code of conduct based on seasons and bag limits, which was unfortunately unsuccessful. [Kaʻūpūlehu Marine Life Advisory Committee] considered dozens of ideas ranging from permanent reef protection, to bag limits, to no action at all.

Id.; Kama Hopkins and Shane Palacat-Nelson, *Residents of the Last Hawaiian Fishing Village Look to Preserve Their Icebox* (Sept. 1, 2021), https://kawaiola.news/aina/residents-of-the-last-hawaiian-fishing-village-look-to-preserve-their-icebox/.

> [Kaʻimi] Kaupiko acknowledges that traditions have changed and evolved, referencing the shift from paddling canoes to the gas propelled ones now used for catching ʻōpelu (mackerel scad). The resources have been impacted too – the negative consequences of over-harvesting and the unsustainable fishing practices of folks who don't respect local values is that fish populations have been depleted. Witnessing these changes to their "icebox," Miloliʻi kūpuna and residents in the 80s and 90s worked hard on efforts to mālama ʻāina. In 2005, they established a Community Based Subsistence Fishing Area (CBSFA) designation for Miloliʻi. Today, Kalanihale has taken on the kuleana of listening to the voices of the community to understand how they want to mālama their marine resources.
>
> *Id.*

Hawai'i Department of Land and Natural Resources (DLNR) is responsible for finding solutions to manage Hawai'i's fish stocks.[24] Despite its best intentions and efforts, the State has yet to implement an effective strategy to do so.[25] Various studies have shown a massive decline in Hawai'i's fish populations.[26] Observations by local fishers and ocean users confirm the same downward trend.[27] A 2003 study that involved hundreds of interviews with Kānaka Maoli elders found that after the 1990s, they observed changes in "the quality of the fisheries, and the declining abundance of fish—noting that [there] were significant declines in almost all areas of the fisheries, from streams to nearshore and the deep sea."[28] Unfortunately, even with modern rules and regulations, Hawai'i has not successfully monitored or implemented an effective management plan that ensures the perpetuity of fisheries into the future.[29] By focusing on the current state laws and Maoli resource management, this article demonstrates the legal arguments that communities and advocates can make to protect their subsistence fisheries.

Part II of this article examines the significance of Hawai'i's nearshore fisheries. It discusses the current status of Hawai'i's fisheries and the laws that regulate them. This section also explores communal management practices prior to westerners stumbling onto the shores of Hawai'i in 1778.[30] It then articulates the cultural significance of lawai'a and fisheries to ancient Kānaka Maoli. Finally, this section highlights the impact of westernization upon Hawai'i's fisheries and Kānaka Maoli culture and laws.

Part III puts the regulation of fisheries in the modern context by illustrating the importance of a Community-Based Subsistence Fishing Area ("CBSFA") in community governance. It assesses the Mo'omomi CBSFA on Moloka'i as a model and highlights the issues that the Mo'omomi CBSFA has

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[24] Kumabe, *supra* note 23, at 243.

[25] *Id.* at 243–44.

[26] KEPA MALY & ONAONA MALY, KA HANA LAWAI'A A ME NĀ KO'A O NA KAI 'EWALU: A HISTORY OF FISHING PRACTICES AND MARINE FISHERIES OF THE HAWAIIAN ISLANDS x (2003) [hereinafter MALY & MALY]. *See* Alan M. Friedlander et al., *Characteristics of effective marine protected areas in Hawai'i*, 29 AQUATIC CONSERV: MAR. FRESHW. ECOSYST. 103–17 (2019) ("Reef fish populations and their associated fisheries have declined dramatically around Hawai'i over the past 100 years due to a growing human population, destruction of habitat, introduction of new and unsustainable fishing techniques, and loss of traditional conservation practices.").

[27] Zoom Interview with Kevin K.J. Chang, Co-Dir., Kua'āina Ulu 'Auamo (Feb. 19, 2021).

[28] MALY & MALY, *supra* note 26, at x.

[29] *See* Kumabe, *supra* note 23, at 243–44.

[30] For an analysis of the arrival of Westerners in Hawai'i and the resulting impacts, *see* LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? HOW SHALL WE LIVE IN HARMONY? 67 (1992).

historically faced. The CBSFA elegantly puts forth a management strategy that utilizes scientific data, Maoli fisheries management techniques, place-based knowledge, and State fishing regulations. Despite this, the Moʻomomi CBSFA still has not been approved by DLNR and its governing body. This article argues that DLNR's delay and refusal to designate the CBSFA is a breach of its constitutional obligation to affirmatively protect traditional and customary Native Hawaiian rights and the fisheries for future generations.

II. BACKGROUND

A. *Ka ʻOihana Lawaiʻa: The Historical and Cultural Significance of Lawaiʻa*[31]

> Ua akamai kekahi poe kanaka Hawaii i ka lawaia, no ia mea, ua kapa ia lakou, he poe lawaia. O ka makau kekahi mea e lawaia ai. O ka upena kekahi, a o ka hinai kekahi.[32]

Prior to Europeans stumbling on the shores of Hawaiʻi, lawaiʻa (fishing) was an integral part of the daily survival of traditional maoli society.[33] Every kanaka possessed the skill to obtain fish through various traditional techniques.[34] This skillset emphasized the iʻa or fish as a primary protein source.[35] The health of community fisheries was essential in sustaining the prosperity of kānaka. Prior to western contact, the estimated population of

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[31] *See* DANIEL KAHĀʻULELIO, KA ʻOIHANA LAWAIʻA: HAWAIIAN FISHING TRADITIONS (Mary Kawena Pukui trans., M Puakea Nogelmeier ed., 2006) (repository of narratives on fishing customs, sources of fish and methods of procurement). Daniel Kahāʻulelio is a native fisherman of the Lāhainā region. He provides readers with a vast knowledge of locations, practices, methods and beliefs of native fisher-people of the Maui region waters. "Ka ʻoihana lawaiʻa" translates to fishing practices and customs.

[32] W.E. Kealakai, He moolelo no ka lawaia ana, KA HAE HAWAII, May 15, 1861, at 28; MALY & MALY, *supra* note 26, at ii ("Some of the people of Hawaii were very knowledgeable about fishing, and they were called fisher-people. The hook was one thing used in fishing. The net was another, and the basket trap, another."). This excerpt does not utilize diacritical markings because it is quoted as originally written in Ka Hae Hawaii.

[33] *See* NATIVE USE OF FISH, *supra* note 15, at 3; D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawaiʻi's Streams and Justice for Hawaiian Communities,* 95 MARQ. L. REV. 127, 139 (2011). *See* LILIKALĀ KAMEʻELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? HOW SHALL WE LIVE IN HARMONY? 67 (1992), for an analysis illustrating the arrival of Westerners in Hawaiʻi and resulting impacts.

[34] *See* NATIVE USE OF FISH, *supra* note 15, at 3, 5–6.

[35] MOKE MANU ET AL., HAWAIIAN FISHING TRADITIONS ix (Esther Mookini trans., 2006) ("While pig, dog, chicken, and wild birds were eaten, and might also be called iʻa (meat), fish was the main source of protein. ʻAi was the bland staple, iʻa the tasty accompaniment that made eating a delight. Seafood was eaten live, raw, baked, broiled, dried, and fermented.").

Kānaka Maoli ranged from several hundred thousand to a million or more.[36] The health of community fisheries was essential for sustaining the health of a population of that scale.[37] The expansive knowledge of lawai‘a was thus necessary for the effective and sustainable management of nearshore fisheries.[38]

Traditional management of Maoli fisheries stems from a land tenure system that emphasized mutual benefit and resource conservation[39] from the mountaintops out into the ocean.[40] In Maoli society, the ali‘i nui held all ‘āina and adjacent fishing areas personally and as sovereign of the people.[41] Bound by trust, the ali‘i nui was required to oversee the welfare of both the people and the ‘āina.[42] Ali‘i nui appointed other ali‘i to exercise political control over ahupua‘a and ‘ili to manage resources and people effectively.[43] The ali‘i nui as the executive ensured that other ali‘i, acting as trustees, responsibly managed the land divisions.[44] Maka‘āinana,[45] the common people, held ali‘i accountable for any abuse of position and power to ensure the health of the land and its people.[46] This relationship between ali‘i and maka‘āinana

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[36] DENNIS KAWAHARADA ed., HAWAIIAN FISHING LEGENDS WITH NOTES ON ANCIENT FISHING IMPLEMENTS AND PRACTICE xi (1992).

[37] *See id.*

[38] *See id.*

[39] Alan T. Murakami & Wayne Chung Tanaka, *Konohiki Fishing Rights in* NATIVE HAWAIIAN LAW: A TREATISE 612, 616 (Melody Kapilialoha Mackenzie et al. eds., 2015) [hereinafter TREATISE].

[40] *See id.*

[41] *Id.* In the Hawaiian language, ali‘i means “chief,” “chiefess,” “officer,” “ruler,” “monarch,” “king,” “queen,” or “royal.” Ali‘i nui means “high chief.” HAWAIIAN DICTIONARY, *supra* note 1, at 20.

[42] TREATISE, *supra* note 39.

[43] *See id.* In the Hawaiian language, ‘ili means “land section, next in importance to ahupua‘a and usually a subdivision of an ahupua‘a.” HAWAIIAN DICTIONARY, *supra* note 1 at 97.

[44] TREATISE, *supra* note 39.

[45] In the Hawaiian language, maka‘āinana means “commoner,” “populace,” “people in general,” “citizen,” or “subject.” HAWAIIAN DICTIONARY, *supra* note 1, at 224.

[46] *See* DAVID MALO, HAWAIIAN ANTIQUITIES 267 (N.B. Emerson trans., 1st ed. 1903). There are many accounts of maka‘āinana holding their ali‘i accountable for abuse of power. One particular account hails from the land of Ka‘ū, where maka‘āinana were upset with the ali‘i’s abuse of power and killed him because of it:

> [Koihala] also robbed the fishermen of their fish. The story is that he compelled his canoe men to paddle him about here and there where the fleets of fishing canoes were. The wind was bleak and his men suffered from the wet and cold, he being snugly housed in the *pola*. One day he had his men take his canoe out towards the south cape where there was a fleet of fishing canoes. His own canoe, being filled with the spoils of his robbery, began to sink; and he called out for help. The

sometimes referred to as hoaʻāina,[47] the tenants who worked the land, thus embodied the principle of mutual benefit in traditional Maoli society.[48] "Aliʻi, with the help of their konohiki, regulated the taking of marine resources in each ahupuaʻa" through communal harvesting on an as-needed basis.[49] Aliʻi nui also implemented "temporary and permanent kapu[50] on specific species, areas, and times."[51] "[A]ny violation thereof in ancient time was said to be punishable by death."[52] However, "spiritual and practical principles," in addition to kapu, encouraged the conservation of resources.[53]

For example, the religious practices of the ocean imposed significant self-regulation on particular fishing practices. Prior to fishing trips, lawaiʻa would observe strict religious rituals to ensure their successful catch and safety.[54] Lawaiʻa would place fish on the koʻa, or shrine, as an offering to the ocean's many gods and deities.[55] In Maoli religion, Kanaloa is the akua or god representing the ocean and watersheds.[56] Kanaloa and his brother, Kāne, are "described in legend as cultivators, awa drinkers, and water finders, who

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> fishermen declined all assistance; his own men left him and swam to the canoes of the fishers, leaving him entirely in the lurch. He was drowned.

Id.

[47] In the Hawaiian language, hoaʻāina means "tenant" or "caretaker, as on a kuleana." HAWAIIAN DICTIONARY, *supra* note 1, at 73.

[48] *See* Wayne Tanaka, *Hoʻohana Aku, Hoʻōla Aku: First Steps to Averting the Tragedy of the Commons in Hawaiʻi Nearshore Fisheries*, 10 ASIAN-PAC. L. & POL'Y J. 235, 243 (2008) [hereinafter *Tragedy*]; TREATISE, *supra* note 39, at 617.

[49] *Tragedy*, *supra* note 48; TREATISE, *supra* note 39, at 617. In the Hawaiian language, konohiki means the "headman of an ahupuaʻa land division under the chief; land or fishing rights under control of the konohiki; such rights are sometimes called konohiki rights." HAWAIIAN DICTIONARY, *supra* note 1, at 166.

[50] In the Hawaiian language, kapu means "taboo," "prohibition," or "forbidden." HAWAIIAN DICTIONARY, *supra* note 1, at 132.

[51] TREATISE, *supra* note 39, at 617. The kapu ensured the replenishment of the nearshore fishery through communal regulation of all kānaka. *See* MALO, *supra* note 46, at 275.

> In the month of Hinaʻiaeleele (corresponding to July) they took the opelu by means of the kaili net and used it for food. The aku was then made tabu, and no man, be he commoner or alii, might eat of the aku; and if any chief or commoner was detected in so doing he was put to death. The opelu was free and might be used as food until the month of Kaelo, or January.

Id.

[52] MALY & MALY, *supra* note 26, at 95.

[53] TREATISE, *supra* note 39, at 617; *see* MALY & MALY, *supra* note 26, at 13.

[54] *See* NATIVE USE OF FISH, *supra* note 15, at 5.

[55] *Id.* at 8.

[56] *See* MALO, *supra* note 46, at 149–50.

migrated from Kahiki and traveled about the islands."[57] Kanaloa, along with other minor gods and ‘aumākua,[58] are believed to take on the form of sea creatures and protect lawai‘a and their families.[59] Given these divine origins, kānaka became caretakers of the land and related resources, and established the community principles of conservation necessary to ensure generous harvests.

B. *Hulihia: The Overthrow of Maoli Fisheries Management*[60]

Western contact brought quick and harsh change to the traditional culture and lifestyle of kānaka.[61] Resource commodification led to an abandonment of resources, resulting in alienated land and resources essential for the Kānaka Maoli subsistence lifestyle.[62] The shift "from communal stewardship and religious reverence to the public right and incentive to maximize exploitation" led "to the proliferation of destructive practices and overexploitation of many of Hawai‘i's fisheries."[63]

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[57] MARTHA BECKWICK, HAWAIIAN MYTHOLOGY 62 (Univ. of Haw. Press 1970) (1940).

[58] In the Hawaiian language, ‘aumakua means "family or personal gods," "deified ancestors who might assume the shape of sharks . . .[,] owls . . .[,] hawks . . .[,] ‘elepaio, ‘iwi, mudhens, octopuses, eels, mice, rats, dogs, caterpillars, rocks, cowries, clouds, or plants. A symbiotic relationship existed; mortals did not harm or eat ‘aumākua [plural of ‘aumakua], and ‘aumākua warned and reprimanded mortals in dreams, visions, and calls." HAWAIIAN DICTIONARY, *supra* note 1, at 32.

[59] *See* Pualani Kanaka‘ole Kanahele et al., *Nā Oli no ka ‘Āina o Kanaka‘ole: A Compilation of Oli and Cultural Practices*, EDITH KANAKA‘OLE FOUNDATION ii, 25–26 (2017). E Kanaloanuiākea is a chant that honors the many forms of Kanaloa. This chant is used during the Kū‘ula dedication ceremony and can be used anytime to honor Kanaloa:

> E Kanaloanuiākea (Kanaloa of the vast expanse)
> E Kanaloa Haunawela (Kanaloa of the depths of intensity)
> Kanaloa ke ala ma‘awe ‘ula a ka lā (Kanaloa of the west sky, the setting sun)
> Kāne ke ala ‘ula o ka lā (Kāne of the east sky, the rising sun)
> Kanaloa noho i ka moana nui (Kanaloa residing in the great sea)
> Moana iki (Small sea)
> Moana o‘o (Mottled sea)
> I ka i‘a nui (In the big fish)
> I ka i‘a iki (In the small fish)
> I ka manō (In the shark)
> I ka niuhi (In the tiger shark)
> . . .
> Ola i ke au a Kanaloa (Life to the realm of Kanaloa)

Id.

[60] In the Hawaiian language, hulihia means "overturned," "a complete change," "overthrow," or "turned upside down." HAWAIIAN DICTIONARY, *supra* note 1, at 89.

[61] *See Tragedy*, *supra* note 48, at 253.

[62] *Id.*

[63] *Id.* at 262.

1. *Codification of Fishing Rights for Maka‘āinana*

"On June 7, 1839, King Kamehameha III formally acknowledged ancient Hawaiian fishing practices and uses of the ocean" by adopting a law[64]—the first of its kind—to formally recognize maka‘āinana fishing rights.[65] It distributed fishing grounds "between different classes of people, granting specific rights to the 'landlords' . . . and their tenants with respect to the nearshore fishing grounds."[66] This declaration was further codified in 1840 and reaffirmed the ali‘i nui's acknowledgment of such rights.[67] The law

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[64] *See* TREATISE, *supra* note 39, at 617.

[65] *Id.*

[66] *Id.*

[67] The 1839 declaration of King Kamehameha III relating to fishing rights was subsequently reaffirmed, translated, and codified by statute enacted on November 9, 1840. An Act to Regulate the Taxes, Laws of the Hawaiian Islands ch. III, § 8(1) (June 7, 1839) (amended Nov. 9, 1840), *reprinted in* MALY & MALY, *supra* note 26, at 243–44. The statute translated into English read:

> **No na Kai noa, a me na Kai kapu**
> **(Of free and prohibited fishing grounds) (1839-1841)**
> **I. -Of free fishing grounds. (No ka noa ana o ke kai)**
>
> His majesty the King hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself. These are the fishing which His Majesty the King takes and gives to the people; the fishing grounds without the coral reef, viz., the Kilohee grounds, the Luhee ground, the Malolo ground, together with the ocean beyond.
> *But the fishing grounds from the coral reefs to the sea beach are for the landlords, and for the tenants of their several lands, but not for others . . .*
> If any of the people take the fish which the landlord taboos for himself, this is the penalty, for two years he shall not fish at all on any fishing ground. And the several landlords shall give immediate notice respecting said fishermen, that the landlords may protect their fishing grounds, lest he go and take fish on other grounds.
> If there be a variety of fish on the ground where the landlord taboos his particular fish, then the tenants of his own land may take them, but not the tenants of other lands, lest they take also the fish tabooed by the landlord. The people shall give to the landlord one third of the fish thus taken. Furthermore, there shall no duty whatever be laid on the fish taken by the people on grounds given to them, nor shall any canoe be taxed or taboo'd.
> If a landlord having fishing grounds lay any duty on the fish taken by the people on their own fishing grounds, the penalty shall be as follows: for one full year his own fish shall be taboo'd for the tenants of his particular land, and notice shall be given of the same, so that a landlord who lays a duty on the fish of the people may be known . . . .
>
> *Id.* (emphasis added).

recognized the people's rights in fisheries beyond fringing coral reefs and sanctioned the right of konohiki to place kapu on certain species of fish or fishing seasons applicable to nearshore fishing grounds.[68] The law also penalized abuse of power by konohiki, such as unduly seizing and taxing kānaka.[69] This law, and subsequent laws enacted in 1842, attempted to preserve the traditional management system for stewarding nearshore areas.[70] These rights were revisited in 1845 when the Kingdom of Hawai‘i passed the Organic Acts.[71] The Organic Acts of 1845 and 1846 clarified the respective fishing rights and responsibilities of the ali‘i nui, konohiki, and maka‘āinana.[72] The Acts also opened ocean fisheries seaward of the nearshore konohiki fisheries to all.[73] These statutes were amended and clarified up until 1897. Still, along the way, the decline of the traditional land tenure system and adoption of private property rights led to many court decisions that collectively commodified and commercialized fisheries.[74]

A series of cases established the precedent that fisheries are the private property of the konohiki and subject only to the limitations set out in the Organic Acts statutes.[75] This precedent emphasized that ownership rights in fisheries were also conferred to hoa‘āina. In 1858, the Supreme Court of the Kingdom of Hawai‘i in *Haalelea v. Montgomery* affirmed the shared fishing rights of tenants, holding that such rights could be restricted by konohiki only as proclaimed explicitly by Kamehameha III and codified in 1846.[76] Ha‘alelea claimed that Montgomery unlawfully prohibited the ahupua‘a tenants from fishing in the waters off Pu‘uloa.[77] Ha‘alelea owned the

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[68] *Id.*

[69] *Id.*

[70] *Id.* at 243.

[71] An Act to Organize the Executive Departments of the Hawaiian Islands, Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands pt. 1, ch. VI, art. V (Apr. 27, 1846), *reprinted in* MALY & MALY, *supra* note 26, at 246–48.

[72] *Id.* Article V of the Act to Organize the Executive Departments of the Hawaiian Islands defined the responsibilities and rights that the konohiki and people had to the wide range of fishing grounds and resources. The law addressed the practice of designating kapu on the taking of fish, tribute of fish paid to King Kamehameha, and identified specific types of fisheries from the freshwater and pond fisheries to those on the high seas under the jurisdiction of the Kingdom.

[73] *See* An Act to Organize the Executive Departments (Apr. 27, 1846), ch. VI, art. V, 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 90.

[74] *See, e.g.*, Haalelea v. Montgomery, 2 Haw. 62 (Haw. Kingdom 1858); Hatton v. Piopio, 6 Haw. 334 (Haw. Kingdom 1882).

[75] *See, e.g.*, *Haalelea*, 2 Haw. 62; *Hatton*, 6 Haw. 334.

[76] *Haalelea*, 2 Haw. at 65, 70–71.

[77] *Id.* at 63. Pu‘uloa is located on the Island of O‘ahu, "[c]ommencing at mauka north corner or point of this land at place called Lae Kekaa, at [the] bend of Pearl River, and running

Honouliuli ahupuaʻa, which he had inherited from his wife, M. Kekauʻōnohi.[78] Montgomery, on the other hand, claimed to have previously received in fee a portion of Honouliuli known as Puʻuloa.[79] The court held that even an attempt to divide a konohiki's rights would infringe on the rights of the hoaʻāina by potentially subjecting them to multiple kapu or taxes within an ahupuaʻa's fisheries.[80] Montgomery had not received any konohiki rights because they could be conveyed only by express grant, which he did not have.[81] The court concluded that it was Haʻalelea who solely held konohiki rights to the nearshore waters of the entire ahupuaʻa, including the waters of Puʻuloa.[82]

In 1882, just as it had in *Haalelea*, the Hawaiʻi Supreme Court confirmed the statutory fishing rights of hoaʻāina.[83] The *Hatton* v. *Piopio* court narrowly construed the codified rights of a konohiki, holding that a konohiki could not prohibit the commercial sale of a tenant's catch.[84] By holding that Piopio had the right to sell his catch, the courts illustrated the diminished role of communal stewardship and the change in the economy in the islands.[85] In doing so, it also emphasized the individual right of an ahupuaʻa tenant to sell fish for profit, subject only to the superior right of the konohiki to kapu or tax the catch.[86] Starting with *Hatton,* the Hawaiʻi Supreme Court slowly changed the narrative and focused on the economic incentive to harvest fish for profit instead of focusing on communal subsistence.

2. *The Downfall of Konohiki Fishing Rights*

The downfall of konohiki fishing rights in the twentieth century is no coincidence. Leading up to the enactment of the Hawaiian Organic Act of

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along [the] edge of Pearl River, makai side, taking in three fish ponds called Pamoku, Okiokilipi and Paakule to open sea[.]" *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 70–71

[81] *Id.* at 69–70.

[82] *Id.* at 70–71.

[83] *See* TREATISE, *supra* note 39, at 619–21.

[84] Hatton v. Piopio, 6 Haw. 334, 337 (Haw. Kingdom 1882) ("The fishing in the open sea off our coasts does not tend materially to lessen the supply unless extraordinary means are used . . . If the ordinary means are employed in taking fish, the Konohiki's opportunities to take all the fish he is able to capture are not diminished by whatever fishing the tenants may do.").

[85] *Id.* at 336–37.

[86] *Id.* at 336.

1900, which incorporated Hawai'i as a Territory of the United States,[87] the Hawaiian Kingdom was experiencing political and cultural turbulence. On January 17, 1893, the Hawaiian Kingdom was overthrown by European and American businessmen who were supported by the military power of the United States of America.[88] The overthrow directly violated the treaties existing between the United States and the Hawaiian Kingdom.[89] In 1896, only three years later, the newly formed Republic of Hawai'i enacted drastic changes to education that required the English language to be the medium and basis of instruction in all public and private schools.[90] Furthermore, in 1898 the perpetrators of the overthrow successfully pushed for the annexation of Hawai'i to the United States.[91] Coincidentally, Hawai'i was also experiencing an economic shift to harvesting fish for profit and straying away from subsistence fishing. Therefore, by the time Congress considered the Hawaiian Organic Act of 1900, the cultural and political foundation of Hawai'i was already in a state of disarray.

The Hawaiian Organic Act of 1900 repealed "all laws of the Republic of Hawai'i which confer exclusive fishing rights upon any person or persons."[92] Furthermore, it proclaimed that "all fisheries in the sea waters of the Territory of Hawai'i . . . shall be free to all citizens of the United States, subject, however, to vested rights[.]"[93] It intended to "do away with all fisheries in the sea waters of the Territory belonging to private individuals[.]"[94] The konohiki at this time could still register and retain their "vested" fishery rights, but only if they petitioned for recognition within two years of the Act's

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[87] An Act to Provide a Government for the Territory of Hawaii, ch. 339, § 2, 31 Stat. 141, 141 (1900).

[88] *See* RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY 183 (rev. ed. 1961).

[89] *See* Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1510.

[90] Laws of the Republic of Hawaii Act 57, § 30, at 189 (1896).

> The English language *shall* be the medium and basis of instructions in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the school, or by direct order in any particular instance. Any schools that shall conform to the provisions of this Section shall not be recognized by the Department.

Id. (emphasis added).

[91] *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55, 55th Cong., 30 Stat. 750 (1898).

[92] *Id.* § 95, 31 Stat. at 160.

[93] *Id.* § 95, 31 Stat. at 160.

[94] Kapiolani Est. v. Territory, 18 Haw. 460, 462 (Haw. Terr. 1907) (holding that "vested fishing rights" under § 95 and § 96 of the Hawaiian Organic Act excluded fishery claims in the Hanapepe River).

passage.[95] This right, however, was not guaranteed because the Attorney General could exercise eminent domain powers to condemn fishery rights.[96] In enacting sections 95 and 96 of the Hawaiian Organic Act of 1900, the United States Congress deliberately sought to "destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the people."[97] By 1953, whether through eminent domain taking by the Attorney General or failure of the konohiki to register, less than a hundred konohiki fisheries remained registered.[98] The Hawaiian Organic Act of 1900 facilitated the replacement of traditional Hawaiian fishery management with western fisheries management policies.[99] Thereafter, Hawaiʻi's fisheries suffered massive decline in part due to the newly integrated capitalistic economic scheme along with the aftershocks of the events following the 1893 overthrow.[100]

C. *Kūpaʻa Mahope o Ka ʻĀina: Insurgence of Kānaka Maoli in the Political Machine*[101]

> The truth is, there is man and there is the environment. One does not supersede the other. The breath in man is the breath

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[95] *Id.* at 461.

[96] *See* Damon v. Territory of Hawaiʻi, 194 U.S. 154, 159 (1904).

[97] *In re* Fukunaga, 16 Haw. 306, 308 (Haw. Terr. 1904).

[98] *See* TREATISE, *supra* note 39, at 621–22 ("[O]f 1,200-1,500 [total] fisheries, 360 to as many as 720 were classified as privately owned fisheries in 1900. As of 1939, only 101 fisheries had been established and registered by some thirty-five owners . . . . [B]etween 1900 and 1953, the federal and territorial governments condemned or acquired [around] 37 fisheries, while an estimated 248 fisheries were not registered and were declared 'abandoned.'").

[99] *See id.*

[100] *See Tragedy*, *supra* note 48, at 262–65.

[101] Eleanor C. Nordyke & Martha H. Noyes, *"Kaulana Nā Pua": A Voice for Sovereignty*, 27 HAWAIIAN J. HIST. 27, 27–29 (1993). "Kaulana Nā Pua," written by Ellen Kehoʻohiwaokalani Wright Prendergast, speaks to the immense opposition Kānaka Maoli had to the annexation of Hawaiʻi to the United States. It was also known as "Mele ʻAi Pōhaku" or the "Stone-eating Song," and "Mele Aloha ʻĀina" or the "Patriot's Song:"

> Kaulana nā pua aʻo Hawaiʻi (Famous are the children of Hawaiʻi)
> Kūpaʻa ma hope o ka ʻāina (Ever loyal to the land)
> Hiki mai ka ʻelele o ka loko ʻino (When the evil-hearted messenger comes)
> Palapala ʻānunu me ka pākaha (With his greedy document of exortion)
> . . .
> ʻAʻole mākou aʻe minamina (We do not value)
> I ka puʻu kālā o ke aupuni (The government's sums of money)
> Ua lawa mākou i ka pōhaku (We are satisfied with the stones)
> I ka ʻai kamahaʻo o ka āina (Astonishing food of the land)

> of Papa [the earth]. Man is merely the caretaker of the land that maintains his life and nourishes his soul. Therefore[,] ‘āina is sacred. The church of life is not in a building, it is the open sky, the surrounding ocean, the beautiful soil. My duty is to protect Mother Earth, who gives me life. And to give thanks with humility as well as forgiveness for the arrogance and insensitivity of man.[102]

In the 1970s, Hawai‘i witnessed a cultural and social shift in what it means to be Kānaka Maoli.[103] The "Hawaiian Renaissance," as it is called today, is the dynamic movement to revive all things Kānaka Maoli.[104] This includes the resurgence of nearly forgotten traditional arts, sciences, and cultural practices, and the insurgence of kānaka into legislative and judicial processes.[105] The roots of the "Hawaiian Renaissance" emerged with the 1966 appointment of Kānaka Maoli, William Shaw Richardson, as the Chief Justice of the Hawai‘i State Supreme Court.[106] The Richardson court applied Maoli concepts to modern jurisprudence in protecting Maoli rights, public ownership of resources, and even broadening citizens' rights to challenge important environmental and land development decisions.[107]

Outside of the Richardson court's decisions, Kānaka Maoli led grassroots initiatives to protect their traditional and cultural rights.[108] Throughout the

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Ma hope mākou o Lili‘ulani (We back Lili‘ulani)
A loa‘a ē ka pono o ka ‘āina (Who has won the rights of the land)
Ha‘ina ‘ia mai ana ka puana (Tell the story)
Ka po‘e i aloha i ka ‘āina (Of the people who love their land)
Id.

[102] NOELANI GOODYEAR-KA‘ŌPUA, IKAIKA HUSSEY, & ERIN KAHUNAWAIKA‘ALA WRIGHT, A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 241 (Duke University Press 2014) (quoting George Helm, "Reasons for the Fourth Occupation of Kaho‘olawe," January 30, 1977). George Jarrett Helm is renowned as a Kānaka Maoli hero and was instrumental in the struggle to protect the life of Kaho‘olawe. *See* Kamako‘i, *Hawaiian Patriots Project*, https://www.kamakakoi.com/hawaiianpatriots/george.html (last visited Apr. 1, 2021).

[103] Ronald Williams Jr., *The Other Hawaiian Renaissance*, HANA HOU, Dec. 1, 2014, at 147, https://www.academia.edu/9658002/The_Other_Hawaiian_Renaissance.

[104] *See id.* at 150–51. A century before the cultural revival of the 1970s, there was a similar resurgence, a first Hawaiian Renaissance. *Id.* The effort to preserve things Kānaka Maoli began with Mō‘ī Lot Kapuaiwa (Kamehameha V). *Id.* He sought to remedy the devastation wrought on the native population from introduced diseases by pushing to preserve and celebrate maoli history. *Id.* When David La‘amea Kalakaua was elected to the throne in 1874, he sought to honor the native past while securing the future. *Id.*

[105] *See* Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 6 (2010).

[106] *See id.*

[107] *See id.* at 6–7.

[108] *See* Williams, *supra* note 103, at 149.

1970s, many movements inspired the convening of delegates to amend the Hawaiʻi Constitution.[109] The 1978 Constitutional Convention led to another outgrowth of Kānaka Maoli land and sovereignty movements.[110] Kānaka Maoli delegates from across the islands convened to advocate for various Maoli issues including: "(1) the protection and perpetuation of ancient Hawaiian rights, traditions, heritage, and archaeological sites; (2) the implementation of native Hawaiian culture and language; (3) the preservation of native Hawaiian vegetation and crops; (4) the recognition of problem areas common to native Hawaiians; and (5) the Hawaiian Homes Commission Act."[111] Key Kānaka Maoli delegates included John D. Waiheʻe III and Adelaide Keanuenueokalaninuiamamao "Frenchy" DeSoto.[112] Waiheʻe, sometimes referred to as the unofficial majority leader of the Convention, and other representatives strategized how to maximize their influence on the Convention.[113] Frenchy DeSoto, the powerhouse behind the grassroots initiative in the convention process, chaired the Hawaiian Affairs

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[109] *See id.* One political action in particular led by the Protect Kahoʻolawe ʻOhana (PKO) catalyzed Kānaka Maoli and the general public to protest the bombing of Kahoʻolawe by the U.S. Navy. *Moʻolelo ʻĀina*, Protect Kahoʻolawe ʻOhana, http://www.protectkahoolaweohana.org/mo699olelo-699256ina.html (last visited Dec. 9, 2020). PKO began a "series of occupations on the island, which brought national attention to the movement" and led to arrests, imprisonment, and the prohibition of access for protesters. *Id.* In 1976, PKO "filed a federal civil suit that sought compliance with environmental, historic site, and religious freedom protection laws." *Id.* Even after the disappearance of George Helm and Kimo Mitchell in 1977, who were lost at sea after journeying to the island to protest the bombings, the fight for aloha aloha ʻāina continued. Colleen Uechi, *40 Years After Men's Disappearance at Sea, Their Visions for Kahoolawe Has Become a Reality*, Maui News (Mar. 5, 2017), https://www.mauinews.com/news/local-news/2017/03/40-years-after-mens-disappearance-at-sea-their-vision-for-kahoolawe-has-become-a-reality. In the Hawaiian language, aloha ʻāina means "love of the land or of one's country" and "patriotism[.]" Hawaiian Dictionary, *supra* note 1, at 21. Furthermore, on October 22, 1990, President George H. W. Bush directed the Secretary of Defense to discontinue the island's use for bombing and target practice, and the United States eventually returned Kahoʻolawe to the State of Hawaiʻi. Department of Defense Appropriations Act of 1994, Pub. L. No. 103–139 § 10001(b), 107 Stat. 1480–81.

[110] *See* Williams, *supra* note 103, at 149.

[111] *See* Troy J.H. Andrade, *Hawai'i '78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 UPAJLSC 85, 122 (2021) (*citing* Constitutional Convention of Hawaii of 1978, *Committee on Hawaiian Affairs: Scope,* (1978)).

[112] *See* Zoom Interview with John Waiheʻe, Former Governor of Haw. (Nov. 19, 2020); Chad Blair, *What A Constitutional Convention Might Mean For Hawaiians*, HONOLULU CIV. BEAT (Feb. 6, 2018), https://www.civilbeat.org/2018/02/chad-blair-what-a-constituitonal-convention-might-mean-for-hawaiians/.

[113] Zoom Interview with John Waiheʻe, *supra* note 112.

Committee.[114] Delegates codified the overwhelming majority of the Committee's work in article XII of the Hawai'i Constitution.[115] By the end of the Constitutional Convention, the Hawaiian Affairs Committee successfully codified crucial amendments in the Constitution.[116] For example, these provisions established the Office of Hawaiian Affairs (OHA), ensured that "ceded" lands would be held in trust by the State of Hawai'i for native Hawaiians[117] and the general public, and protected "traditional and customary rights" of Kānaka Maoli.[118] An additional amendment provided that the State of Hawai'i holds all public natural resources "in trust for the benefit of the people."[119] This consequential amendment would be famously known as the Hawai'i public trust doctrine.

1. *The Duty to Mālama 'Āina: The Hawai'i Public Trust Doctrine*

The Hawai'i public trust doctrine is a direct product of communal management rooted in Maoli custom and tradition that has developed over time, starting from Kingdom Law.[120] In 1840, the first Constitution of the Kingdom of Hawai'i declared that the land, along with its resources, "was not [the King's] private property. It belonged to the Chiefs, and the people in common, of whom [the King] was the head and had the management of landed property."[121] In 1892, an additional fundamental kingdom law was enacted, setting the foundation for the public trust by expressly preserving the usage of land.[122] In essence, through the adoption of English common law as the law of Hawai'i, the public trust doctrine also incorporates kingdom laws and Hawaiian customs.[123] In 1899, a year after Hawai'i's annexation, the territorial Supreme Court adopted the public trust doctrine in *King v. Oahu Railway*, holding that "the people of Hawai'i hold the absolute rights

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[114] *See id.*

[115] *Id.*

[116] *See id.*

[117] The term "native Hawaiian" with a lowercase *n* was invented when Congress passed the Hawaiian Homes Commission Act (HHCA). The term referred to "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Kekuni Blaisdell, *I Hea Nā Kānaka Maoli? Whither the Hawaiians?"*, 11 HŪLILI 253, 256 (2019) (quoting Hawaiian Homes Comissions Act, ch. 42, 42 Stat. 108 (1920)).

[118] *See* Blair, *supra* note 112.

[119] HAW. CONST. art. XI, §1.

[120] *See* D. Kapua'ala Sproat & Isaac Moriwake, *Ke Kalo Pa'a o Waiāhole: Use of the Public Trust as a Tool for Environemtnal Advocacy, in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247, 249 (Cliff Rechtschaffen & Denise Antolini eds., 2007) [hereinafter *Kalo Pa'a*].

[121] *Id.*

[122] *See id.* at 254; HAW. REV. STAT. § 1-1 (2009).

[123] *See* HAW. REV. STAT. § 1-1.

to all its navigable waters and the soils under them for their own common use."[124]

The 1978 Constitutional Convention led to the adoption of the public trust doctrine into state constitutional law and demonstrated the State's efforts to reconcile with Kānaka Maoli and their interests as a matter of conserving and protecting Hawai'i's natural resources.[125] Article XI, section 1 of the Hawai'i Constitution proclaims:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and 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.
> All public natural resources are held in trust by the State for the benefit of the people.[126]

In *In re Water Use Permit Applications,* ("*Waiāhole*"), the Hawai'i Supreme Court held that under the public trust doctrine, the State has both the authority and duty to preserve the rights of present and future generations in the waters of the State.[127] The court rejected the argument that private use for economic development qualified as public trust use, maintaining that "if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time."[128] More importantly, the *Waiāhole* court declined to designate "absolute priorities" between categories of uses under the public trust.[129] This emphasized the idea that "[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."[130] The ever-changing needs of the public trust hold true in *In re Conservation District Use Application HA-3568* ("*Mauna Kea II*").[131] Justice Richard W. Pollack of the

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[124] King v. Oahu Ry. & Land Co., 11 Haw. 717, 723–25 (Haw. Terr. 1899) (citing Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452–55 (1892)); *Kalo Pa'a*, *supra* note 120, at 254.

[125] *See* TREATISE, *supra* note 39, at 538, 553.

[126] HAW. CONST. art. XI, §1.

[127] *Waiāhole*, 94 Hawai'i 97, 139, 9 P.3d 409, 451 (2000); *see Kalo Pa'a*, *supra* note 120, at 248, 260.

[128] *Waiāhole*, 94 Hawai'i at 138, 9 P.3d at 450 (citing Robinson v. Ariyoshi, 65 Haw. 641, 677, 658 P.2d 287, 312 (1982)).

[129] *Id.* at 142, 9 P.3d at 454; *see Kalo Pa'a*, *supra* note 120, at 261.

[130] *Waiāhole*, 94 Hawai'i at 135, 9 P.3d at 477.

[131] *Mauna Kea II*, 143 Hawai'i 379, 431 P.3d 752 (2018).

Hawai‘i Supreme Court took the opportunity to apply the public trust doctrine to conservation land, ruling that "our precedents governing the constitutional public trust obligations of agencies and applicants may readily be adapted to conservation land, and the history and text of article XI, section 1 indicate that they should be so applied."[132]

Based on this understanding, the public trust framework should apply to all-natural and cultural resources, including nearshore fisheries. Thus, the State's duty as a trustee is to "protect and maintain the trust property and regulate its use."[133] The State "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."[134] Therefore, the "State must consider the cumulative impact of existing and proposed [water] diversions on trust purposes and to implement reasonable measures to mitigate the impact, including the use of alternative resources."[135] In its decision-making processes, the State must also utilize a "global, long-term perspective."[136] *Waiāhole* recognized the conventional notion of the public trust but also Kānaka Maoli traditional and customary uses for public trust purposes.[137]

2. *Other Constitutional Provisions Protecting Hawai‘i's Natural Resources*

In addition to the public trust, other constitutional provisions direct the management and perpetuation of our ocean resources. Article XI, section 6 of the Hawai‘i Constitution provides:

> The State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State, including the archipelagic waters of the State, and reserves to itself all such rights outside state boundaries not specifically limited by federal or international law.
> All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same; provided that mariculture operations shall be established under guidelines enacted by the Legislature, which shall protect the public's

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[132] *Id.* at 414, 431 P.3d at 787 (Pollack, J., concurring).
[133] Kobayashi *ex rel* State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).
[134] *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455.
[135] *Id.*
[136] *Id.*
[137] *See id.* at 137–43, 9 P.3d at 449–55; *Kalo Pa‘a*, *supra* note 120, at 261–67.

> use and enjoyment of the reefs. The State may condemn such vested rights for public use.[138]

Article XI, section 6 thus imposes an affirmative duty to "protect the public's use and enjoyment of the reefs."[139] DLNR is the authority tasked with managing "all water and coastal areas of the State," including the taking of aquatic life, "boating, ocean recreation, and coastal areas programs."[140] In fulfilling this duty, the State must manage and protect the public's use and enjoyment of marine, seabed, and archipelagic waters within the State's boundaries.[141]

Likewise, article XII, section 7 of the Hawaiʻi Constitution provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[142]

This provision is a critical tool to preserve Maoli culture and conserve the marine resources that are necessary for Maoli practices.[143] All citizens of Hawaiʻi, including Kānaka Maoli, may utilize these constitutional provisions to ensure that state agencies fulfill their obligation to uphold the constitutional mandates to protect the environment for future generations.[144]

3. *Rulemaking by the Department of Land and Natural Resources*

DLNR has the power and duty to "manage and administer the aquatic life and aquatic resources of the State," and "[f]ormulate and from time to time recommend . . . additional legislation necessary or desirable to implement" the State's conservation and resource management objectives.[145] The Division of Aquatic Resources (DAR), a division of DLNR, retains the authority to manage all aquatic resources, including marine resources.[146] As

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[138] HAW. CONST. art. XI, § 6.
[139] *Id.*
[140] HAW. REV. STAT. § 26-15(b) (2009).
[141] HAW. CONST. art. XI, § 6.
[142] HAW. CONST. art. XII, § 7.
[143] *Id.*
[144] *See* HAW. CONST. art. XI, § 1.
[145] HAW. REV. STAT. § 187A-2 (2011).
[146] *See* HAW. REV. STAT. § 26-15(b) (stating the DLNR "shall manage and administer the public lands of the State . . . and all water and coastal areas of the State . . . including . . . aquatic life . . . and all activities thereon and therein including, but not limited to, boating,

a State agency, DAR must aid in fulfilling the State's public trust responsibilities to "conserve and protect Hawai‘i's natural beauty and all natural resources" for the "benefit of present and future generations."[147] DAR has adopted numerous fishing regulations through its rulemaking power, including "creating geographical or area prohibitions, seasonal prohibitions, size limits, and banning the commercial sale of individual species."[148]

DAR also utilizes various legal approaches focused on species-specific regulations or blanket restrictions within specific areas or throughout all state waters.[149] DAR has six main legal approaches to regulating nearshore marine resources: (1) size limits; (2) bag limits; (3) open and closed fishing seasons; (4) permits for use and possession of lay nets; (5) gear restrictions; and (6) restrictions on types of bait used and the conditions for entry into areas for taking aquatic life.[150] These regulations are applied within each marine management area to address the area's specific needs.

DAR administers six types of marine management areas: (1) marine life conservation districts (MLCD);[151] (2) fishery management areas (FMA);[152] (3) fisheries replenishment areas (FRA);[153] (4) natural area reserves (NARS);[154] (5) bottom fish restricted fishing areas (BRFA);[155] and (6) Community Based Subsistence Fisheries Area (CBSFA).[156] DAR manages more than forty-three marine protected areas within State waters.[157] Additionally, more than twenty-two fish species have individualized restrictions focused on the season, size, weight, and take of these species.[158] Lawai‘a are also limited in the types of fishing gear they can use.[159]

DLNR is given police power to "enforce all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within the State and

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ocean recreation, and coastal areas programs."); HAW. REV. STAT. § 187A-4 (describing that the Board of Land and Natural Resources shall appoint an administrator who has "charge, direction, and control of all matters relating to aquatic resources management").

[147] HAW. CONST. art. XI, § 1.

[148] Kumabe, *supra* note 23, at 243.

[149] HAW. ADMIN. R. § 13-28-1 to -100 (LEXIS through 2022).

[150] *See* HAW. REV. STAT. § 187A-5 (2011).

[151] HAW. REV. STAT. § 190-1 (2011).

[152] HAW. REV. STAT. § 188F (2011).

[153] HAW. REV. STAT. § 188F-4 (2011).

[154] HAW. REV. STAT. § 195 (2011).

[155] HAW. ADMIN. R. § 13-94-8 (LEXIS through 2022).

[156] HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2011).

[157] *See* HAW. ADMIN. R. § 13-28-1 to -100 (LEXIS through 2022).

[158] *See Hawai‘i Fishing Regulations*, DLNR (July, 2022), https://dlnr.hawaii.gov/dar/files/2022/06/fishing_regs_Jul_2022.pdf; HAW. ADMIN. R. § 13-75 (LEXIS through 2022) (regulating the possession and use of certain fishing gear).

[159] *See id.*

the waters subject to its jurisdiction[.]"[160] The Division of Conservation and Resources Enforcement (DOCARE) is the DLNR-designated agency responsible for enforcing all regulations.[161] Given the "myriad of fishing regulations applicable in State water, [DAR] continues to struggle with managing its fisheries."[162]

Recently, various communities and lawaiʻa have voiced concerns about an observational shift in spawning seasons that do not align with seasonal closures. DAR primarily implements its seasonal closure management strategy through effort control.[163] Fishing effort improves spawning potential or protects juveniles from depletion during recruitment when the smaller younger fish transition to older and larger fish.[164] Typically, seasonal closures are the first management strategy deployed by fisheries managers.[165] Seasonal closures, however, historically had both successes and failures – they usually fail when it is the predominant or the only method of

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[160] HAW. REV. STAT. § 187A-2(7) (2011); *see* HAW. REV. STAT. § 199-4 (2011).

[161] *See generally* HAW. REV. STAT. § 199 (2011); *Department of Land and Natural Resources: Division of Conservation and Resources Enforcement*, STATE OF HAW., http://hawaii.gov/dlnr/docare/index.html (last visited Mar. 5, 2021). DOCARE officers also have the authority to investigate complaints and violations, gather evidence, issue citations, and conduct searches and seizures. HAW. REV. STAT. § 199. DOCARE officers enforce regulations related to aquatic life, protection of caves, historic preservation, and the Kahoʻolawe Island Reserve, as well as several city and county ordinances. *See* HAW. REV. STAT. §§ 6D, 6E, 6K (2009); HAW. REV. STAT. § 199-4 (2011).

[162] Kumabe, *supra* note 23, at 244.

[163] JIM BEETS & MARK MANUEL, TEMPORAL AND SEASONAL CLOSURES USED IN FISHERIES MANAGEMENT: A REVIEW WITH APPLICATION TO HAWAIʻI 1 (2007).

> [F]ishing effort is a useful measure of the ability of a fleet to catch a given proportion of the fish stock each year. When fishing effort increases, all else being equal, we would expect the proportion of fish caught to increase . . . . [R]estricting the amount of fishing by either effort or catch management is one way of protecting fish stocks from becoming overexploited or of encouraging the recovery of stocks that are already depleted.

A FISHERY MANAGER'S GUIDEBOOK 222–24 (Kevern L. Cochrane & Serge M. Garcia eds., 2nd ed. 2009).

[164] *See* EDWARD V. CAMP ET AL., FISH POPULATION RECRUITMENT: WHAT RECRUITMENT MEANS AND WHY IT MATTERS 1–5 (2020) ("Recruitment refers to the process of small, young fish transitioning to an older, larger life stage . . . . Recruitment processes are responsible for any fishery that is sustainable and are critically important to consider when making fisheries management decisions.").

[165] BEETS & MANUEL, *supra* note 163.

management.[166] When fishery managers utilized multiple strategies instead of a single management strategy, the survival or return increases exponentially.[167]

The Pacific Halibut Fishery is infamous for its failed management strategy. In this particular fishery, "seasonal closures were enacted and considered economically beneficial by resource agencies[]" in order to save the fishery as a whole.[168] Ultimately, the Pacific Halibut Fishery closures "failed to reduce fishing effort and w[ere] considered to be of limited conservation value."[169] Similarly, the Hawaiian longline swordfish fishery seasonal closures were similarly ineffective, and the State instead implemented alternative strategies to manage that fishery better.[170] The State found that utilizing alternative measures ensured the proliferation of various threatened and endangered species impacted by the longline fishery.[171] Indigenous peoples around the globe, including Kānaka Maoli, utilize this simple yet effective mixed-management strategy.[172] While Indigenous communities have traditionally utilized these strategies, western fisheries managers are only recently realizing the value of this form of management.[173] What strengthens the use of mixed-management strategy for Kānaka Maoli is their knowledge of the religious and practical reasons for properly managing fisheries.[174] This intergenerational and sacred knowledge prevents the outright collapse of communal fisheries.

What current fisheries management lacks is what has allowed Maoli fisheries to thrive. Kānaka Maoli fisheries management is superior because of the intimate connection that Kānaka have to the ocean, food, and each other. Today, local communities, predominantly Kānaka Maoli, are attempting to once again move toward subsistence fishing and utilize this collective knowledge and perspective.[175]

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[166] CAMP ET AL., *supra* note 164, at 2.

[167] *Id.* at 3.

[168] *Id.* at 2.

[169] *Id.* at 2–3.

[170] *Id.* at 3.

[171] *Id.*

[172] *See id.* at 3. The taking of particular fish was prohibited during the spawning seasons. For example, "the most important and well-known tabu of this sort was that governing the *aku* and the *'opelu* (ocean bonito and mackerel)[.]" NATIVE USE OF FISH, *supra* note 15, at 13. "Closed seasons for the ʻopelu and aku usually alternated every six months. There were different times of kapu (fishing prohibited), but the common time was in February and usually lasted for approximately ten days." BEETS & MANUEL, *supra* note 163, at 7.

[173] BEETS & MANUEL, *supra* note 163, at 6–8.

[174] NATIVE USE OF FISH, *supra* note 15, at 13.

[175] *See* Charles Kaʻaiʻai & Sylvia Spalding, *Hoʻohanohano I Nā Kūpuna Puwalu*, 24 J. MARINE EDUC. 1, 2 (2008).

III. ANALYSIS

A. *Hawaiian Self Governance: Emergence of the CBSFA*

> Ke haʻawi nei au iā ʻoe. Mālama ʻoe i kēia mau mea. ʻAʻohe Mālama, pau ka pono o ka Hawaiʻi . . . .[176]

For Kānaka Maoli, fishing traditions, ethics, and skills are passed down within family units. While a book is helpful in establishing familiarity to ʻoihana lawaiʻa, without additional support from an experienced lawaiʻa, a book is not nearly enough. The role of experienced lawaiʻa is integral to learning and conserving Maoli fishing traditions. With this in mind, communities perpetuating these practices and knowledge bases are mobilizing to save the remnants of their nearshore fisheries.[177] Hāʻena is one example of a community that has successfully petitioned for a new form of management that brings together biocultural knowledge and western management frameworks.[178]

In 1994, Governor John Waiheʻe convened the Molokaʻi Subsistence Task Force to determine the importance of subsistence living on Molokaʻi, identify problems affecting subsistence practices, and recommend policies and programs to improve arising socio-economic issues.[179] Traditionally, Molokaʻi was seen as a strategic location between Oʻahu and Maui for natural resources and war. Throughout the years, however, Molokaʻi became economically secluded, which resulted in its exclusion from rapid economic change.[180] For years, Molokaʻi communities faced economic instability resulting in a reliance on subsistence activities to support them through times

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[176] DAVIANNA PŌMAIKAʻI MCGREGOR, NĀ KUAʻĀINA: LIVING HAWAIIAN CULTURE 5 (2007) ("I pass on to you. Take care of these things. If you don't take care, the well-being of the Hawaiian people will end . . . .") NĀ KUAʻĀINA is a repository of narratives pertaining to kuaʻāina from rural communities who have endured despite more than a century of American subjugation and control. McGregor provides readers with a discussion of the landscape and history of places and its people. Additionally, she provides an overview of the effects of westernization to kuaʻāina. Kuaʻāina translates to the "country," "person from the country," or "back land." HAWAIIAN DICTIONARY, *supra* note 1, at 168.

[177] Kaʻaiʻai & Spalding, *supra* note 175.

[178] MOLOKAʻI SUBSISTENCE TASK FORCE, GOVERNOR'S MOLOKAʻI SUBSISTENCE TASK FORCE FINAL REPORT 4 (1994) [hereinafter MOLOKAʻI TASK FORCE]; DIV. OF AQUATIC RES., HAW. DEP'T OF LAND & NAT. RES., MANAGEMENT PLAN FOR THE HĀʻENA COMMUNITY-BASED SUBSISTENCE FISHING AREA, KAUAʻI 1 (Aug. 2016) [hereinafter HĀʻENA], https://dlnr.hawaii.gov/dar/files/2016/08/Haena_CBSFA_Mgmt_Plan_8.2016.pdf.

[179] MOLOKAʻI TASK FORCE, *supra* note 178.

[180] *See* MOLOKAʻI TASK FORCE, *supra* note 178.

of economic hardship.[181] The Moloka‘i Subsistence Task Force Report found that approximately half of the interviewed residents fished as a source of subsistence.[182] The task force "recogniz[ed] that Hawaiians were great fishermen and established the kapu system to preserve the ocean's resources."[183] In addition, the report concluded that "[w]ithout subsistence as a major means for providing food, Moloka‘i families would be in a dire situation."[184] The findings of the Governor's Moloka‘i Subsistence Task Force Final Report were foundational to the legislative establishment of CBSFAs throughout Hawai‘i and, in particular, from Kalaeoka‘īlio to Nihoa flats on Moloka‘i.[185]

In 1994, following the publication of the Final Task Report, DLNR submitted "an Administrative Proposal to designate a CBSFA for the North West coast of Moloka‘i from Kalaeoka‘īlio to Nihoa flats."[186] During that same year, the Legislature passed Act 271, codified as Hawai‘i Revised Statutes (HRS) section 188-22.6, authorizing DLNR to designate and manage CBSFAs to "reaffirm[] and protect[] fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion."[187]

Act 271 sought "to provide native Hawaiians with an opportunity to educate and perhaps guide Hawai‘i and the world in fishery conservation," and "to ensure that subsistence fishing areas continue to be available for use of native Hawaiians."[188] Act 271 was intended to provide DLNR with a means to effectuate its duty under article XII, section 7 of the Hawai‘i Constitution, namely to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights."[189] Act 271 also mandated that DLNR establish a subsistence

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[181] *Id.* at 20.

[182] *Id.* at 47. For Hawaiian families, thirty-eight percent of their food is gathered through subsistence activities. *Id.* at 5.

[183] HAW. S. JOURNAL, 17th Cong., S. C. Rep. 2965, at 1180 (1994).

[184] HUI MĀLAMA O MO‘OMOMI, MO‘OMOMI NORTH COAST OF MOLOKA‘I COMMUNITY-BASED SUBSISTENCE FISHING AREA PROPOSAL AND MANAGEMENT PLAN 28 (2017) [hereinafter MO‘OMOMI CBSFA].

[185] *Id.* at 2.

[186] *Id.*

[187] HAW. REV. STAT. § 188-22.6(a) (2011).

[188] HAW. S. JOURNAL, 17th Cong., S. C. Rep. 2965, at 1180 (1994); HAW. H. JOURNAL, 17th Cong., S. C. Rep. 441-94, at 1031 (1994).

[189] HAW. CONST. art. XII, § 7.

pilot demonstration project on Molokaʻi focusing primarily on Kānaka Maoli families in Hoʻolehua Hawaiian Homestead.[190]

1. *CBSFA Designation*

The CBSFA designation process enables community members to assist DLNR in creating management strategies based on Kānaka Maoli values.[191] Communities can obtain CBSFA designation either through DLNR or the Legislature. To obtain designation through DLNR, applicants must compile and submit a proposal.[192] HRS section 188-22.6 identifies foundational information required in the proposal, including "justification for the proposed designation" and a "management plan containing a description of the specific activities to be conducted in the fishing area."[193] The proposals should also meet community-based subsistence needs and judicious fishery conservation and management practices.[194]

The second avenue to attain designation is through the Legislature. In 2005, Miloliʻi on Hawaiʻi Island became the first CBSFA to receive permanent legislative designation through a statute.[195] The proposed administrative rules for the Miloliʻi CBSFA were finally approved on June 9, 2022 and signed into law on August 2, 2022.[196] In 2006, the Hāʻena CBSFA was established by statute on the island of Kauaʻi.[197] In 2015, the administrative regulations governing the Hāʻena CBSFA were approved by

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[190] HAW. S. JOURNAL, 17th Cong., S. C. Rep. 2965, at 1180 (1994).

[191] *See* HAW. REV. STAT. § 188-22.6 (2011).

[192] *Id.* § 188-22.6(b).

[193] *Id.* ("The proposal shall include: (1) The name of the organization or group submitting the proposal; (2) The charter of the organization or group; (3) A list of the members of the organization or group; (4) A description of the location and boundaries of the marine waters and submerged lands proposed for designation; (5) Justification for the proposed designation including the extent to which the proposed activities in the fishing area may interfere with the use of the marine waters for navigation, fishing, and public recreation; and (6) A management plan containing a description of the specific activities to be conducted in the fishing area, evaluation and monitoring processes, methods of funding and enforcement, and other information necessary to advance the proposal.").

[194] *Id.*

[195] HAW. REV. STAT. § 188-22.7 (2011) (designating the Miloliʻi CBSFA on Hawaiʻi Island).

[196] *State of Hawai'i Division of Aquatic Resources: Newly-Established Miloli'i Community-Based Subsistence Fishing Area Now In Effect,* https://dlnr.hawaii.gov/dar/announcements/newly-established-milolii-community-based-subsistence-fishing-area-rules-now-in-effect/; David M. Forman, *Applying Indigenous Ecological Knowledge for the Protection of Environmental Commons: Case Studies from Hawai'i for the Benefit of "Island Earth,"* 41 U. HAW. L. REV. 300, 318 (2019).

[197] HAW. REV. STAT. § 188-22.9 (2011) (designating the Hāʻena CBSFA on Kauaʻi Island).

the governor and enacted into law.[198] The "[l]egislative designation may allow communities to achieve designation, free from any [procedural] constraints imposed by DLNR."[199] The Hā‘ena CBSFA covers three-and-a-half miles of shoreline, unlike the proposed five miles that Moloka‘i sought to designate.[200] The significant difference between DLNR designation and legislative designation is that a legislative designation is attained *before* the community attempts to draft a management plan; thus, communities avoid wasting their effort on proposals that DLNR will not approve.[201] The challenge to obtaining this type of designation, however, is to survive the legislative process.[202]

The CBSFA concept should be viewed through the lens of the Kānaka Maoli value of "aloha ‘āina, which emphasizes the connection between the environment and communities, whereby if you care for the environment, the environment will care for you."[203] CBSFAs represent a State-recognized way for community groups to maintain "traditional communal management informed by traditional and customary fishing and management practices that were integral to sustaining the health and abundance of marine resources[.]"[204] CBSFA designation represents a hybrid-konohiki fisheries management system with State-community collaborative fisheries management that is "place-based, community-driven, and culturally rooted."[205]

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[198] Jade M.S. Delevaux et al., *Linking Land and Sea Through Collaborative Research to Inform Contemporary Applications of Traditional Resource Management in Hawai‘i*, 10 SUSTAINABILITY (SPECIAL ISSUE) 159, 162 (2018), https://www.mdpi.com/books/pdfdownload/book/5177 ("[A]fter nearly ten years of planning and negotiation, over seventy meetings, fifteen rule drafts, three public hearings and multitude studies undertaken to document visitor impacts, user groups, fishery health, and the importance of locally caught fish within and beyond the Hā‘ena community, these rules became law.").

[199] Jodi Higuchi, *Propagating Cultural Kīpuka: The Obstacles and Opportunities of Establishing a Community-Based Subsistence Fishing Area*, 31 U. HAW. L. REV. 193, 210 (2008).

[200] HĀ‘ENA, *supra* note 178, at 14.

[201] Higuchi, *supra* note 199.

[202] *See generally* H. Majority Staff Off., State H.R., *A Citizen's Guide to Participation in the Legislative Process,* HAW. STATE LEGISLATURE (June 2013), https://www.capitol.hawaii.gov/docs/cg/CitizensGuide.pdf (discussing the hurdles and deadlines of the legislative process).

[203] HĀ‘ENA, *supra* note 178, at 6.

[204] *Id.*

[205] *Id.*

2. *CBSFA Rulemaking*

The designation of a CBSFA is a burdensome process that communities bear.[206] The investment into the CBSFA process requires an immense amount of community resources, including funds, time, and emotional drive.[207] Once the community completes a management proposal, there is a series of community and DAR stakeholder meetings.[208] The purpose of these meetings is to gather the communities' opinions and perspectives of the designation.[209] Following these meetings, the Board of Land and Natural Resources (BLNR)[210] holds a meeting to approve initiation of the CBSFA process and holds a public hearing for the rules.[211] The Department of the Attorney General and the small business regulatory review board assess the proposed rules.[212]

Once a community passes the preliminary designation phase of the CBSFA, it then moves on to the rulemaking phase.[213] HRS section 188-22.6 requires DLNR to "designate community-based subsistence fishing areas and carry out fishery management strategies for such areas[] through administrative rules adopted pursuant to [c]hapter 91, for the purpose of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion."[214] Chapter 91, known as the Hawai'i Administrative Procedure Act (HAPA), governs the "administrative procedure[s] for all state and county

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[206] *See generally* Mehana B. Vaughan & Margaret R. Caldwell, *Hana Pa'a: Challenges and Lessons for Early Phases of Co-Management*, 62 MARINE POL'Y 51 (2015) (discussing reasons the CBSFA planning process experienced by community members in Hā'ena, one of the few areas designated a CBSFA by the DLNR, was so lengthy and difficult).

[207] *See id.*

[208] Erin Zanre, *Community-Based Subsistence Fishing Area Designation Procedures Guide*, HAW. DEP'T OF LAND & NAT. RES., DIV. OF AQUATIC RES. 6 (2014), https://dlnr.hawaii.gov/coralreefs/files/2015/02/CBSFA-Designation-Procedures-Guide_v.1.pdf.

[209] *See id.* at 4.

[210] The BLNR is the seven-member board that heads the DLNR. HAW. REV. STAT. §§ 171-3, -4 (2011). The chair of the BLNR is also the executive head of DLNR. *Board of Land and Natural Resources*, HAW. DEP'T OF LAND & NAT. RES., https://dlnr.hawaii.gov/boards-commissions/blnr-board/ (last visited Sep. 20, 2022).

[211] Zanre, *supra* note 208, at 9–10.

[212] *Id.* at 10.

[213] *Id.*

[214] HAW. REV. STAT. § 188-22.6 (2011).

boards, commissions, departments or offices which would encompass procedure of rule making and adjudication of contested cases."[215]

Section 91-3 of HAPA outlines the rulemaking procedures that agencies must follow to adopt, amend, or repeal a rule.[216] First, the agency must "[g]ive at least thirty days' notice for a public hearing" that describes the topic of the hearing, the language of the proposed rule, and the date, time, and place of the hearing.[217] Second, all agencies must:

> Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency, if requested to do so by an interested person, shall issue a concise statement of the principal reasons for and against its determination.[218]

Third, the notice must be mailed to all persons who made a timely written request for advance notice and the notice must be posted on the internet.[219] After the public hearing, public comments are collected, and BLNR is mandated to "fully consider all written and oral submissions respecting the proposed rule."[220] Once the notice and comment section is complete, BLNR holds a hearing for official approval of the administrative rules.[221] Finally, the rules are reviewed by the governor.[222] If approved, all rules adopted, amended, or repealed must be made available for public inspection.[223] The Chapter 91 rulemaking process is a labyrinth that has proven to be burdensome to communities, taking years to finalize, including multiple hearings and drafts of rules.[224]

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[215] *Bush v. Hawaiian Homes Comm'n*, 76 Haw. 128, 133, 870 P.2d 1272, 1277 (1994) (quoting H. Stand. Comm. Rep. No. 8, in 1961 House J., at 653).

[216] HAW. REV. STAT. § 91-3 (2012).

[217] *Id.*; Hall v. State, 10 Haw. App. 210, 217, 863 P.2d 344, 347 (Ct. App. 1993) (concluding that "the Notice met all the present requirements of HRS § 91-3" to provide enough information for interested persons to meaningfully participate in the rule amendment process because it "clearly summarized the Amendments and their purpose, advised where copies of the Amendments could be obtained, and stated where the public could be heard on the matter").

[218] HAW. REV. STAT. § 91-3(a)(2) (2012).

[219] *Id.* § 91-3(a)(1).

[220] *Id.* § 91-3(a)(2).

[221] *Id.*

[222] *Id.* § 91-3(d).

[223] *Id.* § 91-3(e).

[224] Zoom Interview with Malia Akutagawa, Assoc. Professor of Law and Hawaiian Stud., Univ. of Haw. at Mānoa (Feb. 19, 2021).

B. *Moʻomomi CBSFA*

CBSFAs are unique to Hawaiʻi because of the State's mandate to protect Kānaka Maoli rights and conserve Hawaiʻi's precious marine resources.[225] While CBSFAs provide a rose-colored glimpse into the future of fisheries management, they are still inherently difficult to implement. Currently, only Hāʻena and Miloliʻi have obtained a permanent CBSFA designation.[226] The pilot project in Moʻomomi failed to secure permanent designation after the pilot period concluded in 1997.[227]

1. *Hawai'i Revised Statutes Section 188-22.6*

The Moʻomomi CBSFA is in compliance with section 188-22.6 which clearly outlines the standards that communities must follow to be designated as a CBSFA. The Moʻomomi CBSFA includes all the requirements within a proposal while meeting "community-based subsistence needs and judicious fishery conservation and management practices."[228] In addition to the required proposal, the Moʻomomi CBSFA serves as a repository of scientific data and traditional and customary knowledge of Kānaka Maoli lawaiʻa within the community.[229]

a. Hui Mālama o Moʻomomi Proposal

Since 1993, Hui Mālama o Moʻomomi ("HMM") "has provided stewardship of the natural and public trust resources at Moʻomomi throughout eight DLNR administrations."[230] HMM is comprised of "Hoʻolehua Homesteaders and Pālāʻau moku[231] residents whose subsistence lifestyle depends on efforts to mālama both natural and cultural resources for present and future generations."[232] HMM's formation coincided with the Governor's Molokaʻi Subsistence Task Force "to document the importance of subsistence fishing and gathering of marine resources for Molokaʻi

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[225] *See generally* HAW. CONST. art. XI, §§ 1, 6; HAW. CONST. art. XII, § 7.

[226] *See* HAW. REV. STAT. § 188-22.9 (2011).

[227] *See* MOʻOMOMI CBSFA, *supra* note 184, at 10, 30.

[228] *See* HAW. REV. STAT. § 188-22.6 (2011).

[229] *See generally* MOʻOMOMI CBSFA, *supra* note 184.

[230] *Id.* at 10.

[231] In the Hawaiian language, moku in this context refers to a "district," "island," "islet," or a "section." However, moku also means "to be cut," "severed," "amputated," "broken in two, as a rope," "broken loose, as a stream after heavy rains, or as a bound person," "to punctuate," "forest," "grove," "clump," "severed portion," "fragment," "cut," "laceration," "scene in a play," "ship," "schooner," "vessel," "boat," or "a stage of pounded poi." HAWAIIAN DICTIONARY, *supra* note 1, at 252.

[232] *See generally* MOʻOMOMI CBSFA, *supra* note 184, at 10.

families."[233] Through rulemaking, the pilot project area was reduced to Kawa‘aloa and Mo‘omomi Bays.[234] After the discontinuation of the pilot project, HMM continued to work with stakeholders to informally but consistently monitor and manage Kawa‘aloa and Mo‘omomi Bays.[235] Despite DLNR's failure to promulgate administrative rules to formally designate this area as a CBSFA, HMM and coastal landowners continued to manage the fishery, expanding west to Kalaeoka‘īlio and east to Nihoa flats.[236] In the years following, HMM continued to work with community stakeholders, community organizations, and government agencies to effectively steward the land and sea of the North West coast of Moloka‘i.[237] Through their efforts to effectively mālama the North West coast of Moloka‘i, HMM created a repository of Kānaka Maoli fisheries knowledge,[238] observational data,[239] and educational curriculum[240] to further the goal to "perpetuate local resources essential for subsistence of present and future generations of Ho‘olehua Homesteaders."[241]

b. Mo‘omomi CBSFA Location and Boundaries

The proposed location and boundary of the Mo‘omomi CBSFA focus on the Mo‘omomi North Coast fisheries.[242] The proposed regulatory area is a product of lawai‘a meetings, community round-table discussions, and DAR-led public community workshops on Moloka‘i.[243] HMM seeks to create a CBSFA from Kalaeoka‘īlio to Kaholaiki, from the shoreline and extending

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[233] *Id.*

[234] *Id.* at 2.

[235] *Id.* at 10.

[236] *Id.*

[237] *See id.* at 10. Stewardship projects, activities, and experiences include the ongoing management of resources and facilities at Mo‘omomi and Kawa‘aloa Bay (1997–present). *Id.* at 11. It also includes the return of Kalaina Wāwae to the stewardship of HMM (2003). *Id.* at 14.

[238] *See id.* HMM stewardship projects tailored toward the natural and cultural experience at Mo‘omomi include the observation of Hawaiian moon phases and fish spawning cycles and the publication of pono fishing calendar. *Id.* at 11.

[239] *Id.* at 12–13. Natural stewardship projects include erosion projects (late 1990s-early 2000s); turtle nesting observations (1993-current); and Native Hawaiian plant restoration (2001-2004). *Id.*

[240] *Id.* at 14–15.

[241] *Id.* at 5 ("The mission of HMM is to perpetuate local resources essential for the subsistence of present and future generations of Ho‘olehua Homesteaders; to maintain subsistence as a viable option in Moloka‘i's fluctuating economy; and to encourage young Hawaiians to perpetuate traditional Hawaiian fishing practices.").

[242] *See id.* at 64.

[243] State of Haw. Div. of Aquatic Res., *Mo‘omomi Online Public Hearing Presentation*, YOUTUBE, at 14:07 (Aug. 7 2020), https://dlnr.hawaii.gov/dar/announcements/moomomi-online-public-hearing-presentation-faqs/.

one nautical mile offshore.[244] Pursuant to section 187A-23(a), the proposed boundary is fundamental to traditional and customary management by Kānaka Maoli of the nearshore fisheries.[245] Under Kingdom Law, the fishing grounds for the konohiki and the hoaʻāina tenants extended "from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward, to the beach at low water mark."[246] In addition, the one-mile boundary ensures the protection of koʻa[247] that were traditionally managed by hoaʻāina.[248] The one-mile boundary will focus on subsistence use while protecting the area from commercial extraction of its reef, bottom, and pelagic fish.[249]

The proposed CBSFA boundaries also include the Kawaʻaloa Bay Nursery Area.[250] HMM hopes to establish Kawaʻaloa Bay as a protected nursery area, consistent with traditional ecological knowledge and twenty-seven years' worth of data collection.[251] Even though this portion will be protected, it will still allow for extensive subsistence fishing and gathering activities in Moʻomomi Bay and areas outside of Kawaʻaloa Bay.[252] Through these proposed CBSFA boundaries, HMM hopes to manage in accordance with modern science and traditional knowledge while ensuring that community members are still able to survive.[253]

c. Justification for Moʻomomi CBSFA Designation

The north coast of Molokaʻi is an essential and extensively used traditional fishing and gathering area. The marine resources of the north coast of Molokaʻi have sustained the Kānaka Maoli population of this area since at

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[244] *Id.* at 14:37.

[245] *See* HAW. REV. STAT. § 187A-23(a) (2011) (establishing that "[t]he fishing grounds from the reefs, and where there happens to be no reefs, from the distance of one geographical mile seaward of the beach at low watermark, in law, shall be considered the private fishery of the [K]onohiki, whose lands by ancient regulations, belong to the same").

[246] CIV. CODE §§ 387–88 (1859).

[247] In the Hawaiian language, koʻa means "coral," "coral head, "fishing grounds, usually identified by lining up with marks on shore," or "shrine, often consisting of circular piles of coral or stone, built along the shore or by ponds or streams, used in ceremonies as to make fish multiply; also built on bird islands, and used in ceremonies to make birds multiply." HAWAIIAN DICTIONARY, *supra* note 1, at 155.

[248] *See* HAW. REV. STAT. § 187A-23(a) (2011).

[249] MOʻOMOMI CBSFA, *supra* note 184, at 38.

[250] *Id.* at 65.

[251] *See id.* at 62–63.

[252] *Id.* at 63.

[253] *Id.* at 59.

least 900 A.D.[254] Whether by land or by sea, oral history accounts indicate that the coast from Nihoa to Kalaeoka‘īlio was abundant with ko‘a (traditional fishing areas) marked by kū‘ula (fishing shrines).[255] Here, this integral knowledge of the lawai‘a has been passed from one generation to the next, illustrating its importance.[256] Through these lawai‘a, "[t]he fishing protocols, scientific observation methods and harvesting practices of that time have been passed down from generation-to-generation to promote the sustainable use of marine resources within the utilized nearshore areas."[257] Residents between Nihoa and Kalaeoka‘īlio have utilized this coastline as a fishing and gathering area, a classroom, and a place of generational knowledge.[258] The Ho‘olehua Homestead collective identity of subsistence lawai‘a illustrates the shared cultural heritage that is analogous to the perspectives of traditional communities in Hawai‘i.[259] In addition to providing sustenance through subsistence, Kānaka Maoli reinforce a deep kinship to ‘āina that is the foundation of Māoli spirituality and religion. Through subsistence fishing, the lawai‘a emphasizes communal identity, relationships, and perpetuating traditional and cultural practices.

This CBSFA seeks to prioritize addressing various threats to the livelihood of the hoa‘āina.[260] These threats include (1) the critical transition of stewardship, (2) the severe decline of species and the protection of special resources, and (3) the threats to traditional fishing practices.[261] With the kūpuna of the north coast of Moloka‘i aging, the next generation needs to take on the responsibility of exercising stewardship of these vital community resources. The community seeks the State's assistance by adopting the CBSFA and the proposed regulations to formalize management practices that HMM has sought to implement for the past twenty-seven years.[262] Simply adopting the proposed regulations will reinforce the rights and responsibilities in Kānaka Maoli subsistence, cultural, and religious practices of managing the ocean for the next generation of stewards.

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[254] *Id.* at 16 (quoting Marshall Weisler, *Mo‘omomi: A Place of the Ancient Hawaiians*, MOLOKA‘I NEWS, Aug. 1, 1987).

[255] *Id.* at 17. In the Hawaiian language, kū‘ula means "any stone god used to attract fish, whether tiny or enormous, carved or natural, named for the god of fishermen," "heiau near the sea for worship of fish gods," and a "hut where fish gear was kept with kū‘ula images so that gear might be impregnated with kū‘ula mana, usually inland and very taboo." HAWAIIAN DICTIONARY, *supra* note 1, at 187.

[256] MO‘OMOMI CBSFA, *supra* note 184, at 17.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.* at 30–31.

[261] *Id.*

[262] *Id.* at 30.

2. *Moʻomomi CBSFA Management Plan*

Pursuant to HRS section 188-22.6(b)(6), each community must submit "[a] management plan containing a description of the specific activities to be conducted in the fishing area, evaluation and monitoring processes, methods of funding and enforcement, and other information necessary to advance the proposal."[263] The Moʻomomi CBSFA management plan is "based upon observations and knowledge that have been accumulated and passed down from one generation to the next of kūpuna and poʻo lawaiʻa (head fishers)."[264] HMM seeks to directly manage five different species due to the threat of overfishing.[265] Each species is significant in the diet of hoaʻāina who rely on the fisheries of the north coast of Molokaʻi. By implementing place-based pono[266] fishing practices, HMM created species bag limits, species size limits, and species-specific gear and harvesting restrictions.[267] Species bag limits target Ula, Uhu, Kūmū, and Kole.[268] Species size limits target Moi and Kūmū.[269] Families that rely on subsistence fishing will be able to continue to

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[263] HAW. REV. STAT. § 188-22.6(b)(6) (2011).

[264] MOʻOMOMI CBSFA, *supra* note 184, at 45.

[265] *Id.* at 81.

[266] In the Hawaiian language, pono has many definitions including "[g]oodness," "uprightness," "morality," "moral qualities," "correct or proper procedure," "excellence," "well-being," "prosperity," "welfare," "benefit," "behalf," "equity," "sake," "true condition or nature," "duty," "moral," "fitting," "proper," "righteous," "right," "upright," "just," "virtuous," "fair," "beneficial," "successful," "in perfect order," "accurate," "correct," "eased," "relieved," "should," "ought," "must," and "necessary." HAWAIIAN DICTIONARY, *supra* note 1, at 340.

[267] MOʻOMOMI CBSFA, *supra* note 184, at 67.

[268] *Id.* The species bag limits for Ula (spiny lobster) are two per day. The species bag limit for Uhu pālukaluka or ahuʻula is two per day. For Kūmū it is two per day and for Kole it is twenty per day. *Id.* Ula sometimes referred to as spiny lobster is "any crustacean of the genus Panulirus. These animals are also known as lobster, Hawaiian spiny lobster, red lobster, green lobster, or ula." Uhu means "any fish known as Scarus dubius, Scarus psittacus, Scarus rubroviolaceus, Chlorurus sordidus, Chlorurus perspicillatus, or any recognized synonym." Kūmū means "any fish known as Parupeneus porphyreus or any recognized synonym." HAW. ADMIN. R. § 13-95-1 (LEXIS through 2022); DIV. OF AQUATIC RES., HAW. DEP'T OF LAND & NAT. RES., FISHING IN HAWAIʻI: A STUDENT MANUAL 66 (Mar. 2016) https://dlnr.hawaii.gov/dar/files/2016/03/Fishing_in_Hawaii.pdf (identifying Kole as Ctenochaetus strigosus or goldring surgeonfish).

[269] MOʻOMOMI CBSFA, *supra* note 184, at 67. The species size limit for Moi is a maximum size of eighteen inches fork length in comparison to the § 13-95-23 requirement of eleven inches in length. The species size limit for Kūmū is a maximum size limit of sixteen inches fork length. *Id.* To harvest Kole, the fish must be a minimum of five inches fork length. *Id.* at 68. Moi means "any fish known as *Polydactylus sexfilis* or any recognized synonym." HAW. ADMIN. R. § 13-95-1.

fish with a reasonable limitation. In addition to these regulations, HMM intends to limit commercial fishing to only Akule[270] and Ta'ape.[271] HMM also places a time limit to gather certain species and utilize specific gear.[272] Finally, scuba spearfishing will not be allowed in the CBSFA boundaries.[273] In addition to these CBSFA regulations, all existing state regulations would continue to apply.[274] HMM, in partnership with DLNR, has held a plethora of community-organized outreach meetings starting in 2014.[275] From 2014-2018, several public scoping meetings occurred to organize and solicit public opinion on the CBSFA.[276]

3. *Chapter 91 Process*

On April 13, 2018, BLNR approved formal Chapter 91 rulemaking for the Mo'omomi CBSFA.[277] In January 2020, Governor Ige approved the draft Mo'omomi CBSFA Rules for Public Hearing, initiating the Chapter 91 process.[278] According to Chapter 91, DLNR must "[g]ive at least thirty days' notice for a public hearing" that describes the topic of the hearing, the language of the proposed rule, and the date, time, and place of the hearing.[279] DLNR published a legal public notice in the July 19, 2020 edition of the Honolulu Star Advertiser and on its website.[280] Per section 91-3, DAR

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[270] Akule means "any fish identified as *Selar crumenophthalmus* or other recognized synonym. This fish is also known as pa'a'a, halal[ū], hahalal[ū], and big-eyed scad." HAW. ADMIN. R. § 13-95-1.

[271] MO'OMOMI CBSFA, *supra* note 184, at 68.

[272] *Id.*

[273] *Id.* at 67.

[274] *Id.* at 68.

[275] *Id.* at 101–03.

[276] *Id.* The community organized meetings include January 2014; November 8, 2014; March 25, 2015; April 25, 2015; August 26, 2015; September 2015; October 15, 2015; November 2015; March 16, 2017; March 21, 2017; April 5, 2017; June 6, 2017; June 14, 2017; August 10, 2017; September 26, 2017; November 17–18, 2017; and March 30–April 1, 2018. HUI MĀLAMA O MO'OMOMI, MO'OMOMI NORTHWEST COAST OF MOLOKA'I: ADMINISTRATIVE RECORD 13–22 (2020) [hereinafter ADMINISTRATIVE RECORD], https://www.mauinui.net/uploads/9/4/3/7/94377987/moomomi_administrative_record_2008 14__abbreviated__compressed.pdf.

[277] Division of Aquatic Resources, *Moomomi CBSFA Meeting*, YOUTUBE (Aug. 19, 2020), https://www.youtube.com/watch?v=XbIaQk9xfWU.

[278] *Id.*

[279] Hall v. State, 10 Haw. App. 210, 217, 863 P.2d 344, 347 (Ct. App. 1993) (concluding that "the Notice met all the present requirements of HRS § 91-3. The Notice clearly summarized the Amendments and their purpose, advised where copies of the Amendments could be obtained, and stated where the public could be heard on the matter. The Notice provided enough information or access to information to enable interested persons to participate meaningfully in the rule amendment process.").

[280] *Public Hearing Notice for Proposed Adoption of Hawaii Administrative Rules Chapter 13-60.9, Moomomi Community-Based Subsistence Fishing Area, Molokai*, STAR

published a statement informing the public of the proposed rule adoption to establish the Moʻomomi CBSFA and the date, time, and place to attend the hearing.[281] All interested persons could testify either online via internet or telephone, in-person, or by written testimony.[282]

On August 19, 2020, from 5:30 to 9:30 pm, the online and in-person public hearing for the proposed adoption of a new chapter under the Hawaiʻi Administrative Rules to establish the Moʻomomi CBSFA was held.[283] Molokaʻi residents, as well as non-Molokaʻi residents, testified in support of the proposed adoption of the CBSFA.[284] Testimony was given by people of all ages from keiki to kūpuna advocating for the designation of the CBSFA.[285] Residents elaborated on their responsibility to care for Moʻomomi and its fisheries as follows:

> I am nine years old and attend Kualapuʻu elementary school. Lobster is one of my favorite things to eat. I hope that we will still have lobster when I grow up. I also hope that one day my children will get to eat lobster. That is why the Moʻomomi CBSFA is a good thing. I support the CBSFA. – Kaʻikena Rawlins-Fernandez, 2020
>
> I love to fish. It is technically my life. I caught seven pāpio a couple of weeks ago with my pole, and I let all of them go except for one. The one that I used to feed my family, and while I only take what I need and I support CBSFA. – Kauluwai, 2020
>
> We are not saying that there are no fish. There are fish. What we are saying is that there has been an observed decline and to wait until the fish are gone to take action to protect them is too late. We were raised and taught to ensure that our future moʻopuna, seven generations from now, will have the resources they need to subsist. In addition to safeguarding food for future generations, this issue is about the survival and perpetuation for traditional and customary practices passed down by kūpuna. CBSFA designation would grant

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ADVERTISER (July 19, 2020), https://statelegals.staradvertiser.com/2020/07/19/0001288119-01/.

[281] *Id.*

[282] *Id.* All interested persons who desired to testify were asked to sign up to testify via zoom. All requests needed to be emailed to CBSFA@hawaii.gov at least 48 hours in advance. *Id.*

[283] *Id.*; State of Haw. Div. of Aquatic Res., *Moomomi CBSFA Meeting*, YOUTUBE (Aug. 19, 2020), https://www.youtube.com/watch?v=XbIaQk9xfWU.

[284] State of Haw. Div. of Aquatic Res., *Moomomi CBSFA Meeting*, YOUTUBE (Aug. 19, 2020), https://www.youtube.com/watch?v=XbIaQk9xfWU.

[285] *Id.*

> the Moloka'i community more authority by co-managing with DLNR, and DOCARE officers who are Moloka'i boys. Misconception has made these rules challenging to pass. – Keani Rawlins-Fernandez, 2020
> To not have regulation or kapu is not very akamai. We leave ourselves open for exploitation and disaster. Our change to be a part of this process should not be overlooked. If we expect to keep our kūleana intact for the next generation, the approval of these rules is necessary. – Kelson Mac Poepoe, 2020
> This is for the keiki. This is for those yet unborn. – Malia Akutagawa, 2020.[286]

Based on testimony given at the public hearing, there was overwhelming support to adopt the Mo'omomi CBSFA under the Hawai'i Administrative Rules.[287]

However, the testimony also showed some opposition to the designation as well. While some opposed the CBSFA, none of the opposition was against the actual regulations themselves.[288] The general concerns of the opposition can be summarized into four main points: (1) the proposal was not representative of the community; (2) the proposal will take away Kānaka Maoli gathering rights; (3) the resources of Mo'omomi are not depleted; and (4) DLNR needs to focus on invasive species removal.[289] Community members identified similar issues that the CBSFA process addressed, including regulating fishing from residents not from Moloka'i, focusing on replenishing native fisheries, and preserving a constant connection to Mo'omomi.[290] Most of the opposition targeted the overall scoping, hearing, and rulemaking process.[291] The majority of the opposition also focused on community politics and general distrust of DLNR.[292] In recent years, a group calling themselves the Native Hawaiian Gathering Rights Association (NHGRA) asserted claims that Kānaka Maoli are "basically giving up [their] native gathering rights and turning it over to the state and allowing them to manage."[293] Article XII, section 7 of the Hawai'i Constitution, while

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[286] *Id.* Ka'ikena Rawlins-Fernandez. *Id.* at 2:16:48. Kauluwai. *Id.* at 3:19:05. Keani Rawlins-Fernandez. *Id.* at 3:32:55. Kelson Mac Poepoe. *Id.* at 1:17:42. Malia Akutagawa. *Id.* at 4:23:04.

[287] *See id.*

[288] *See id.*

[289] *See id.*

[290] *See id.*

[291] *See id.*

[292] *See id.*

[293] Catherine Cluett Pactol, *Mo'omomi CBSFA Gets Support in Public Hearing*, THE MOLOKA'I DISPATCH (Aug. 26, 2020), https://themolokaidispatch.com/moomomi-cbsfa-gets-support-in-public-hearing/; *see* Ku'uwehi Hiraishi, *Community Fisheries Management Put to*

allowing state regulation of traditional and customary rights, has been interpreted by the courts to ensure that the government does not regulate and manage Maoli gathering rights out of existence.[294] The proposed regulations allow for the continued harvest of the five target species with additional regulations including seasonal limits, bag limits, size limits, and gear restrictions.[295]

Disagreement between the supporters and non-supporters of the CBSFA has led to an alleged divide in the Hoʻolehua Homestead community.[296] This disagreement led to DLNR's supposed hesitation in adopting the CBSFA designation.[297] The CBSFA designation and Chapter 91 process, however, is not a popularity contest.[298] DLNR's hesitation in adopting the CBSFA is rooted in the concept that the "whole community" needs to want the CBSFA to adopt this rule.[299] While DLNR holds this position for Moʻomomi, DLNR did not have the same position when it came to approving the Hāʻena CBSFA.[300] Similar to Moʻomomi CBSFA, the Hāʻena CBSFA also had similar opposition from commercial fishers, many of which have businesses based on Oʻahu.[301] Additionally, nothing in the language of Chapter 91 indicates that an entire community needs to support a rule for it to be adopted.[302] The agency action must be in accordance with the binding law of HRS section 188-22.6, which states that "the proposals shall meet community-based subsistence needs and judicious fishery conservation and management practices."[303]

Test on Molokaʻi, HAW. PUB. RADIO (Aug. 27, 2020, 3:52 PM), https://www.hawaiipublicradio.org/local-news/2020-08-27/community-fisheries-management-put-to-test-on-moloka-i.

[294] *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawaiʻi 425, 442, 903 P.2d 1246, 1263 (1995).

[295] State of Haw. Div. of Aquatic Res., *Moomomi CBSFA Meeting*, YOUTUBE (August 19, 2020), https://www.youtube.com/watch?v=XbIaQk9xfWU.

[296] Pactol, *supra* note 293.

[297] Zoom Interview with Malia Akutagawa, *supra* note 224.

[298] *Id.*

[299] *Id.*

[300] *See* Nathan Eagle, *Ige Signs Rules to Create Community-Based Subsistence Fishing Area*, HONOLULU CIV. BEAT (Aug. 4, 2015), https://www.civilbeat.org/2015/08/ige-signs-rules-to-create-hawaiis-first-community-based-subsistence-fishing-area/.

[301] *See* Will Caron, *Kaua'i Overwhelmingly Supports Hā'ena Subsistence Fishing Plan*, HAWAII INDEPENDENT (Oct. 19, 2014, 2:31 PM), https://thehawaiiindependent.com/story/kauai-overwhelmingly-supports-haaena-subsistence-fishing-plan.

[302] *See* HAW. REV. STAT. § 91-1 (2012).

[303] *See* HAW. REV. STAT. § 188-22.6 (2011).

C. *Infringement of Hawai‘i Constitution Article XII, Section 7*

The Hawai‘i Constitution, statutes, and case law do not explicitly afford Kānaka Maoli absolute protection for subsistence fishing practices. However, this does not mean that subsistence fishing is not a traditional and customary Kanaka Maoli right. Article XI, section 6 of the Hawai‘i Constitution imposes an affirmative duty to "protect the public's use and enjoyment of the reefs."[304] Likewise, article XII, section 7 of the Hawai‘i Constitution places an affirmative duty to "protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by . . . descendants of native Hawaiians."[305] These constitutional provisions, along with article XI, section 1 on the public trust, arm Kānaka Maoli communities with the ability to ensure that state agencies fulfill their constitutional obligation to protect the environment for future generations.[306] The Hawai‘i Supreme Court has established four factors that indicate when traditional and customary Kānaka Maoli practices receive protection under article XII, section 7 of the Hawai‘i Constitution.[307] Article XII, section 7 is considered "an important and indispensable 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."[308] The following cases assisted the Hawai‘i Supreme Court define the scope of customary and traditional rights held by Kānaka Maoli under the Constitution.

1. *Foundation in Case Law*

In *Kalipi v. Hawaiian Trust Co.*, the late Billy Kalipi sought to gather certain items for subsistence and medicinal purposes within several ahupua‘a where he owned land but did not reside, and was denied access by the large ahupua‘a landowners.[309] The Hawai‘i Supreme Court provided a test for claims under HRS section 7-1: (1) that a gatherer's residence is within the ahupua‘a in which gathering rights were to be exercised; (2) that gathering is limited to, among other items, firewood, and house timber, as specified in HRS section 7-1; (3) that gathering takes place on undeveloped land; and (4) that gathering rights be utilized to practice native customs.[310] The court also

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[304] HAW. CONST. art. XI, § 6.

[305] HAW. CONST. art. XII, § 7.

[306] *See* HAW. CONST. art. XI, §§ 1, 6; HAW. CONST. art. XII, § 7.

[307] *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai‘i 425, 438–47, 903 P.2d 1246, 1259–68 (1995); State v. Hanapi, 89 Hawai‘i 177, 186-87, 970 P.2d 485, 494–95 (1998).

[308] COMM. OF THE WHOLE REP. NO. 12 (Haw. 1978), *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 1016 (1980).

[309] 66 Haw. 1, 3–4, 656 P.2d 745, 747 (1982).

[310] *Id.* at 7–9, 656 P.2d at 749–51.

held that "any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of the purported native rights with our modern system of land tenure must fail."[311]

In *Pele Defense Fund v. Paty*, Kānaka Maoli residents living in Puna on Hawaiʻi Island asserted gathering rights claims in certain ahupuaʻa outside of their ahupuaʻa of physical residence.[312] Finding for the petitioners, the court held that access and gathering rights "may extend beyond the ahupuaʻa in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[313] Thus, this case allowed for such rights to not be limited to one's ahupuaʻa of residence or common law concepts associated with tenancy or land ownership.

In *Public Access Shoreline Hawaiʻi v. Hawaiʻi City Planning Comm'n* (*PASH*), petitioners challenged the issuance of a Special Management Area permit by the Hawaiʻi County Planning Commission (HPC) to Nansay Hawaiʻi, Inc. to pursue the development of a resort complex on the island of Hawaiʻi.[314] The Hawaiʻi Supreme Court held that the HPC erred in not granting Hawaiian practitioners standing.[315] The court reaffirmed *Pele Defense Fund* by holding that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state."[316] Second, the court held that in determining customary rights, "the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner."[317] The court also held that the State and all governing bodies and agencies at the state and county level are obligated to protect the reasonable exercise of traditional and customary rights of Kānaka Maoli to the extent feasible.[318]

Finally, in *Ka Paʻakai o Ka ʻĀina v. Land Use Comm'n, State of Hawaiʻi*, a Hawaiian coalition challenged the State Land Use Commission's grant for reclassification of 1,000 acres of land from conservation to urban, and the Commission's failure to protect customary and traditional practices there.[319] The court held that the State, acting through its agencies, must employ an

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[311] *Id.* at 4, 656 P.2d at 748.
[312] *See* 73 Haw. 578, 584-89, 837 P.2d 1247, 1253–55 (1992).
[313] *Id.* at 620, 837 P.2d at 1272.
[314] 79 Hawaiʻi 425, 429, 903 P.2d 1246, 1250 (1995).
[315] *Id.* at 434, 903 P.2d at 1255.
[316] *Id.* at 448, 903 P.3d at 1269.
[317] *Id.* at 442, 903 P.3d at 1263.
[318] *See id.* at 450, 903 P.3d at 1271 n.43.
[319] 94 Hawaiʻi 31, 34, 7 P.3d 1068, 1071 (2000).

analysis to "effectuate [its] obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]"[320] The analysis includes determining the identity and scope of "valued cultural, historical, or natural resources."[321] Next, the relevant state agency must evaluate the extent to which those resources will be affected or impaired by the proposed action.[322] Finally, the agency must determine the feasible action to be taken by the State to reasonably protect Kānaka Maoli rights if they exist.[323] The court held that a State agency has an affirmative duty to protect cultural rights and practices; it may not abdicate this duty to the landowner or developer.[324]

Through these series of cases, the Hawai‘i Supreme Court established factors that indicate whether traditional and customary Kānaka Maoli practices receive constitutional protection.[325] The following criteria are considered: (1) establishment of a claimed customary practice by November 25, 1892;[326] (2) exercise of the right within the ahupua‘a of the practitioner's residence, with an exception occurring when the practice is not linked to residence within the ahupua‘a;[327] (3) exercise on less than fully developed land;[328] and (4) that the customary practice is reasonably exercised.[329] The court does consider the continuous exercise of traditional and customary practices.[330] Continuous use is not required; even if the custom is interrupted, it is not "destroyed" but instead makes proving a traditional and customary right more difficult.[331]

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[320] *Id.* at 46–47, 7 P.3d at 1083–84.

[321] *Id.* at 47, 7 P.3d at 1084.

[322] *Id.*

[323] *Id.*

[324] *See id.* at 45, 7 P.3d at 1082.

[325] *See* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai‘i 425, 447–48, 903 P.2d 1246, 1268–69 (1995).

[326] *Id.* at 47–48, 903 P.2d 1246, 1268.

[327] *Id.* at 448, 903 P.2d at 1269.

[328] State v. Hanapi, 89 Hawai‘i 177, 186-88, 970 P.2d 485, 494-96 (1998) (affirming Hanapi's conviction of criminal trespass in the second degree for entering his neighbor's land to observe land restoration construction taking place) ("[I]f property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property.").

[329] *PASH*, 79 Hawai‘i at 442, 903 P.2d at 1263 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 618–21, 837 P.2d 1247, 1269–72 (1992)).

[330] *Id.* at 441 n.26, 903 P.2d at 1262 n.26.

[331] *Id.*

2. *Residents of Moʻomomi Have a Constitutional Right to Manage their Fisheries*

> He kakaikahi loa paha ka poe e lawaia nei i keia mau la i lawa maoli ma keia oihana, a he mea minamina loa hoi ia na makou ka nalo aku o keia ike i huli ia me ka hoomanawanui e na kupuna o kakou.[332]

The State is obligated to affirmatively protect and ensure that traditional and customary Native Hawaiian rights are not regulated out of existence.[333] DLNR breached its constitutional obligation to affirmatively protect traditional and customary Maoli fishing practices. Applying the *PASH* standard, the traditional and customary practices of lawaiʻa at Moʻomomi indicate use as early as 900 A.D.[334] Archaeological studies show that Kānaka Maoli were present in the area because of the numerous habitation sites, koʻa, and dense concentrations of fish remains.[335] The traditional knowledge and use of Moʻomomi indicate the continuous practices of the lawaiʻa in this area.

Looking at the second factor considered by the Hawaiʻi Supreme Court, the access and use of Moʻomomi are predominantly used as a subsistence fishing ground by residents within the Pālāʻau moku.[336] The Pālāʻau moku is not within the ahupuaʻa boundaries of the CBSFA designation.[337] The access and gathering rights, however, extend beyond the ahupuaʻa of Moʻomomi. There is proof that Kānaka Maoli outside of this ahupuaʻa have utilized these waters customarily and traditionally for subsistence fishing and cultural activities.[338] Kānaka Maoli from the Pālāʻau moku have been documented to

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[332] KAHĀʻULELIO, *supra* note 31. ("Rare indeed today are those people that are fishing who are truly experts in this field, and it would [be] very regrettable to us if this knowledge, so patiently acquired by our ancestors, should be lost."). This quote by D. Kanewanui does not utilize diacritical markings because it is quoted as originally written in KA ʻOIHANA LAWAIʻA: HAWAIIAN FISHING TRADITIONS.

[333] *PASH*, 79 Hawaiʻi at 442, 903 P.2d at 1263.

[334] MOʻOMOMI CBSFA, *supra* note 184, at 16. *But see* Patrick V. Kirch, *When Did the Polynesians Settle Hawai'i? A Review of 150 Years of Scholarly Inquiry and a Tentative Answer*, 12 HAWAIIAN ARCHAEOLOGY 3, 3 (2011) (rejecting original inferences of Polynesian settlement of Hawaiʻi between ca. AD 300–750 and instead supporting Polynesian discovery and colonization of the Hawaiian Islands between approximately AD 1000 and 1200).

[335] MOʻOMOMI CBSFA, *supra* note 184, at 16 (quoting Marshall Weisler, *Mo'omomi: A Place of the Ancient Hawaiians*, MOLOKAʻI NEWS, Aug. 1, 1987).

[336] *Id.* at 5.

[337] *See id.* at 39; *Moku Maps*, DEPʻT OF LAND & NAT. RES. (Apr. 6, 2022), https://dlnr.hawaii.gov/ahamoku/2022/04/06/moku-maps/ (Pālaʻau Moku borders Molokaʻi's southern coast and is thus outwise the ahupuaʻa boundaries of CBSFA designation, which runs along Molokaʻi's northern coast).

[338] *See* Pele Def. Fund v. Paty, 73 Haw. 578, 620–21, 837 P.2d 1247, 1271–72 (1992).

utilize the waters of Mo'omomi for "pole, hand-line fishing, throw net, spear fishing as well as gathering 'opihi (Patellidae spp.), 'a'ama crab (Grapsus tenuicrustatus, Pachygrapsus plicatus), limu (various marine algae) and lobster (P. penicillatus)."[339]

The third factor focuses on whether the customary practice is exercised on less than fully developed land. The Hawai'i Supreme Court utilizes the "less than fully developed" test to determine whether Kānaka Maoli customary practices are exercised on less than fully developed lands.[340] Accordingly, "less than fully developed" lands apply to all State waters, except fishponds.[341] All subsistence fishing within Mo'omomi should be considered as occurring on less than fully developed land.

The fourth and final factor focuses on whether the customary practice is reasonably exercised. According to *PASH*, "the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7."[342] The Kānaka Maoli fishing practices at Mo'omomi must be for subsistence purposes[343] and must place no actual harm upon the recognized interest of the State to enact regulations necessary for the conservation of aquatic life.[344] Hawai'i courts have not yet defined "subsistence" in the context of traditional and customary rights. HRS section 188-22.6(c)(2), however, defines "subsistence" as "the customary and traditional Native Hawaiian uses of renewable ocean resources for direct personal or family consumption or sharing."[345] The Governor's Moloka'i Subsistence Task Force Final Report indicated that in 1990, forty-nine percent of families were Kānaka Maoli on Moloka'i.[346] Of those Maoli families, many "rely upon subsistence fishing, hunting, gathering, or cultivation for a significant portion of their food."[347] The use of Mo'omomi as a subsistence fishery is crucial. The people of Moloka'i, through the passage of knowledge from lawai'a, and within families, have continuously utilized this area as a place to gather, fish,

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[339] *See* Mo'omomi CBSFA, *supra* note 184, at 18 ("When ocean conditions permit, residents of the Pāla'au Moku are able to launch small boats from a modest, unimproved boat ramp on the east side of Mo'omomi Bay, as well as across the sandy beach to fish for nearshore species using a variety of methods.").

[340] Andrew R. Carl, *Note, Method is Irrelevant: Allowing Native Hawaiian Traditional and Customary Subsistence Fishing to Thrive*, 32 U. Haw. L. Rev. 203, 224–25 (2009).

[341] *Id.*

[342] Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 442, 903 P.2d 1246, 1263 (1995).

[343] *See* HAW. CONST. art. XII, § 7.

[344] Carl, *supra* note 340, at 225; *see* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 11–12, 656 P.2d 745, 751–52 (1982); *PASH*, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43.

[345] HAW. REV. STAT. § 188-22.6(c)(2) (2011).

[346] MOLOKA'I TASK FORCE, *supra* note 178, at 19.

[347] *Id.*

and survive. The testimonies and actions by families in the Hoʻolehua Homestead and Pālāʻau moku demonstrate that this area is continuously used for subsistence purposes. Considering the continuous usage and reliance by Kānaka Maoli families, subsistence fishing practices at Moʻomomi should be reasonable under PASH, which is ultimately up to the factfinder to decide.

The right to gather and fish in Moʻomomi is an assertion of traditional and customary rights by the Kānaka Maoli in the Pālāʻau moku. The HMM, on behalf of Kānaka Maoli within the Hoʻolehua Homestead and Pālāʻau moku, seeks permanent designation of a CBSFA in order to ensure that they can continue their traditional and customary right to fish.[348] Without a CBSFA designation, the people of Molokaʻi will not be able to effectively manage their fisheries for subsistence, cultural, and religious purposes. There is also a threat that the traditional knowledge held dearly in Molokaʻi will eventually be lost or relegated to historical documents and stories, rather than put into actual use. Thus, by not approving the Moʻomomi CBSFA, DLNR is impeding on the rights of the Kānaka Maoli of the Pālāʻau moku to continue their traditional and customary practices of subsistence fishing in Moʻomomi.

D. *Breach of DLNR's Public Trust Responsibilities*

The assertions of the breach of traditional and customary rights go hand in hand with assertions of a breach of the public trust. While on its face, the public trust doctrine seems to protect only "Hawai[ʻ]i's natural beauty and natural resources" for "the benefit of present and future generations," but it is clear that it does more than just that.[349] The public trust doctrine also inherently protects the rights of Kānaka Maoli. The preservation and protection of Hawaiʻi's natural resources is a Maoli foundational concept. Historically, Hawaiʻi has entrusted the care of its public natural resources to the aliʻi, konohiki, Mōʻī, and then the state government for the benefit of all its people.[350] The public trust precedents should be applied equally to all resources, ensuring that they are preserved to be passed to future generations as it was preserved for Hawaiʻi residents.[351] This interpretation aligns with Kānaka Maoli principles, which seek to protect and conserve the natural resources and beauty for those who are not yet born. The Moʻomomi CBSFA

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[348] *See* MOʻOMOMI CBSFA, *supra* note 184, at 5.

[349] HAW. CONST. art. XI, § 1; *see* MOʻOMOMI CBSFA, *supra* note 184.

[350] *See In re* Conservation Dist. Use Application HA-3568 (*Mauna Kea II*), 143 Hawaiʻi 379, 421, 431 P.3d 752, 794 (2018) (Pollack, J. concurring in part).

[351] *Id.*

seeks to protect the fisheries of Mo‘omomi for future generations.[352] There is a recorded decline of five particular species and today's advocates seek to ensure that those five sources of food will be around for generations to come.[353]

When reviewing an agency's decision under the public trust doctrine, the court requires additional rigor.[354] The "[c]larity in the agency's decision is all the more essential 'in a case such as this where the agency performs as a public trustee and is duty-bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.'"[355] "When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations" in that resource.[356] DLNR "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."[357] DLNR must then measure the use of Mo‘omomi "under a 'reasonable and beneficial use' standard, which requires examination of the proposed use in relation to other public and private uses."[358] All agencies "must apply a presumption in favor of public use, access, enjoyment, and resource protection."[359]

DLNR does not provide any evidence that it has the legal authority to deny the public trust in fishery resource management. Clarity and completeness are essential in DLNR's decision where DLNR performs as a public trustee and is "duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute."[360] Since the community hearings in August 2020, DLNR has not released an official statement on the designation of the Mo‘omomi CBSFA. In December 2020, DAR released a testimony compilation and summary indicating individual testimonies who opposed and supported the CBSFA designation.[361] DAR received a total of 949 individual testimonies with approximately 650 individuals who "signed an online petition distributed through social media."[362] Of the 949 individual

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[352] *See generally* MO‘OMOMI CBSFA, *supra* note 184.

[353] *See id.* at 30–31.

[354] Kauai Springs, Inc. v. Plan. Comm'n of Kaua‘i, 133 Hawai‘i 141, 164, 324 P.3d 951, 974 (2014).

[355] *Id.* (quoting In re Water Use Permit Application (*Waiāhole*), 94 Hawaii 97, 158, 9 P.3d 409, 470 (2000)).

[356] *Id.* at 173, 324 P.3d at 983.

[357] *Id.*

[358] *Id.*

[359] *Id.*

[360] *Id.* at 181, 324 P.3d at 991 (quoting *Waiāhole*, 94 Hawaii at 158, 9 P.3d at 470).

[361] *See* Division of Aquatic Resources, Mo‘omomi Community Based Subsistence Fishing Area: Testimony Compilation and Summary 1 (2020).

[362] *Id.*

testimonies, 561 individuals were in support of the designation while 388 individuals were opposed to the designation.[363] The testimonies in opposition consistently highlighted that the conflicts over resources in Moʻomomi seemed to be more of a "social issue" rather than the CBSFA designation itself.[364]

The Moʻomomi CBSFA designation process has been ongoing since 1994 with several public scoping meetings occurring from 2014 to 2018.[365] Furthermore, DLNR continued to have hearings in 2020 to receive individual testimonies to make a CBSFA determination.[366] As of 2023, there has been no update on the Moʻomomi CBSFA designation. DLNR has not released a statement indicating any reasoning as to why it would or would not designate the Moʻomomi CBSFA. Thus, DLNR's continuous delay of the designation of the Moʻomomi CBSFA is a breach of the public trust, for it prevents the Kānaka Maoli community from protecting the natural resources of Moʻomomi for future generations.

IV. CONCLUSION

Lawaiʻa are the protectors and key embodiment of mālama ʻāina in the ocean. The knowledge of the lawaiʻa is crucial for a community to achieve governance over its resources. The Moʻomomi CBSFA reflects the repository of knowledge that the lawaiʻa of Moʻomomi have passed down over generations. The Moʻomomi CBSFA illustrates the ideal hybrid management style that centralizes governance in the community and

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[363] *Id.* The Testimony Complication and Summary document further separated the total testimony in support of designation into overall Molokaʻi support and Hoʻolehua specific support. Out of 561 testimonies in support of designation, 190 testimonies were from Molokaʻi and 66 from Hoʻolehua. Similarly, the total testimony in opposition of designation is separated into overall Molokaʻi opposition and Hʻoolehua specific opposition. Out of 388 testimonies in opposition of designation, 280 were from Molokaʻi with 109 specifically from Hoʻolehua.

[364] Transcript of Moʻomomi CBSFA Public Hearing Kualapuu Charter School Cafeteria (Aug. 19, 2020) (on file with author). Some individual testimonies highlighted discontempt with the CBSFA designation process and the history of DLNR in the management of Moʻomomi. Other testimony indicated that the process had caused division within the community for families who felt that there was a lack of outreach. However, the majority of testimony recognized Moʻomomi as a special place to the individual and their families.

[365] Moʻomomi CBSFA, *supra* note 184, at 68. The community organized meetings include January 2014; November 8, 2014; March 25, 2015; April 25, 2015; August 26, 2015; September 2015; October 15, 2015; November 2015; March 16, 2017; March 21, 2017; April 5, 2017; June 6, 2017; June 14, 2017; August 10, 2017; September 26, 2017; November 17-18, 2017; and March 30-April 1, 2018. Administrative Record, *supra* note 276, at 13–22.

[366] State of Haw. Div. of Aquatic Res., Moomomi CBSFA Meeting, YouTube (Aug. 19, 2020), https://www.youtube.com/watch?v=XbIaQk9xfWU.

combines traditional knowledge with modern science and management techniques. The Mo‘omomi CBSFA proposed rules should be adopted. The CBSFA process is not a popularity contest. Hawai‘i Revised Statutes section 188-22.6 and the applicable Chapter 91 procedures allow communities to engage in the rulemaking process and protect resources.

DLNR’s delay and refusal to designate the CBSFA breaches its constitutional obligation to affirmatively protect traditional and customary Hawaiian rights and the fisheries for future generations. Retroactive management is ineffective when a community relies so heavily on a particular fishery for subsistence. The purpose of management is to plan ahead to ensure that the resource is still around for generations to come. The opportunity to effectively co-manage the Mo‘omomi fishery is there, and it is just a matter of DLNR taking the necessary steps to do its job and fulfill the State’s constitutional mandates.

Mutual Aid and Maunakea: Policing Protests Post-*Flores*

Isabelle H. Constant,[*] Robin William Girard, Ph.D.[**] and Dru Hara[***]

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I. INTRODUCTION[1]

On July 17, 2019, police officers from the Honolulu Police Department and Maui Police Department were deployed subject to a mutual aid agreement[2] with the Hawai'i County Police Department to the summit of Maunakea[3] in response to the demonstrations by Native Hawaiian[4] activists blocking access to construction workers.[5] Among the first to be arrested by police officers in riot gear were several kūpuna[6] as the other kia'i[7] stood by peacefully.[8]

This deployment marked a significant departure from past deployments of police officers to a neighbor island, which had been limited to police actions responding to environmental disasters[9] or originating in the sending

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[1] In the body of this note, we refer to the Supreme Court decision as Flores. In citations, the Intermediate Court of Appeals (ICA) decision, Flores v. Ballard, 149 Hawai'i 81, 482 P.3d 544 (Ct. App. 2021), will be referenced as Ballard. The Hawai'i Supreme Court decision, Flores v. Logan, 151 Hawai'i 357, 513 P.3d 423 (2022), will be referenced as Logan.

[2] "A mutual aid agreement is an agreement between jurisdictions or agencies to provide services across boundaries during emergencies or a disaster." FEMA, FIRE MANAGEMENT ASSISTANCE GRANT PROGRAM GUIDE 23 (2014).

[3] This note will use the one-word spelling of the name for the mountain, "Maunakea," instead of "Mauna Kea," as recommended by the University of Hawai'i Hilo School of Hawaiian Language and accepted by the Hawai'i Board on Geographic Names and the federal government. *Mauna Kea or Maunakea?*, UNIV. OF HAW. INST. FOR ASTRONOMY, https://www2.ifa.hawaii.edu/newsletters/article.cfm?a=690&n=55/ (last visited Jan. 1, 2023) ("While the name Mauna Kea (white mountain) is simply descriptive, 'Maunakea' is a name that in Native Hawaiian tradition is short for 'Mauna a Wākea,' the mountain of Wākea, one of the progenitors of the Hawaiian people. Maunakea is believed to connect the land to the heavens.").

[4] In this note, "Native Hawaiian" refers to individuals that can trace their ancestry back to the peoples inhabiting the islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. *See* 42 U.S.C. § 3057k.

[5] *See* discussion *infra* Part II.

[6] "Kūpuna" is plural for "kupuna," which means "grandparent" or "ancestor." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 186 (1986).

[7] "Kia'i" means "guardians" or "caretakers," and herein refers to those gathered in opposition to the construction of the TMT. *Id.* at 146.

[8] Michael Brestovansky, *Dozens of Kupuna Arrested on Third Consecutive Day of TMT Protest*, HAW. TRIBUNE-HERALD (July 18, 2019, 12:05 AM), https://www.hawaiitribune-herald.com/2019/07/18/hawaii-news/dozens-of-kupuna-arrested-on-third-consecutive-day-of-tmt-protest/.

[9] *See* Blaze Lovell, *Hawaii Supreme Court Hears Arguments Over County Police Jurisdiction*, HONOLULU CIV. BEAT (Aug. 26, 2021),

jurisdiction.[10] In *Flores v. Logan*, the Hawai‘i Supreme Court endorsed the use of mutual aid agreements between police departments without defining any limits or criteria for their action.[11] While the court's reasoning was sound, permitting police mutual aid outside of emergency declarations could decrease police accountability, thereby increasing the risk of abuse by police against Native Hawaiians, who are already disparately impacted by the Hawai‘i criminal justice system.[12] Because interactions between Native Hawaiian protesters and the police are likely to continue, the potential for the unprincipled use of neighbor island police forces to act without oversight against demonstrations in support of constitutionally protected land rights remains a valid concern post-*Flores*.[13]

This note argues that although the court in *Flores* considered the valid interests of the State in reaching its decision, it failed to adequately address the potential abuse of mutual aid agreements by unelected police chiefs as a tool to oppress marginalized communities. Part II describes the context of the Hawai‘i Supreme Court's decision in *Flores*, including a brief overview of protests against the construction of the Thirty Meter Telescope on the summit of Maunakea, the district court's dismissal of the complaint and its subsequent appeal, and the supreme court's affirming. Part III analyzes the policy arguments for and against the supreme court's endorsement of mutual aid agreements between police departments, showing that the court deferred to the valid State interests in allowing the expansive use of mutual aid agreements, to the detriment of countervailing police accountability concerns. Ultimately, this note argues that mutual aid agreements have the potential to erode police accountability, which could result in increasingly disparate impacts on Native Hawaiians.

II. BACKGROUND

A. Context Leading up to the Case

Maunakea is already home to thirteen telescopes, two of which are set to be decommissioned by 2023.[14] In 2009, the Thirty Meter Telescope

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https://www.civilbeat.org/2021/08/hawaii-supreme-court-hears-arguments-over-county-police-jurisdiction/ [hereinafter *Arguments*].

[10] *Logan*, 151 Hawai‘i at 370, 513 P.3d at 436.

[11] *See* discussion *infra* Part III.C.

[12] *See* discussion *infra* Part III.C.

[13] *See* discussion *infra* Part III.D.

[14] Paula Dobbyn, *Removal of Mauna Kea Telescope Set for Later this Year*, HONOLULU CIV. BEAT (Feb. 15, 2022), https://www.civilbeat.org/2022/02/removal-of-mauna-kea-telescope-set-for-later-this-year/; Decommissioning, Univ. Haw. Hilo Ctr. for Maunakea

International Observatory (TIO) selected Maunakea as its preferred site to build and operate the Thirty Meter Telescope (TMT).[15] The next decade saw protests and extensive litigation leading up to and following its planned construction launch date of July 15, 2019.[16]

Maunakea has historical and cultural significance to Native Hawaiians.[17] The Kumulipo, a creation chant that is "most arguably the most important literary work in the Hawaiian canon," traces Native Hawaiian lineage back to Maunakea itself.[18] The Kumulipo tells the story of Papa (earth mother) and Wākea's (sky father) first-born mountain son, Mauna a Wākea.[19] While all land is venerated by Native Hawaiians, Maunakea is particularly important because of these divine origins.[20]

Maunakea is also designated as a state conservation district to protect its unique landscape and historical and cultural sites.[21] Article XII, section 7 of the Hawai‘i Constitution provides that the State must protect "all rights, customarily and traditionally exercised for . . . cultural and religious purposes" that Native Hawaiians possess.[22] The Hawai‘i Supreme Court has interpreted this provision as placing "an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confer[ring] upon the State and its agencies the power to protect these rights and to prevent any interference with the exercise of these

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Stewardship, https://hilo.hawaii.edu/maunakea/stewardship/decommissioning/ (last visited Oct. 9, 2022).

15 About, TMT Int'l Observatory, https://www.tmt.org/page/about#story/ (last visited Oct. 9, 2022). The TMT is an "extremely large telescope that will allow [scientists] to see deeper into space and observe cosmic objects with unprecedented sensitivity and detail." *Id.* Maunakea was selected for its "stable, dry, and cold" climate, "all of which are important characteristics for capturing the sharpest images and producing the best science." *Id.* However, a site in La Palma on the Canary Islands was selected as TMT's alternate site because its conditions are similar to Maunakea. *Id.*

16 *See, e.g.*, Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai‘i 376, 363 P.3d 224 (2015); *In re* Conservation Dist. Use Application HA-3568 (*In re TMT*), 143 Hawai‘i 379, 431 P.3d 752 (2018).

17 Terina Kamailelauli‘i Fa‘agau, *Reclaiming the Past for Mauna a Wākea's Future: The Battle Over Collective Memory and Hawai‘i's Most Sacred Mountain*, 22 ASIAN-PAC. L. & POL'Y J. 1, 16–17 (2021).

18 *Id.* at 17.

19 *Id.* at 17–18.

20 *Id.* at 20.

21 Conservation districts are state land use district administered by the State Board of Land and Natural Resources to "protect[] watersheds and water sources, scenic and historic areas, parks, wilderness, open space, recreational areas, habitats of endemic plants, fish and wildlife, and all submerged lands seaward of the shoreline." Uses in conservation districts are subject to rules promulgated by the State Department of Land and Natural Resources. *State Land Use Districts*, LAND USE COMM'N, https://luc.hawaii.gov/about/state-land-use-districts/ (last visited Jan. 1, 2023).

22 HAW. CONST. art. XII, § 7.

rights."[23] Advocates for Native Hawaiian rights have expressed concern that the State has used police to "obstruct Hawaiian constitutional access rights on Mauna Kea.".[24]

Additionally, the Maunakea protests occurred within the larger context of struggles for sovereignty and rights to ceded land that Native Hawaiians have faced since the Admission Act.[25] This friction created by private or government development projects that infringe upon indigenous peoples' land rights or environmentally protected areas can also be seen as a local manifestation of a national conversation.[26] The continental United States has seen similar protests to those on Maunakea where projects infringe upon indigenous rights and people, the Dakota Access Pipeline being a noteworthy example.[27]

B. Facts of the Case

On July 10, 2019, Governor Ige and the TIO issued a joint news release announcing that the construction of the TMT was set to begin the week of July 15.[28] On July 13, 2019, E. Kalani Flores[29] joined a group of kiaʻi assembled at Puʻu Huluhulu near Mauna Kea Access Road to stand in opposition to the scheduled construction of the TMT.[30] By July 15, the

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[23] Ka Paʻakai o ka ʻĀina v. Land Use Comm'n, 94 Hawaiʻi 31, 45, 7 P.3d 1068, 1082 (2000) (citations omitted).

[24] Kekailoa Perry, *How the Hawaii Constitution Protects Mauna Kea*, HONOLULU CIV. BEAT (Aug. 24, 2019), https://www.civilbeat.org/2019/08/how-the-hawaii-constitution-protects-mauna-kea/ (explaining constitutional provisions providing for access to culturally significant lands held in the public trust).

[25] *See* Hawaiʻi Admission Act, Pub. L. No 86-3, 73 Stat. 4 (1959); *see also* Anita Hofschneider, *Mauna Kea Ignited a New Wave of Hawaiian Pride. Where Does it Go From Here?*, HONOLULU CIV. BEAT (Feb. 5, 2020), https://www.civilbeat.org/2020/02/mauna-kea-ignited-a-new-wave-of-hawaiian-pride-where-does-it-go-from-here/ (offering a brief overview and timeline of the modern Hawaiian self-determination movement and how the movement relates to the Maunakea protest).

[26] *See, e.g.*, *Treaties Still Matter: The Dakota Access Pipeline*, NAT'L MUSEUM AM. INDIAN, https://americanindian.si.edu/nk360/plains-treaties/dapl/ (last visited Oct. 9, 2022) (offering an overview of the Dakota Access Pipeline's infringement on Standing Rock Sioux land).

[27] *Id.*

[28] Thirty Meter Telescope Set to Start Construction July 15, MAUI NOW (July 10, 2019), https://mauinow.com/2019/07/10/thirty-meter-telescope-set-to-start-construction-july-15/.

[29] Flores is a Native Hawaiian activist who lives on Hawaiʻi Island and has performed traditional Native Hawaiian ceremonies on Maunakea for a number of years. He has brought a number of cases seeking to protect rights and access on Maunakea for Native Hawaiian practitioners. Flores v. Ballard, 149 Hawaiʻi 81, 84, 482 P.3d 544, 548 (Ct. App. 2022).

[30] Flores v. Logan, 151 Hawaiʻi 357, 359, 513 P.3d 423, 425 (2022).

announced start date for construction,[31] the number of kia'i had grown into the hundreds.[32] While emotions ran high, the proceedings remained peaceful and the day ended without any arrests or progress on the construction.[33] That same day, the Chief of the Hawai'i County Police Department (HCPD), Paul Ferreira, and the Chief of the Honolulu Police Department (HPD), Susan Ballard,[34] entered into an interdepartmental assignment agreement under Hawai'i Revised Statutes (HRS) section 78-27.[35] The following day, HCPD entered into an identical interdepartmental assignment agreement with the Chief of the Maui Police Department (MPD), Tivoli Faaumu.[36] Subsequently, dozens of HPD and MPD officers were sent to Hawai'i Island to support HCPD in operations relating to the peaceful protests opposing TMT.[37] Chief Ferreira deputized the HPD and MPD officers upon their arrival and instructed them to assist with clearing the access road to make way for the construction equipment.[38]

By the morning of July 17, the number of kia'i on the mountain had grown to over 1,000.[39] Shortly after 7:00 AM, state officers with the Hawai'i Island Branch of the Department of Land and Natural Resources Division of Conservation and Resources Enforcement (DOCARE) approached the kia'i on the frontline to warn them that they would be arrested if they did not clear the road.[40] Among the kia'i were a group of several dozen kūpuna, who

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[31] *TMT Construction Set to Begin*, U. HAW. NEWS (July 10, 2019), https://www.hawaii.edu/news/2019/07/10/tmt-construction-set-to-begin/.

[32] Vanessa Romo, *Hawaii Protestors Block Access Road to Stop Construction of Massive Telescope*, NAT'L PUB. RADIO (July 15, 2019, 6:27 PM), https://www.npr.org/2019/07/15/741990200/hawaii-protesters-block-access-road-to-stop-construction-of-massive-telescope/.

[33] *Dozens of Honolulu Police Officers Deployed to Assist Law Enforcement at Mauna Kea*, HAW. NEWS NOW (July 16, 2019, 3:00 PM) [hereinafter *Officers Deployed to Assist Law Enforcement at Mauna Kea*], https://www.hawaiinewsnow.com/2019/07/15/with-tmt-construction-set-begin-protesters-lie-ground-block-potential-vehicles/.

[34] Chief Ballard, the original named defendant in the case, was replaced as Chief of HPD by retired National Guard Major General Arthur "Joe" Logan in May 2022 prior to Flores' appeal to the Hawai'i Supreme Court. *See Logan*, 151 Hawai'i at 370 n.1, 513 P.3d at 436 n.1.

[35] *Id.* at 359, 513 P.3d at 425; HAW. REV. STAT. § 78-27 (2012). For a complete discussion and language of section 78-27, *see* discussion *infra* Part II.C.2.

[36] *Logan*, 151 Hawai'i at 359, 513 P.3d at 425.

[37] *Id.* at 360, 513 P.3d at 426; *Officers Deployed to Assist Law Enforcement at Mauna Kea*, *supra* note 33.

[38] *Logan*, 151 Hawai'i at 360, 513 P.3d at 426.

[39] Brestovansky, *supra* note 8.

[40] *See* Anita Hofschneider, *Another 'Truce' After a Day of Arrests on Mauna Kea*, HONOLULU CIV. BEAT (July 17, 2019) [hereinafter *Another Truce*], https://www.civilbeat.org/2019/07/arrests-begin-as-tmt-protesters-block-road/; *see also* Haw. Dep't Land & Nat. Res., *Courage, Compassion & Aloha on Maunakea*, VIMEO (July 19, 2019, 2:16 PM) [hereinafter *Courage, Compassion & Aloha on Maunakea*], https://vimeo.com/349095779/.

offered themselves[41] as the first to be arrested.[42] Over the next few hours, the local HCPD officers slowly and respectfully carried out the process of apprehending the kūpuna as other kiaʻi stood by peacefully.[43] This continued until around 11:30 AM, when dozens of additional officers, many of them from HPD and MPD, arrived in full riot gear and armed with batons.[44] The arrival of these heavily armored officers prompted kiaʻi, who had been standing by in observance, to suddenly form a human wall, linking arms in front of the kūpuna and refusing to move from the roadway.[45] The resulting standoff lasted three hours before the police suddenly withdrew.[46] In response, Governor David Ige issued an emergency proclamation that afternoon, authorizing county and state agencies to engage in emergency management functions as defined in HRS section 127A.[47]

C. Procedural History

1. Flores' Complaint Seeking Injunctive Relief from Police Chiefs Dismissed for Lack of Private Right of Action

On July 17, 2019, Flores filed a complaint in the Circuit Court of the Third Circuit seeking declaratory judgment and injunctive relief against the police chiefs of the counties of Honolulu, Maui, and Hawaiʻi.[48] In the complaint, Flores alleged that the police chiefs violated HRS section 52D-5[49] by using

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[41] Among the kūpuna who were arrested that morning were longtime activist Walter Ritte, Office of Hawaiian Affairs trustee Carmen Hulu Lindsey, and four members of the Royal Order of Kamehameha I. *Another Truce*, *supra* note 40.

[42] Brestovansky, *supra* note 8.

[43] *Id.*

[44] *Another Truce*, *supra* note 40.

[45] Brestovansky, *supra* note 8.

[46] *Id.*

[47] *See* @GovHawaii, TWITTER (July 17, 2019, 4:57 PM), https://twitter.com/GovHawaii/status/1151687393369419776/; *Emergency Proclamation for Mauna Kea*, HAW. EMERGENCY MGMT. (July 17, 2019), https://dod.hawaii.gov/hiema/emergency-proclamation-for-mauna-kea/.

[48] Flores v. Logan, 151 Hawaiʻi 357, 360, 513 P.3d 423, 426 (2022).

[49] HRS section 52D-5 (2012) provides:

> Powers of chief of police outside own county. The chief of police of each county and any duly authorized subordinates shall have and may exercise all powers, privileges, and authority necessary to enforce the laws of the State, in a county other than the county in and for which the chief has been appointed, if:
>
> (1) The exercise of such power, privilege, and authority is required in the pursuit of any investigation commenced within the county in and for which the chief has been appointed; and

police officers from HPD and MPD to assist HCPD officers in responding to the TMT protests.[50] Flores also alleged that the HPD and MPD officers did not have legal authority to exercise police powers in Hawai'i County against the TMT protesters.[51] Flores sought a declaratory judgment against the chiefs of police for violating section 52D-5, preliminary and permanent injunctions against the chiefs of police prohibiting further violation of section 52D-5, and attorneys' fees.[52] Additionally, Flores sought a temporary restraining order against the Maui and Honolulu county police officers, seeking to enjoin them from exercising their police powers against the TMT protesters.[53]

Honolulu Police Chief Ballard moved for dismissal for failure to state a claim, arguing that HRS section 52D-5 did not create a private right of action.[54] Chief Ballard further argued that the case was moot because HPD officers were no longer deployed to Hawai'i County.[55] Maui Police Chief Faaumu joined, agreeing that there was no private right of action and that the case should otherwise be dismissed as moot.[56] Hawai'i County Police Chief Ferreira joined, agreeing that there was no private right of action under section 52D-5. Chief Ferreira, however, did not take a position on the case's mootness.[57]

Flores contested both points in a memorandum in opposition to the motion to dismiss.[58] First, Flores contended that section 52D-5 created an implied private right of action.[59] Second, Flores argued that the case was not moot because it fell squarely within the exceptions of the mootness doctrine.[60]

> (2) The concurrence of the chief of police of the county in which the power, privilege, and authority sought to be exercised is obtained.

[50] *See Logan*, 151 Hawai'i at 360, 513 P.3d at 426.

[51] *Id.* at 360, 513 P.3d at 426.

[52] *Id.* at 360, 513 P.3d at 426.

[53] *Id.* at 360 n.7, 513 P.3d at 426 n.7.

[54] *Id.* at 360–61, 513 P.3d at 426–27 (relying on Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc., 110 Hawai'i 302, 312, 132 P.3d 1213, 1223 (2006)).

[55] *Id.* at 361, 513 P.3d at 427.

[56] *Id.* at 361, 513 P.3d at 427.

[57] *Id.* at 361, 513 P.3d at 427. "A case is 'moot' if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law." Right to Know Comm. v. City Council, City & Cnty. of Honolulu, 117 Hawai'i 1, 8, 175 P.3d 111, 118 (Ct. App. 2007) (citations omitted). Nonetheless, a case will escape the bar on mootness if it qualifies for an established exception. *See* Hamilton *ex rel.* Lethem v. Lethem, 119 Hawai'i 1, 5, 193 P.3d 839, 843 (2008).

[58] *Logan*, 151 Hawai'i at 361, 513 P.3d at 427.

[59] *Id.* at 361, 513 P.3d at 427.

[60] *Id.* at 361, 513 P.3d at 427.

The circuit court granted the motion, ruling that "there is no private right of action pursuant to HRS Section 52D-5."[61] Judgment was entered pursuant to the circuit court's oral ruling on November 12, 2019.[62]

2. ICA Affirmed Circuit Court's Dismissal

On December 6, 2019, Flores appealed the circuit court's decision.[63] Flores advanced three arguments for why the circuit court erred in concluding that section 52D-5 did not create a private right of action.[64] First, Flores argued that by establishing territorial limits for police authority, the state legislature intended to create a right to be "free from off island county police officers exercising police powers on Hawai'i Island."[65] Second, Flores argued that the legislature intended a private right of action to allow judicial review because precluding such a right would "violate[] the separation of powers doctrine."[66] Third, Flores argued that because section 52D-5 lacks any penalty or mechanism for enforcement, the statute must include a private right of action.[67]

In their answer brief, the police chiefs argued that their mutual aid was authorized under HRS section 78-27,[68] not section 52D-5, and that the ICA

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[61] *Id*. at 361–62, 513 P.3d at 427–28.
[62] *Id*. at 362, 513 P.3d at 428.
[63] *Id*. at 362, 513 P.3d at 428.
[64] *Id*. at 362, 513 P.3d at 428.
[65] *Id*. at 362, 513 P.3d at 428.
[66] *Id*. at 362, 513 P.3d at 428.
[67] *Id*. at 362, 513 P.3d at 428.
[68] HRS section 78-27 provides:

Temporary inter- and intra-governmental assignments and exchanges.

> With the approval of the respective employer, a governmental unit of this State may participate in any program of temporary inter- or intra-governmental assignments or exchanges of employees as a sending or receiving agency. "Agency" means any local, national, or foreign governmental agency or private agency with government sponsored programs or projects.
>
> (b) As a sending agency, a governmental unit of this State may consider its employee on a temporary assignment or exchange as being on detail to a regular work assignment or on leave of absence without pay from the employee's position. The employee on temporary assignment or exchange shall be entitled to the same rights and benefits as any other employee of the sending agency.
>
> (c) As a receiving agency, a governmental unit of this State shall not consider the employee on a temporary assignment or exchange who is detailed from the sending agency as its employee, except for the purpose of disability or death resulting from personal injury arising out of and in

therefore need not reach the merits of the case.[69] However, the chiefs of police also argued that the circuit court's decision could be affirmed on three separate grounds.[70] First, the chiefs argued that the dismissal could be upheld because the circuit court correctly decided that section 52D-5 did not create a private right of action.[71] Second, the chiefs of police argued that Flores did not have grounds to challenge the legal authority of HPD and MPD officers in Hawai'i county because he was not arrested, and therefore the circuit court correctly dismissed the case.[72] Third, the police chiefs argued that the ICA could affirm the circuit court's dismissal because the Charter of the County of Hawai'i (CCH) section 7-2.4(e)[73] granted the chief of police the power to

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> the course of the temporary assignment or exchange. The employee on detail may not receive a salary from the receiving agency, but the receiving agency may pay for or reimburse the sending agency for the costs, or any portion of the costs, of salaries, benefits, and travel and transportation expenses if it will benefit from the assignment or exchange.
>
> (d) An agreement consistent with this section and policies of the employer shall be made between the sending and receiving agencies on matters relating to the assignment or exchange, including but not limited to supervision of duties, costs of salary and benefits, and travel and transportation expenses; provided that the agreement shall not diminish any rights or benefits to which an employee of a governmental unit of this State is entitled under this section.
>
> (e) As a receiving agency, a governmental unit of this State may give the employee of the sending agency on a temporary assignment or exchange an exempt appointment and grant the employee rights and benefits as other exempt appointees of the receiving agency if it will benefit from the assignment or exchange.

[69] *Logan*, 151 Hawai'i at 362–63, 513 P.3d at 428–29.
[70] *Id.* at 363, 513 P.3d at 429.
[71] *Id.* at 363, 513 P.3d at 429.
[72] *Id.* at 363, 513 P.3d at 429.
[73] CCH section 7-2.4 (2020) provides:

Powers, Duties, and Functions of the Chiefs of Police. The chief of police shall be the administrative head of the police department and shall:

> (a) Be responsible for the preservation of the public peace, prevention of crime, detection and arrest of offenders against the law, protection of the rights of persons and property, and enforcement and prevention of violations of all laws of the state and ordinances of the county and all regulations made in accordance therewith.
>
> (b) Train, equip, maintain, and supervise the force of police officers and employees.
>
> (c) Promulgate rules and regulations for the organization and administration of the police force.
>
> (d) Make periodic reports to the police commission about the activities of the police department and about actions taken on cases investigated by the police commission.

deputize HPD and MPD officers.[74]

(e) Have such other powers, duties, and functions as may be required by the police commission or provided by law.

[74] *Logan*, 151 Hawai‘i at 363, 513 P.3d at 429.

In his reply brief, Flores, in addition to reiterating his arguments in his opening brief that HRS section 52D-5 created a private right of action, countered the police chief's contention that section 78-27 authorized mutual aid because the exercise of police powers is not a "right or benefit" conferred under the meaning of the statute.[75] Flores further argued that the chiefs of police "conspired to violate HRS [section] 52D-5" by agreeing to deploy HPD and MPD officers in Hawai‘i county prior to the governor's emergency declaration.[76] Because the agreement occurred before the emergency declaration, section 127A-12[77] was inapplicable.[78] Finally, Flores maintained that he satisfied the requirements for declaratory damages, despite not being arrested.[79]

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[75] *Id.* at 363, 513 P.3d at 429.

[76] *Id*. at 363, 513 P.3d at 429.

[77] HRS section 127A-12 (Supp. 2021) (amended 2017) provides in relevant part:

> Emergency management powers, in general.
>
> . . . .
>
> (b) The governor may exercise the following powers pertaining to emergency management:
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> . . . .
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> (4) Sponsor and develop mutual aid plans and agreements for emergency management between the State, one or more counties, and other governmental, private-sector, and nonprofit organizations, for the furnishing or exchange of food, clothing, medicine, and other materials; engineering services; emergency housing; police services; health, medical, and related services; firefighting, rescue, transportation, and construction services and facilities; personnel necessary to provide or conduct these services; and such other materials, facilities, personnel, and services as may be needed. The mutual aid plans and agreements may be made with or without provisions for reimbursement of costs and expenses, and on such terms and conditions as are deemed necessary;
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> . . . .
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> (c) The mayor may exercise the following powers pertaining to emergency management:
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> . . . .
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> (2) Sponsor and develop mutual aid plans and agreements for emergency management between one or more counties, and other governmental, private-sector, or nonprofit organizations, for the furnishing or exchange of food, clothing, medicine, and other materials; engineering services; emergency housing; police services; health, medical, and related services; firefighting, rescue, transportation, and construction services and facilities; personnel necessary to provide or conduct these services; and other materials, facilities, personnel, and services as may be needed. The mutual aid plans and agreements may be made with or without provisions for reimbursement of costs and expenses, and on terms and conditions as are deemed necessary[.]

[78] *Logan*, 151 Hawai‘i at 363, 513 P.3d at 429.

The International Municipal Lawyers Association, Inc. (IMLA), a non-profit professional organization that advocates on behalf of local governments,[80] submitted an amicus curiae brief in support of the chiefs of police.[81] The IMLA argued that the ICA should affirm the circuit court's decision because "mutual aid by law enforcement is an essential form of intergovernmental cooperation" that "enables jurisdictions to access additional resources when the need arises."[82] The IMLA contended that mutual aid is common practice both in Hawai'i and elsewhere in the United States.[83] The IMLA also argued that the state legislature expressly authorized mutual aid in HRS 78-27 and 127A.[84] Finally, the IMLA argued that section 52D-5 does not preclude the ability of the counties to provide mutual aid.[85]

The ICA affirmed the circuit court's decision.[86] While the ICA agreed with Flores that the case fell within an exception to mootness as both "capable of repetition, yet evading review" and of public interest,[87] "the ICA concluded that HRS [section] 52D-5 was neither implicated nor violated."[88] The ICA further held that section 78-27 authorized mutual aid, and thus, the temporary assignment of HPD and MPD officers was lawful.[89] Finally, the ICA held that while the agreement to send officers under section 52D-5 was inappropriate because it did not apply to the circumstances at hand, the agreement was otherwise authorized under a number of state and local

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[79] *Id*. at 363, 513 P.3d at 429.

[80] *About / Mission / History*, IMLA, https://imla.org/about-mission-history/ (last visited Sept. 20, 2022).

[81] *Logan*, 151 Hawai'i at 363, 513 P.3d at 429.

[82] *Id*. at 363, 513 P.3d at 429.

[83] *Id*. at 363, 513 P.3d at 429.

[84] *Id*. at 364, 513 P.3d at 430.

[85] *Id*. at 364, 513 P.3d at 430.

[86] *Id*. at 364, 513 P.3d at 430.

[87] Flores v. Ballard, 149 Hawai'i 81, 88, 482 P.3d 544, 551 (Ct. App. 2021), *aff'd, rev'd sub nom.* Flores v. Logan, 151 Hawai'i 357, 513 P.3d 423 (2022).

[88] *Logan*, 151 Hawai'i at 364, 513 P.3d at 430; *Ballard*, 149 Hawai'i at 89, 482 P.3d at 552.

[89] *Logan*, 151 Hawai'i at 365, 513 P.3d at 431; *Ballard*, 149 Hawai'i at 91, 482 P.3d at 554.

statutes,[90] including HRS sections 52D-3,[91] 52D-6, 78-27,[92] and CCH section 7-2.4(b).[93]

3. Hawai'i Supreme Court Unanimously Upheld ICA Decision Affirming Dismissal of Complaint

On April 22, 2021, Flores appealed the ICA's judgment to the Hawai'i Supreme Court.[94] In his application for certiorari, Flores raised several points of error, including whether the ICA erred in affirming the circuit court's order dismissing Flores's complaint.[95]

The Hawai'i Supreme Court affirmed in a unanimous decision.[96] Writing for the court, Justice Nakayama held that "the circuit court did not err when it dismissed Flores's complaint because there is no private right of action pursuant to HRS [section] 52D-5."[97] Further, the court held that the ICA correctly held that mutual aid between police departments is permitted under sections 78-27 and 127A-12.[98]

In finding no private right of action to sue under section 52D-5, the court noted that "requirements imposed by statutes do not necessarily give rise to a private right of action."[99] The courts use a three-part test to determine if "a private remedy is implicit in a statute not expressly providing one."[100] First, the court asked if Flores was a member of the class for whose special benefit the statute was enacted.[101] Relying on legislative history, the court found that he was not, reasoning that the statute was enacted to "provide continuity to police investigations from one county jurisdiction to another" and "does not contemplate a private citizen bringing a claim against the [c]hiefs of [p]olice for a violation of the statute."[102] Second, the court asked if there was

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[90] *Logan*, 151 Hawai'i at 365–66, 513 P.3d at 431–32; *Ballard*, 149 Hawai'i at 92, 482 P.3d at 555.

[91] HRS section 52D-3 (2012) provides: "Powers and duties of chief of police. The chief of police shall have the powers and duties as prescribed by law, the respective county charter, and as provided by this chapter."

[92] HRS section 52D-6 (2012) provides: "Police force; employees. The chief of police may appoint officers and other employees under such rules and at such salaries as are authorized by law. Probationary appointment, suspension, and dismissal of officers and employees of the police department shall be as authorized by law."

[93] CCH § 7-2.4. For full text, *see supra* note 73.

[94] *Logan*, 151 Hawai'i at 358, 366, 513 P.3d at 424, 432.

[95] *See id.* at 358, 367, 513 P.3d at 424, 433.

[96] *See id*. at 358, 513 P.3d at 424.

[97] *Id*. at 358, 513 P.3d at 424.

[98] *Id*. at 358, 370, 513 P.3d at 424, 436.

[99] *Id.* at 368, 513 P.3d at 434 (quoting Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 405, 391 P.3d 1, 12 (2017)).

[100] *Id.* at 368, 513 P.3d at 434 (quoting Whitey's Boat Cruises v. Napali-Kauai Boat Charters, 110 Hawai'i 302, 312, 132 P.3d 1213, 1223).

[101] *Id.* at 368, 513 P.3d at 434.

[102] *Id.* at 369, 513 P.3d at 435.

legislative intent to create or deny a private right of action.[103] Finding no explicit indication of intent in the language of the statute or the legislative history, the court found that Flores failed to show strong evidence of an implicit right of action.[104] Third, the court asked if implying a private right of action was inconsistent with the legislative purpose.[105] The court found that it was, reasoning that "allowing a private individual to sue police chiefs would interfere with the ability of police from different jurisdictions to cooperate and provide continuity to police investigations."[106]

In holding that mutual aid between police departments was permitted, the court rejected Flores's contention that "both prongs of HRS [section] 52D-5 [be] satisfied, meaning that (1) the officer is pursuing an investigation, originating in the 'sending' jurisdiction and (2) the chief of police of the 'receiving' jurisdiction consents."[107] The court reasoned that the statute should be read as specifying only one among many scenarios in which mutual aid is permissible.[108] The court further supported its conclusion with the policy arguments raised by the IMLA in its amicus brief that mutual aid is of practical necessity.[109]

III. HAWAIʻI SUPREME COURT DECISION RISKS DISPARATELY IMPACTING NATIVE HAWAIIANS

While its analysis was sound, the Hawaiʻi Supreme Court's decision in *Flores* failed to adequately consider how marginalized communities could be adversely impacted by permitting police mutual aid outside of emergency declarations. Instead, the court focused on the valid state interests in permitting the expansive use of mutual aid agreements while ignoring the potential decrease in police accountability, thereby increasing the potential for interactions between police and Native Hawaiians, who are already disparately impacted by the Hawaiʻi criminal justice system.

The court's decision relied generally on a textual interpretation of the relevant laws, HRS sections 52D-5, 78-27, and 127A-12.[110] This approach

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[103] *Id.* at 369, 513 P.3d at 435.

[104] *Id.* at 369, 513 P.3d at 435 (explaining that the standard for an implicit intention under *Hungate* is strong evidence).

[105] *Id.* at 369, 513 P.3d at 435.

[106] *Id.* at 369, 513 P.3d at 435.

[107] *Id.* at 370, 513 P.3d at 436.

[108] *See id.* at 370, 513 P.3d at 436.

[109] *Id.* at 370, 513 P.3d at 436 ("[T]he IMLA pointed out, mutual aid is an important tool to enable state agencies 'to access additional resources when the need arises[ ]' and helps facilitate a timely response to emergencies.").

[110] *See id.* at 370, 513 P.3d at 436.

reflects a type of formalist legal decisionmaking that tends to exclude or minimize extratextual sources in an attempt to make the law both more autonomous and objective.[111] Critical legal scholars have pointed out the limitations of this formalist approach, specifically questioning its efficacy in providing justice and addressing cultural harms.[112]

As an alternative to formalism, a contextual legal analysis examines the context and setting in which a legal problem arises.[113] A contextual analysis explicitly assesses the actual results of the legal decision, including who will benefit and who will be harmed.[114] Often, a contextual inquiry is necessary to "fully and accurately assess both the legal and justice impacts of [judicial] decisions on the people and communities involved, as well as society at large."[115] For these reasons, the contextual legal analysis is an appropriate and familiar framework for courts to apply in cases affecting the Native Hawaiian community.[116]

A. Hawai'i Supreme Court Endorsed Valid State Interests in Permitting Expansive Use of Mutual Aid Agreements

When the Hawai'i Supreme Court affirmed the ICA's decision upholding the circuit court's dismissal of Flores's complaint in favor of the chiefs of police of Hawai'i, Maui, and Honolulu counties, the court endorsed the State's legitimate interest in expansive mutual aid agreements.[117] Justice Nakayama's majority opinion makes only a brief mention of those policy

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[111] *See* Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999).

[112] *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, 155–56 (2011) ("[L]egal formalism's failure to fully consider social and historical context, politics, culture, and a myriad of other social factors impedes both the courts' capacity to render just decisions and the general public's understanding of the law's role in shaping society.").

[113] JUAN F. PEREA ET AL., RACES AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 3 (3d ed. 2014).

[114] *See, e.g.*, Eric K. Yamamoto et al., *Contextual Strict Scrutiny*, 49 HOWARD L. J. 241, 244 (2006) (discussing the application of contextual analysis to strict scrutiny for equal protections analysis).

[115] Sproat, *supra* note 112, at 170–71 (internal quotations omitted); *see* Charles R. Lawrence II., *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987) (proposing that courts "analyze governmental behavior . . . by considering evidence regarding the historical and social context in which the decision was made and effectuated").

[116] Sproat, *supra* note 112, at 170 n. 221 ("Without expressly saying so, the Hawai'i Supreme Court has employed a version of contextual legal analysis that has been especially attentive to politics, economics, and culture, both historically and in terms of current conditions."); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 368–388 (1987) (advancing Native Hawaiian claims for reparations by "looking to the bottom").

[117] *See Logan*, 151 Hawai'i at 370, 513 P.3d at 436.

interests in her analysis of the law apart from a brief treatment of the argument raised by the IMLA's amicus brief.[118] In concluding that "Flores's interpretation that HRS [section] 52D-5 limits all out-of-county police action and mutual aid is without merit," the court briefly comments upon the policy underpinning mutual aid agreements:

> Flores's interpretation ignores the practical need for mutual aid – a necessity that the Legislature recognized and provided for in other statutes. *See* HRS § 78-27 (providing for the temporary inter-governmental assignment of employees by agreement); HRS § 127A-12 (vesting county mayors with authority to "develop mutual aid plans and agreements for emergency management" between counties for the provision of necessary services, including police services). Furthermore, as the IMLA pointed out, mutual aid is an important tool to enable state agencies "to access additional resources when the need arises[]" and helps facilitate a timely response to emergencies.[119]

The brevity of the court's treatment of the policy implications of its decision belies its significance. The centrality of these policy arguments is embedded in the court's dual holdings: by continuing on to its analysis upholding the use of mutual aid agreements, the court ruled beyond what was strictly required to affirm the ICA's and circuit court's decisions.[120] Once the court had reached the conclusion that Flores was not entitled to the declaratory relief he sought because he lacked a private right of action under section 52D-5, no further analysis was required to hold that the "circuit court properly granted the Chiefs of Police's Motion to Dismiss" for failure to state a claim.[121]

Indeed, the court appears to acknowledge that no further analysis was required of it or the ICA once that conclusion was reached in the opening sentence of its analysis of the permissibility of mutual aid agreements between county police departments: "[a]lthough the ICA could have affirmed the circuit court's Order Granting Motion to Dismiss because HRS [section] 52D-5 does not create a private right of action, the ICA correctly determined

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[118] *See id*. at 363–64, 513 P.3d at 429–30.

[119] *Id*. at 370, 513 P.3d at 436 (alteration in original).

[120] As noted by the ICA in *Flores v. Ballard*, "[i]n our de novo review we 'may affirm a grant of summary judgment on any ground appearing in the record, even if the circuit court did not rely upon it.'" 149 Hawai'i 81, 88, 482 P.3d 544, 551 (Ct. App. 2021) (quoting Tauese v. State, Dep't of Lab. & Indus. Rels., 113 Hawai'i 1, 15 n.6, 147, P.3d 785, 799 n.6 (2006) (citations omitted)); *see also Logan*, 151 Hawai'i at 364 n.18, 513 P.3d at 430 n.18.

[121] *See Logan*, 151 Hawai'i at 370, 513 P.3d at 436.

that mutual aid between different counties is permitted."[122] Because the court was not obligated to reach this holding and rule on the permissibility of mutual aid agreements between county police departments, that it nevertheless chose to do so is significant and merits interrogation.

The State has valid interests in allowing mutual aid agreements between agencies, including police departments.[123]

> Mutual aid relationships are essential to fulfilling a governmental entity's preparedness obligations. No single governmental agency or entity is equipped to respond to all possible incidents, especially large scale incidents that might occur within its jurisdiction. Likewise, each jurisdiction must be prepared to contribute its resources to local, regional, and statewide preparedness efforts.[124]

In fact, mutual aid is considered of such vital importance that increasingly "[i]ntergovernmental . . . cooperation is also becoming a legal requirement."[125]

Such mutual agreements generally serve two important functions: to "allow for emergency back-ups, or to authorize a municipal officer to complete a traffic or criminal chase begun in his or her own territory."[126] This latter function is explicitly permitted under section 52D-5, Hawai'i's hot or fresh pursuit statute.[127] Perhaps surprisingly,[128] the Hawai'i Supreme Court read section 52D-5 in *Flores* as not limiting the scope of permissible

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[122] *Id*. at 370, 513 P.3d at 436.

[123] *Id*. at 370, 513 P.3d at 436; *see, e.g.*, Alan D. Cohn, *Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response*, 37 URB. LAW. 1, 4 (2005).

[124] Cohn, *supra* note 123.

[125] *Id*. The 2004 Office for Domestic Preparedness (ODP) Homeland Security Grant Program

> "encouraged [states] to employ regional approaches to planning and preparedness and to adopt regional response structures whenever appropriate" to meet identified homeland security needs. Moreover, states are required to report to ODP the establishment and maintenance of mutual aid agreements. Indeed, legislation was introduced in the 108th Congress mandating intergovernmental and interdisciplinary cooperation, and encouraging regional cooperation and preparedness efforts.

Id.

[126] Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 133 (2003).

[127] HAW. REV. STAT. § 52D-5 (2012).

[128] Perhaps surprisingly because the court's ostensible interpretation of the plain language of the statute seems to run afoul of the "*expressio unius est exclusio alterius*" canon of interpretation, which draws a negative inference between what is stated in a statute and what is not: the expression of one thing implies the exclusion of the other. *See* 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2022).

agreements between police departments, implying that a "plain language" reading of the statute extends authorization to allowing aid in emergency situations as well.[129] While this latter function is most applicable to the facts of *Flores*, the mutual aid agreement between the police chiefs was not written, or in effect, during the emergency declaration issued by Governor Ige.[130]

Mutual aid agreements between counties are perhaps more essential in Hawai'i than in any other state, given the unique constraints of its geography and demographics. Because the population of Hawai'i is concentrated so heavily on the island of O'ahu, the City and County of Honolulu benefits from an outsized proportion of the resources within the state.[131] This means that the less populous neighbor islands have a smaller share of resources at their disposal when responding to an emergency.[132] Permitting counties to provide mutual aid allows for a more efficient distribution of resources in times of need, ensuring that no county is forced to bear the full brunt of natural disasters, such as volcanic eruptions or hurricanes, alone.[133]

This same disparity in access to resources, however, also gives rise to important countervailing considerations, including the potential for the unprincipled use of neighbor island police forces, police accountability, and the disparate impact of police on marginalized communities. This discrepancy especially affects Native Hawaiians, who are already subject to disparate treatment and elevated risk of use of force by law enforcement.[134]

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[129] *See* Flores v. Logan, 151 Hawai'i 357, 370, 513 P.3d 423, 436 ("[N]othing in the plain language of HRS [section] 52D-5 indicates that the statute identifies the only scenario in which a police officer may exercise police authority in another jurisdiction. Rather, HRS [section] 52D-5 describes a specific scenario in which it is permissible for a chief of police or an authorized subordinate to exercise the authority of the sending county in another county.").

[130] @GovHawaii, *supra* note 47.

[131] According to the most recent census data, of the 1,455,271 people living in Hawai'i, nearly 70 percent live in Honolulu County (1,016,508). *Hawaii: 2020 Census*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/hawaii-population-change-between-census-decade.html/. The rest are dispersed between the four other counties: Hawai'i County with 13.8% or 200,629 people; Maui County with 11.3% or 164,754 people; Kaua'i County with 5% or 73,298 people; and Kalawao with only 82 people total. *Id.* HPD had a budget of $309.88 million for 2020, which was roughly double the combined budgets of the other counties (HCPD, $67.45 million; MPD, $57.82 million; and KPD, $37.69 million). *Hawaii*, POLICE SCORECARD, https://policescorecard.org/hi/ (last visited Oct. 9, 2022).

[132] *See* POLICE SCORECARD, *supra* note 131.

[133] *See* Cohn, *supra* note 123.

[134] *See* discussion *infra* Parts III.C–D.

B. Flores Gives Police Chiefs Undue Discretion in Deploying Mutual Aid Operations

The county police chiefs executed the mutual aid agreement – and HPD and MPD officers arrived at Pu'u Huluhulu – prior to Governor Ige's emergency declaration.[135] Holding that mutual aid between police departments was permitted in these circumstances effectively authorizes police chiefs to deploy joint forces within the State regardless of county jurisdiction.[136] This grants the same executive discretion to unelected county police chiefs that the emergency management statute explicitly reserves for the governor.[137] Affording this discretion to the police chiefs is contrary to the State's own position "that the determination of the existence of an emergency is for the governor and the governor alone to make."[138] Further, by holding that there is no private action under section 52D-5, the court has denied private citizens of any meaningful opportunity for judicial review.[139]

This level of unchecked authority is particularly problematic in the context of *Flores*, which centers on one of the largest inter-island police operations in recent history.[140] In defense of their actions, police officials emphasized the history of interagency cooperation between the departments.[141] But previous coordinated efforts have typically been limited to such operations as targeted drug busts and responses to natural disasters.[142] The challenged action in *Flores* involved the deployment of HPD and MPD officers, at the request of the Hawai'i County Police Chief, to remove the kia'i, and clear the roadway for the movement of heavy equipment necessary to the construction of the TMT.[143] Even after the governor issued his emergency proclamation, other government officials expressed their doubts as to

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[135] Flores v. Logan, 151 Hawai'i 357, 359–60, 513 P.3d 423, 425–26.

[136] *See id*. at 359–60, 513 P.3d at 425–26.

[137] *See* HAW. REV. STAT. § 127A-12.

[138] Arguing the validity of the governor's emergency proclamation before the circuit court, Craig Iha, counsel with the State Department of the Attorney General said, "We're not saying there is no review at all . . . . What we're arguing is that the determination of the existence of an emergency is for the governor and the governor alone to make." *Court Weighs Suspending Mauna Kea Emergency Proclamation; Honolulu Police Recalled to Oahu*, KHON2 (July 25, 2019, 11:50 AM) [hereinafter *Court Weighs Suspending Mauna Kea Emergency Proclamation*], https://www.khon2.com/always-investigating/court-weighs-suspending-mauna-kea-emergency-proclamation-honolulu-police-recalled-to-oahu/.

[139] *See Logan*, 151 Hawai'i at 367–70, 513 P.3d at 433–36.

[140] *See Court Weighs Suspending Mauna Kea Emergency Proclamation*, *supra* note 138.

[141] *Lieutenant Governor Visits Mauna Kea Protestors*, HAW. PUB. RADIO (July 22, 2019, 4:16 PM) [hereinafter *Lieutenant Governor Visits Mauna Kea Protestors*], https://www.hawaiipublicradio.org/local-news/2019-07-22/lieutenant-governor-visits-mauna-kea-protesters.

[142] *See Court Weighs Suspending Mauna Kea Emergency Proclamation*, *supra* note 138.

[143] *See Lieutenant Governor Visits Mauna Kea Protestors*, *supra* note 141.

whether the situation on Maunakea qualified as a state of emergency.[144] Unfortunately for Flores, the court did not find it necessary to interrogate the motive or necessity for the interdepartmental agreements.[145] In its hesitancy to place stringent limits on mutual aid operations between police departments, the court may have removed any barrier to county police departments operating outside of their respective jurisdictions.[146]

C. Police Accountability Is Compromised When Officers Operate Outside of Their Jurisdiction

The court's broad approval of mutual aid between police departments raises the issue of police accountability.[147] Accountability has been central to recent national protests against police violence, particularly against people of color and marginalized groups, and has spurred many states and localities to introduce transformative accountability legislation.[148] One important element to police accountability is the long-term assignment of officers to specific geographic areas.[149] Proponents of geographic deployment plans argue that officers deployed to the same neighborhood over a long period of time have more contact with the citizens they are policing and thus are able to form a stronger relationship with them.[150]

Compared to a majority of police departments in the nation, Hawai'i's police departments are distinct because all police officers work in the same county in which they live.[151] In other states, many have called for residency

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[144] Honolulu City Councilmember Heidi Tsuneyoshi expressed doubts about the need for HPD officers on Hawai'i Island and filed Resolution 19-169 demanding details on the operation. *Court Weighs Suspending Mauna Kea Emergency Proclamation*, *supra* note 138.

[145] *See* Flores v. Logan, 151 Hawai'i 357, 367–70, 513 P.3d 423, 433–36.

[146] *See id.* at 367–70, 513 P.3d at 433–36; *Arguments*, *supra* note 9.

[147] *See*, *e.g.*, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., COMMUNITY POLICING DEFINED 9 (2014) [hereinafter COMMUNITY POLICING DEFINED], https://cops.usdoj.gov/RIC/Publications/cops-p157-pub.pdf/.

[148] *The Changing Landscape of Policing*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/george-floyd-anniversary/ (last visited Oct. 8, 2022) (providing a brief description and index of state and city improvements that "strengthen accountability for law enforcement, and work to create fundamental changes to public safety systems"). Notably, then chief of the Honolulu Police Department, Susan Ballard, told the Police Commission in 2020 that she hoped that Hawai'i would be exempt from the broad police reform sweeping the nation. Anita Hofschneider, *Honolulu Police Chief Hopes Nationwide Reform Movement Skips Hawaii*, HONOLULU CIV. BEAT (June 19, 2020), https://www.civilbeat.org/2020/06/honolulu-police-chief-hopes-nationwide-reform-movement-skips-hawaii/.

[149] COMMUNITY POLICING DEFINED, *supra* note 147, at 7.

[150] *Id.*

[151] "On average, among the 75 U.S. cities with the largest police forces, 60 percent of police officers reside outside the city limits." Nate Silver, *Most Police Don't Live in the Cities*

requirements compelling officers to live in the communities where they work.[152] Proponents of local policing believe that officers who live and work in the same community "tend to be more productive in engaging with the community, have a better understanding of the needs of the citizens . . . , [are] more invested in the municipality in which they live and work, [and] make neighborhoods safer to live . . . ."[153]

The value of local policing was powerfully displayed in the interaction between DOCARE Hawai‘i Island Branch Chief Lino Kamakau and the kūpuna, and other kia‘i gathered at Pu‘u Huluhulu on the morning of July 17, 2019.[154] Visibly emotional, Chief Kamakau communicated his empathy for the kia‘i and his personal reluctance to arrest the kūpuna standing in defiance to the TMT development.[155] In a later news release, Kamakau expressed the value of the communal connection between local officers and kia‘i, stating that "long after all the other officers from other places have departed, we'll still be here."[156]

The subsequent arrests were conducted calmly and respectfully.[157] The arresting officers were largely DOCARE officers local to Hawai‘i Island.[158] In many cases, the officers were friends or family with the kūpuna they were arresting.[159] During a pause in the arrests that morning, state officials praised the peaceful behavior of law enforcement and kia‘i alike.[160]

They Serve, FIVETHIRTYEIGHT (Aug. 20, 2014, 4:14 PM), https://fivethirtyeight.com/features/most-police-dont-live-in-the-cities-they-serve/.

[152] *See Should Police Officers Be Required to Live in the City They Serve?*, WNYC STUDIOS: THE TAKEAWAY (Sept. 17, 2020), https://www.wnycstudios.org/podcasts/takeaway/segments/police-officers-live-city-they-serve/.

[153] DANIEL VILLA, MEASURING THE IMPACT OF RESIDENCY REQUIREMENTS AND RELATIONSHIP WITH THE CITIZENS OF IN THE COMMUNITY 50 (June 2021) (Ed.D. capstone, DePaul University), https://via.library.depaul.edu/soe_etd/215/. *But see* Grace Hauck & Mark Nichols, *Should Police Officers Be Required to Live in the Cities They Patrol? There's No Evidence It Matters*, USA TODAY (June 13, 2020, 4:00 AM), https://www.usatoday.com/story/news/nation/2020/06/13/police-residency-data/5327640002/ (suggesting that residency requirements may be less impactful than previously thought).

[154] *See Courage, Compassion & Aloha on Maunakea*, *supra* note 40.

[155] *See id.*

[156] *Veteran Hawai‘i Island Law Enforcement Commander on Front Lines of Dialog and Diplomacy*, HAW. DEP'T LAND & NAT. RES. (July 22, 2019), https://dlnr.hawaii.gov/blog/2019/07/22/nr19-137/. Kamakau continued, "[m]any of these people are our blood relatives and in nearly all cases members of our island ohana. This is why it is so important that we continue to show respect and kindness on both sides." *Id.*

[157] *See Another Truce*, *supra* note 40.

[158] *Id.*

[159] *Id.*

[160] *See id.*

The somber yet courteous mood of that morning abruptly changed upon the arrival of HPD and MPD officers in full riot gear.[161] An assembly of 56 HPD and 27 MPD officers equipped with batons, helmets, and pepper spray marched towards the kiaʻi.[162] A blockade of 150 women, all prepared to be arrested, confronted the extra-county officers as they attempted to clear the access road.[163] Deputy Attorney General Craig Iha later stated that officers were prepared to use tear gas against kiaʻi if necessary.[164] This escalated tension between officers and kiaʻi reflected the precise danger that Flores predicted may result when off-island police operate outside of their home county.[165]

Mutual aid among the counties further dilutes accountability because it is not always clear to whom officers report and under whose authority they operate.[166] On Maunakea, the officers were reportedly taking orders from both the State and the Hawaiʻi County police.[167] Directions were sometimes unclear.[168] With multiple agencies operating under a "unified command," news reports suggested that miscommunication among the agencies was a regular occurrence.[169]

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[161] *See id.*

[162] *See* Mahealani Richardson, *Officers: Police Plans to Arrest TMT Protestors, Clear Road Abruptly Fell Through*, HAW. NEWS NOW (Aug. 13, 2019, 8:40 AM) , https://www.hawaiinewsnow.com/2019/08/13/frontline-hpd-officer-describes-tmt-protest-mauna-kea/.

[163] *Id.*

[164] Blaze Lovell, *Can the Thirty Meter Telescope Survive Growing Opposition?*, HONOLULU CIV. BEAT (July 22, 2019), https://www.civilbeat.org/2019/07/can-the-thirty-meter-telescope-survive-growing-opposition/.

[165] Plaintiff-Appellant's Opening Br., at 24, Flores v. Ballard, 149 Hawaiʻi 81, 482 P.3d 544 (Ct. App. 2021) (No. CAAP-19-841). Flores' opening brief to the ICA provides:

> One of the evils of having an off island police officer go beyond his or her territory is that since they are not policing in their home county, they are less likely to treat the off island community with the same deference and respect as their home county. In other words, Plaintiff-Appellant asserts that an off island county police officer is more likely [to] violate the rights of individuals beyond his county unless there is some nexus to his or her presence, i.e. a continuation of an investigation from his/her home county.
>
> *Id.*

[166] Richardson, *supra* note 162.

[167] *Id.*

[168] *See id.* On the day in question, officers operating under orders to clear the road were suddenly ordered to retreat. The reasons for the abrupt change in plans remain unclear, but some members of law enforcement believe that the decision was political. *Id.*

[169] *See id.*

These problems can be exacerbated when police from different agencies are not held to the same standards or provided with the same training to deal with the communities that they are policing.[170] This is a real concern in Hawai'i, where the State has fallen behind the rest of the nation in setting statewide law enforcement standards.[171] As the last state to put together a statewide law enforcement standards board, Hawai'i is already behind on training and certification standards.[172] Advocates for police accountability have called for police agencies to streamline expectations across all islands and departments.[173] The ACLU of Hawai'i has expressed specific concerns about the lack of adequate law enforcement standards and the impact on accountability, particularly within a system that allows for unchecked police power.[174] In the absence of meaningful statewide law enforcement standards, allowing police agencies to operate outside of their jurisdiction under mutual aid agreements may open the door to police abuse and disparate treatment of marginalized communities.[175]

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[170] *See* COMMUNITY POLICING DEFINED, *supra* note 147, at 8.

[171] Gina Mangieri, *Hawaii Law Enforcement Standards Board Behind As Nation Turns Focus on Policing*, KHON2 (June 3, 2020, 10:39 AM), https://www.khon2.com/always-investigating/hawaii-law-enforcement-standards-board-behind-as-nation-turns-focus-on-policing/. After years of no funding, the 2022 Hawaii State Legislature considered two companion measures to provide necessary funds and resources for the Law Enforcement Standards Board. Blaze Lovell, *Hawaii Lawmakers Advance Measures to Fund the Police Standards Board*, HONOLULU CIV. BEAT (Mar. 2, 2022), https://www.civilbeat.org/2022/03/hawaii-lawmakers-advance-measures-to-fund-the-police-standards-board/. Both measures, however, were deferred. S.B. 1046, S.D. 2, 31st Leg., Reg. Sess. (Haw. 2021); H.B. 892, H.D. 2, S.D. 1, 31st Leg., Reg. Sess. (Haw. 2021).

[172] *Id.*

[173] *Id.*

[174] *Id.* ACLU of Hawai'i's then-policy director Mandy Fernandes said in a statement to the press:

> Uniform standards for law enforcement are the absolute bare minimum and the tip of the iceberg of reforms needed to dismantle a system of racist policing that exists in Hawaii and across the country . . . . The police have an immense amount of authority over tasks that would be more appropriate in the hands of other government agencies or community partners. The public deserves accountability, and for that we need to replace our existing system of unfettered deference to police with one that checks police power and fosters full transparency.

Id.

[175] *See id.*; Flores v. Logan, 151 Hawaii 357, 370, 513 P.3d 423, 436; OFF. HAWAIIAN AFFS., THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM (2010) [hereinafter 2010 OHA REPORT], https://www.oha.org/wp-content/uploads/2014/11/es_final_web_0.pdf/.

D. Native Hawaiians Are Disparately Impacted by and Disproportionately Represented in Hawai'i's Criminal Justice System

The possible diminution of police accountability during extra-jurisdictional police actions in opposition to the protests by marginalized peoples seeking to enforce their legitimate rights must be understood in the context of the disparate impact of the criminal justice system on those communities.[176] This is particularly true for Native Hawaiian communities that, by virtue of their dual status as a marginalized community with constitutionally protected rights and interests in the land, are likely to find themselves repeatedly on the receiving end of police action while acting to protect and exercise those rights.[177] Given the likelihood that disputes over land will continue as competition for limited space increases as a result of urbanization, gentrification, and climate change, interactions between Native Hawaiian protesters seeking to vindicate their rights and the police seeking to enforce the interests of developers and private landowners are likely to only become more fraught.[178] Because *Flores* allows neighbor-island police to become embroiled in otherwise local disputes through the approval of mutual aid agreements in non-emergency contexts, it runs the risk of reducing police accountability, thereby increasing the likelihood of negative interactions between the police and the Native Hawaiian community.[179]

As things stand today, Native Hawaiians already suffer disparately within the Hawai'i criminal justice system.[180] Interactions between Native Hawaiians and the criminal justice system are more likely to result in

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[176] *See, e.g.*, *Dozens Gather in Waikiki to Protest 2 Police Shootings*, ASSOCIATED PRESS (Apr. 19, 2021), https://apnews.com/article/shootings-police-hawaii-crime-honolulu-73e78a5e3f010dcaea710b4faad07807/.

[177] *See generally* Perry, *supra* note 24 (underscoring how Governor Ige and University of Hawai'i President Lassner used police to unlawfully obstruct Native Hawaiians' opportunity to access Maunakea and the telescopes, curtailing rights afforded under article XII, section 7 of the Hawai'i Constitution).

[178] *See* Christina Jedra, *With Eye on Mauna Kea, Oahu Isn't Letting Protestors Stop Unpopular Projects*, HONOLULU CIV. BEAT (Oct. 21, 2019), https://www.civilbeat.org/2019/10/with-eye-on-mauna-kea-oahu-isnt-letting-protestors-stop-unpopular-projects/. In the months following the confrontation on Maunakea, Honolulu police acted quickly to arrest protestors and tamp down opposition to proposed development. *Id.* In Waimānalo, HPD handcuffed 28 protestors opposing the construction of a ball field over what is believed to be a burial site. *Id.* In Kahuku, HPD arrested 55 protestors who blocked the road in opposition of the proposed Nā Pua Makani wind farm project. *Id.*

[179] *See* discussion *supra* Part III.C.

[180] Lezlie Kī'aha, *Thinking Outside the Bars: Using Hawaiian Traditions and Culturally-Based Healing to Eliminate Racial Disparities Within Hawai'i's Criminal Justice System*, 17 ASIAN-PAC. L. & POL'Y J. 1, 11–12 (2016).

negative outcomes than for other racial and ethnic groups.[181] On O'ahu, for example, despite making up only 25 percent of the population, Native Hawaiians "were the subjects in more than a third of the incidents involving police use of force in 2019," according to the HPD's annual use of force report.[182] The decision to deploy a multi-county police presence in opposition to the protests on Maunakea played out in this context of "significant racial disparities" in the use of force by police.[183]

These patterns of racial disparities in interactions with the criminal justice system are replicated statewide: according to a 2010 report by the Office of Hawaiian Affairs, Native Hawaiians, who constitute only about 24 percent of the population statewide, make up 27 percent of the arrests and 39 percent of the incarcerated population.[184] While this disparate treatment impacts both Native Hawaiian men and women, Native Hawaiian women bear the brunt of its effect.[185]

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[181] *See* 2010 OHA REPORT, *supra* note 175.

[182] Christina Jedra & Anita Hofschneider, *'Significant' Disparity in Use of Force Questioned by Honolulu Police Commission*, HONOLULU CIV. BEAT (Feb. 3, 2021), https://www.civilbeat.org/2021/02/significant-disparity-in-use-of-force-against-some-groups-questioned-by-honolulu-police-commission/. HPD defines the use of force as "anything beyond a routine handcuffing." *Id.* (internal quotations omitted).

[183] Anita Hofschneider, *Report: Honolulu Police Use of Force Increased Last Year*, HONOLULU CIV. BEAT (Nov. 11, 2020), https://www.civilbeat.org/2020/11/report-honolulu-police-use-of-force-increased-last-year/.

[184] 2010 OHA REPORT, *supra* note 175, at 8. More recent data from a 2018 prison reform task force report suggests that this trend has not improved. Yoohyun Jung, *New Ideas for Transforming Hawaii's Prisons*, HONOLULU CIV. BEAT (Sept. 23, 2019), https://www.civilbeat.org/2019/09/new-ideas-for-transforming-hawaiis-prisons/ (reporting a 3 percent decrease in Native Hawaiians as a proportion of the population but only a 2 percent decrease in the rate of incarceration). *But see* Kī'aha, *supra* note 180, at 11 (citing criminal justice advocates estimating that Native Hawaiians make up closer to 60 percent of the incarcerated population).

Apart from other indigenous groups, Native Hawaiians are more likely to be sentenced to prison than any other group. 2010 OHA REPORT, *supra* note 175, at 8. When controlling for age, gender, and type of charge, a Native Hawaiian was 50% more likely to receive a prison sentence if judged guilty than a White defendant. *Id*. Further, when sentenced to prison or to probation, Native Hawaiians receive longer sentences than most other racial or ethnic groups. *Id.* Compared to a White defendant, Native Hawaiians spend 11 days longer in prison and 21 days longer on probation. *Id.* Similarly, when released on parole, Native Hawaiians are among the most likely to have their parole revoked, resulting in reincarceration. *Id.* at 10.

[185] *Id.* at 9. Hawai'i has the dubious distinction of having the "largest proportion of its population of women in prison," and Native Hawaiian women are disproportionately represented amongst them. *Id.* Recognizing the intergenerational trauma resulting from the incarceration of women, who often serve as the primary caregivers in their families and communities, the Hawai'i Judiciary is currently working to create a Women's Court to help divert eligible offenders from prisons into treatment and education programs instead. *See* Alicia Lou, *Hawaii Will Soon Have a Women's Court in an Effort to Reduce Recidivism*, HONOLULU CIV. BEAT (July 24, 2022), https://www.civilbeat.org/2022/07/hawaii-will-soon-have-a-womens-court-in-an-effort-to-reduce-recidivism/. This initiative, backed by the

The collateral consequences of these high rates of incarceration among Native Hawaiians serve to further dispossess an already marginalized community.[186] *Flores* exacerbates this problem by increasing the risk of

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Women's Prison Project and the Hawai'i Women's Legislative Caucus, follows the success attributed in part to the newly established Girl's Court to reduce the number of girls incarcerated at the Hawai'i Youth Correctional Facility to zero for the first time in its history. *See id.*; Megan Tagami, *The Hawaii Youth Correctional Facility Has No Girls. Can It Do the Same for Boys?*, HONOLULU CIV. BEAT (June 23, 2022), https://www.civilbeat.org/2022/06/the-hawaii-youth-correctional-facility-has-no-girls-can-it-do-the-same-for-boys/.

[186] 2010 OHA REPORT, *supra* note 175, at 12. As the report explains,

> [i]mprisonment and conviction carries with it a set of collateral consequences that extend well beyond the sentence imposed by the court. Many Hawaiians coming out of the criminal justice system are denied the opportunity to finish school; they lose or cannot obtain a driver's license; they cannot find stable employment; and they are simply unable to support their families. These collateral consequences push the limits of "punishment to fit the crime" and effectively deprive a person convicted of an offense of any second chance at effectively living in, and contributing to, a community.

Id.

> The collateral consequences of incarceration, however, extends well beyond the economic and can reach into the very heart of the family:
> Hawai'i is also unique in that state law allows family courts to terminate parental rights when a child has been removed from a parent. In addition, people with a criminal history are not permitted to become foster or adoptive parents, and simply living with, or being married to, a person convicted of a crime limits the individual family rights. Oftentimes, as a subsequent result of an incarceration, the entire family unit suffers collateral damage. In this type of policy environment, "penal and welfare practices attempt to shift the responsibility for structural disadvantage onto individuals in marginalized populations, while extending the state's power to police families among a broader network of kin." Thus, the entirety of the family unit that is the backbone of Native Hawaiian society, becomes weakened through the loss of even one member. For a population that diverges from the traditional westernized nuclear family structure to depend so heavily on extended community, an incarceration is a devastating loss felt far beyond the incarcerated individual.

John Taschner, *Native Hawaiians' Disproportional Incarceration Rates Leading to Disproportional Jail Deaths*, 21 J.L. SOCIETY 93, 103 (2021).

Perhaps more insidious still, 29 percent of Hawai'i's incarcerated population is incarcerated out of state because of the chronic levels of overcrowding in Hawai'i's prison system. 2010 OHA REPORT, *supra* note 175, at 9. *See generally* Kevin Dayton, *Hawaii Oversight Commission Finds 'Unacceptable' Conditions At the Crowded Hilo Jail*,

disparate treatment by neighbor-island police acting through mutual aid agreements, where accountability is less clearly established, and by facilitating the use of the overwhelming power of the State to bear upon an already marginalized group.[187] Such disproportionate responses may contribute towards a more acrimonious relationship between Native Hawaiian activists and the State, resulting in escalating tactics on both sides, further incarceration, and increased marginalization of Native Hawaiians in their ancestral lands.[188]

IV. CONCLUSION

The Hawai'i Supreme Court in *Flores* approved an expansive view of mutual aid agreements between governmental agencies, including between the county police departments in non-emergency contexts. In so doing, the court explicitly endorsed the valid State interests in permitting such agreements, including the efficient distribution of resources. The court declined to find a private right of action to challenge such agreements, denying an important means by which police actions could be held accountable by the public. By contrast, the court gave little attention to the impact that such mutual aid agreements could have on marginalized communities in Hawai'i. Native Hawaiians, who already are disparately treated within the criminal justice system and who suffer disproportionate incarceration, are likely to be disparately and disproportionately impacted by such agreements, particularly in the context of protests over land rights similar to the Maunakea protests at issue in *Flores*. Allowing mutual aid agreements without additional oversight risks undermining police accountability as police officers operate beyond their local jurisdiction and without the community engagement required to build a relationship of trust and respect.

HONOLULU CIV. BEAT (Sept. 2, 2022), https://www.civilbeat.org/2022/09/hawaii-oversight-commission-finds-unacceptable-conditions-at-the-crowded-hilo-jail/. Native Hawaiians are again disproportionately affected, constituting 41 percent of the population incarcerated out of state. 2010 OHA REPORT, *supra* note 175, at 9. This means that not only are families forcibly separated by nearly 2,500 miles of open ocean, but the incarceration of Native Hawaiians plays directly into the removal of Native Hawaiians from their lands. *See* Taschner, *supra* note 186, at 120.

Worse yet, the high rates of incarceration experienced by Native Hawaiians, coupled with the crowded condition in the prison system and the legacy of poor access to healthcare, has led to Native Hawaiians being infected with COVID-19 infections at a higher rate than other incarcerated populations. Tascher, *supra* note 186, at 115. *See generally* Kevin Dayton, *Covid-19 is Surging Again at Hawaii Prisons. The Oahu Jail is Especially Hard Hit*, HONOLULU CIV. BEAT (Aug. 26, 2021), https://www.civilbeat.org/2021/08/covid-19-is-surging-again-at-hawaii-prisons-the-oahu-jail-is-especially-hard-hit/.

[187] *See* COMMUNITY POLICING DEFINED, *supra* note 147, at 5.

[188] *See* Mangieri, *supra* note 171; 2010 OHA REPORT, *supra* note 175.