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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

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INTRODUCTION

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Preface

Dru Hara and Leeyannah Armaine V. Santos*

In 1973, Chief Justice William S. Richardson established Hawai‘i’s first and only law school. In doing so, he forged a path for all people of Hawai‘i to obtain a legal education without having to move away or worry about the prohibitive costs of a juris doctor degree.[1] Chief Justice Richardson did this with the hope that the law school’s graduates, many coming from the islands’ most marginalized communities, would develop the necessary tools to protect those without power and achieve justice for those wronged.[2] Today, Richardson graduates continue to seek justice in their roles as leaders in their fields across Hawai‘i – and beyond. Thus, this school year marks the 50th anniversary of not only the law school, but also the mission that Chief Justice Richardson began to achieve a more just and equitable society.

It is our great privilege to publish Volume 46’s first issue in this landmark year for our law school and community. All of the authors in Issue 1 are recent graduates and current students of the law school who have written these pieces under the guidance of our school’s most prominent thought-leaders. In line with Chief Justice Richardson’s vision for the law school, the scholarship presented in this Issue focuses on emerging legal issues of great impact to our Hawai‘i and Pacific Island communities. From indigenous self-determination and access to Native Hawaiian education, to the application of social and reparative justice principles for island peoples, each piece builds upon themes and values that best embody our school’s mission to shape future lawyers who advance justice and the rule of law.

We would like to offer our immense appreciation and gratitude to our faculty advisors, Professors Justin D. Levinson and Miyoko T. Pettit-Toledo, for their wisdom and guidance, our Law School Dean, Camille A. Nelson, for her and the law school’s continued support of the journal, and our Faculty Support Specialist Julie Suenaga for her commitment and devotion to supporting the Law Review. Lastly, we would like to thank the Volume 46 Editorial Board and Staff Writers for their invaluable time and work, and for going above and beyond to publish this Issue.

Mahalo nui for supporting the Law Review.

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* Editors-in-Chief, University of Hawai‘i Law Review, Volume 46 (2023–2024).

[1] Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 5 (2010).

[2] *Id.* at 15.

Kala: Disentangling Kamehameha Schools From the 2022 Federal Indian Boarding School Initiative Investigative Report While Actualizing *Social Healing Through Justice* For its Kanaka Maoli Students

Holly K. Doyle*

* * *

"*Ke kala aku nei au iā ʻoe a pēlā nō hoʻi ai e kala ia mai ai*, or, I unbind you from the fault, and thus may I also be unbound from it."[1]

— Mary Kawena Pukui

[*] University of Hawai'i at Mānoa William S. Richardson School of Law, Class of 2024 (Anticipated). Many sincere thanks to Fred T. Korematsu Professor of Law and Social Justice Eric K. Yamamoto who reviewed and commented on early drafts of this Article. His expertise and guidance proved invaluable to its shaping. Thank you to Professors Miyoko T. Pettit-Toledo and Susan K. Serrano for supporting this draft during its final stages. Mahalo piha to the University of Hawai'i Law Review's fabulous editorial team for their care and precision in getting this Article across the finish line. Any errors are mine alone.

[1] 1 MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 75 (1972) [hereinafter 1 NĀNĀ I KE KUMU] (modern orthography inserted by author).

I. INTRODUCTION: A TIME OF HULIHIA[2]

Kanaka Maoli artist, activist, and scholar Dr. Jamaica Heolimeleikalani Osorio describes the current time as one of hulihia.[3] A time of overturning, of "chaos and creation, and abundance and fear."[4] She thinks of the global COVID-19 pandemic (which leaves over seven million people dead at the

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[2] Some text from this Article appears in Holly K. Doyle, *Unbound: Actualizing* Social Healing Through Justice *for Native Survivors of Federal Indian Boarding Schools*, 48 N.Y.U. Rev. L. & Soc. Change (forthcoming Winter 2024) (on file with author) (setting the contextual, historical, and analytical foundation for this Article). *Unbound* is a comparative law piece that first recounts and examines Canada's extensive reparative justice initiative for the harms of its residential schools. *Id.* It then evaluates the United States' nascent reconciliation initiative through the *social healing through justice* framework, first giving credit where due and then identifying lacunae in the report's recommendations. *Id. Kala* particularizes research from *Unbound*, by focusing on Hawai'i and Kamehameha Schools.

[3] Finding Our Way with Prentis Hemphill, *Aloha 'Āina with Dr. Jamaica Heolimeleikalani Osorio*, (Aug. 1, 2022) https://www.findingourwaypodcast.com/individual-episodes/s3e4. *See generally* Noelani Goodyear-Ka'ōpua, *Kūoko'a: Independence*, *in* THE VALUE OF HAWAI'I 3: HULIHIA, THE TURNING (Noelani Goodyear-Ka'ōpua et al. eds., 2020). I follow certain style conventions articulated by Dr. Goodyear-Ka'ōpua and Dr. Osorio respectively:

> I use a number of terms interchangeably to refer to the indigenous people of Hawai'i, people who are genealogically connected to Ka Pae 'Āina 'o Hawai'i (the Hawaiian archipelago) since time immemorial: Kānaka Maoli, . . . 'Ōiwi, . . . Hawaiian, and Native Hawaiian. Kānaka Maoli . . . refer[s] to the whole group as a singular class. [Kanaka Maoli or Kanaka is a descriptor.] In my usage of these terms, I refer to all Kānaka Maoli, without any blood quantum restriction. I do not italicize ['ōlelo Hawai'i or] Hawaiian terms in this essay. When terms are italicized, it is to emphasize their importance to my argument and analysis.

Noelani Goodyear-Ka'ōpua, *Domesticating Hawaiians: Kamehameha Schools and the "Tender Violence" of Marriage*, *in* INDIAN SUBJECTS: HEMISPHERIC PERSPECTIVES ON THE HISTORY OF INDIGENOUS EDUCATION 16, 38 n.1 (Brenda J. Child & Brian Klopotek eds., 2014) [hereinafter Goodyear-Ka'ōpua, *Domesticating Hawaiians*].

> Although 'ōlelo Hawai'i appears frequently throughout the course of this [Article], this [Article] does not include [translations]. The terms I [use] have many meanings and to reduce them to a single English gloss would be counterproductive . . . . Wehewehe.org is an appropriate source for the reader to consult for definitions of Hawaiian terms across multiple dictionaries.

JAMAICA HEOLIMELEIKALANI OSORIO, REMEMBERING OUR INTIMACIES: MO'OLELO, ALOHA 'ĀINA, AND EA xv (2021) [hereinafter OSORIO, REMEMBERING OUR INTIMACIES].

[4] Finding Our Way with Prentis Hemphill, *supra* note 3, at 03:05.

time of this writing)[5] and the attempted insurrectionist coup following President Biden's inauguration.[6] But, she notes, part of hulihia is also "all of the beautiful uprising" by Indigenous groups asserting their right to self-determination and by the Black Lives Matter movement to end white supremacist violence against Black people globally.[7] She observes that times of transformation are difficult and painful.[8] They always have been.[9] But she finds resolve in knowing "[t]his is what it feels like to tear down violent systems" and "create the world we deserve."[10]

Secretary of the Interior Deb Haaland also knows that "work[ing] toward a future we are all proud to embrace"[11] means experiencing the difficulty and pain of acknowledging historic injustice and its persisting wounds.[12] A member of the Pueblo of Laguna and the first Native American cabinet secretary,[13] Secretary Haaland lives with the intergenerational trauma caused by centuries of state-sanctioned physical and cultural genocide against

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[5] WORLD HEALTH ORG., *WHO Coronavirus (COVID-19) Dashboard*, https://covid19.who.int/ (last visited Feb. 8, 2024).

[6] *From 'An Attempted Coup' to Chaos, Searing Moments of Jan. 6*, ASSOCIATED PRESS (July 23, 2022), https://apnews.com/article/Jan-6-hearings-key-moments-b374e48ab5a1a0a597fd5b6ec69048c2; Finding Our Way with Prentis Hemphill, *supra* note 3, at 04:14.

[7] Finding Our Way with Prentis Hemphill*, supra* note 3, at 04:33. *See generally About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Nov. 5, 2023).

[8] Finding Our Way with Prentis Hemphill, *supra* note 3, at 04:57.

[9] *Id.* at 05:08.

[10] *Id.* at 05:10.

[11] Memorandum from Deb Haaland, Sec'y of the Interior, to the Assistant Secretaries, Principal Deputy Assistant Secretaries, & Heads of Bureaus & Offs. 2 (June 22, 2021) [hereinafter DOI Memo], https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf.

[12] *See id. See generally* ERIC K. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY (2021) [hereinafter YAMAMOTO, HEALING THE PERSISTING WOUNDS].

[13] *Secretary Deb Haaland*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/secretary-deb-haaland (last visited Oct. 30, 2023). Secretary Haaland is one of the first two Native American women to serve in Congress, alongside Representative Sharice Davids of Kansas. Eli Watkins, *First Native American Women Elected to Congress: Sharice Davids and Deb Haaland*, CNN (Nov. 7, 2018, 12:01 AM EST), https://www.cnn.com/2018/11/06/politics/sharice-davids-and-deb-haaland-native-american-women. Both Secretary Haaland and Representative Davids were elected to office in 2018. *Id.*

Indigenous peoples.[14] She is the granddaughter of two generations of United States Federal Indian Boarding School survivors.[15]

"From the earliest days of the Republic,"[16] the United States conspired to take Native land for the benefit of the emerging country's white inhabitants by kettling Indigenous peoples into sedentary lifestyles, pushing them into debt and eagerly accepting repayment in land.[17] Boarding schools advanced this effort by separating Native children from their families, severing their cultural, physical, and economic connection to the land, and destroying Native identity.[18] Canada's residential schools did something similar.[19] So when Secretary Haaland heard the news that the Tk'emlúps te Secwepemc First Nation discovered the remains of 215 children at Kamloops Indian Residential School in Canada,[20] she immediately thought of her

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[14] Deb Haaland, *My Grandparents Were Stolen from Their Families as Children. We Must Learn About This History*., WASH. POST (June 11, 2021, 9:00 AM EDT) [hereinafter Haaland, *My Grandparents Were Stolen*], https://www.washingtonpost.com/opinions/2021/06/11/deb-haaland-indigenous-boarding-schools/. Canada's Truth and Reconciliation Commission defined physical and cultural genocide in its report on Canadian residential schools:

> *Physical genocide* is the mass killing of the members of a targeted group . . . . *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.

TRUTH & RECONCILIATION COMM'N CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 1 (2015).

[15] Haaland, *My Grandparents Were Stolen*, *supra* note 14.

[16] BRYAN NEWLAND, BUREAU INDIAN AFFS., FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 21–22, 93 (2022) [hereinafter NEWLAND REPORT].

[17] *Id.*

[18] *Id.* at 21, 37.

[19] *See generally* TRUTH & RECONCILIATION COMM'N CAN., *supra* note 14.

[20] Amanda Coletta, *Remains of 215 Indigenous Children Discovered at Former Canadian Residential School Site*, WASH. POST (May 28, 2021, 1:19 PM EDT), https://www.washingtonpost.com/world/2021/05/28/canada-mass-grave-residential-school/.

grandparents.[21] That they too could have been buried in unmarked graves at United States boarding schools impelled her to launch an investigation on "[this] side of the border."[22]

Of the 408 boarding schools identified in the Department of the Interior's investigative report, Hawai'i hosted seven.[23] Four broad criteria employed by the department to compile the first official list of Federal Indian Boarding Schools[24] cast a wide net, ensnaring even those schools established by ali'i "to train future monarchs" of the Kingdom of Hawai'i[25] and for the

[21] DOI Memo, *supra* note 11, at 1; Haaland, *My Grandparents Were Stolen*, *supra* note 14.

[22] DOI Memo, *supra* note 11, at 1; Haaland, *My Grandparents Were Stolen*, *supra* note 14.

[23] NEWLAND REPORT, *supra* note 16, at 6, 69. The seven Federal Indian Boarding Schools the United States supported in Hawai'i between 1819 and 1969 are as follows: Hilo Boarding School, Industrial and Reformatory School (Kawailoa), Industrial and Reformatory School (Keone'ula, Kapalama), Industrial and Reformatory School (Waiale'e, Waialua), Industrial and Reformatory School for Girls (Keone'ula, Kapalama), Industrial and Reformatory School for Girls (Maunawili, Ko'olaupoko), Industrial and Reformatory School for Girls (Mō'ili'ili, Honolulu), Kamehameha Schools, Lahainaluna Seminary, Mauna Loa Forestry Camp School, and Moloka'i Forestry Camp School. *Id.* at 78. However, Dr. Maile Arvin notes that the report "makes some significant errors in reference to Hawaii – such as designating one school as located at 'Kawailou.' There is no such place as 'Kawailou.' This is likely a misrecognition of an actual place, Kawailoa." Maile Arvin, *Native Hawaiians Are Confronting the Legacies of "Indian Boarding Schools"*, TRUTHOUT (May 26, 2022), https://truthout.org/articles/native-hawaiians-are-confronting-the-legacies-of-indian-boarding-schools/.

[24] NEWLAND REPORT, *supra* note 16, at 17–18. The Department of the Interior classified institutions as Federal Indian boarding schools if they provided (1) housing and (2) education, and (3) received Federal funds and/or support during its (4) pre-1969 operations. *Id.*

[25] Linda K. Menton, *A Christian and "Civilized" Education: The Hawaiian Chiefs' Children's School, 1839-50*, 32 HIST. EDUC. Q. 213, 213 (1992); Newland Report, *supra* note 16, at 74 ("King Kamehameha III also created the Chiefs' Children's School, also known as the Royal School, to train future monarchs of the Kingdom of Hawai'i. Maintained by missionaries, Native Hawaiian children were segregated by gender in the School, which was a change from Native Hawaiian culture and practices, and disciplinary practices included food denial and corporal punishment.").

"enlightenment and elevation of the Hawaiian race[.]"[26] Kamehameha Schools is among those implicated.[27]

Ke Ali'i Bernice Pauahi Bishop established the perpetual charitable trust that is Kamehameha Schools in her 1883 will.[28] Intending to safeguard keiki 'Ōiwi—and, thus, Kānaka Maoli—futures against the "rapid social changes occurring at the time, Pauahi considered education the means toward future advancement of Hawaiian children."[29] In this way, Kamehameha Schools is distinctive.[30] Nearly all other Federal Indian Boarding Schools were created by the federal government itself—or by religious institutions and organizations backed by the federal government[31]—with the express dual purpose of Native land dispossession and forced assimilation.[32]

But several assimilative tactics wielded against Native children in continental Federal Indian Boarding Schools were also brought to bear against Kanaka children by Kamehameha Schools' five original trustees.[33] Kanaka Maoli scholar and current Kamehameha Schools Trustee Dr. Noelani Goodyear-Ka'ōpua exposes the similarities.[34] Both Kamehameha Schools and Federal Indian Boarding Schools shared a white supremacist, cis-heteropatriarchal and imperialist curricula of cultural suppression and assimilation resulting in persisting "racialized and gendered violence"[35] and

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[26] MARY H. KROUT, THE MEMOIRS OF HON. BERNICE PAUAHI BISHOP 238 (1908, reprinted in 1958). It must be noted that Krout's MEMOIRS is a biography authorized by Kamehameha Schools and is one of three biographies – all Kamehameha Schools-approved – about Ke Ali'i Pauahi. Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 46 n.91.

[27] NEWLAND REPORT, *supra* note 16, at 75, 78.

[28] Will of Bernice Pauahi Bishop (Oct. 31, 1883), *in In re* Estate of Bishop, Probate No. 2425 (Haw. Sup. Ct. 1884) (filed in Certificate of Proof of Will); Avis Kuuipoleialoha Poai & Susan K. Serrano, *Ali'i Trusts: Native Hawaiian Charitable Trusts*, *in* NATIVE HAWAIIAN LAW: A TREATISE 1168, 1172 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter Poai & Serrano]; see *infra* Section IV.B for greater discussion of Kamehameha Schools' establishment.

[29] Poai & Serrano, *supra* note 28, at 1172.

[30] See *infra* Section IV.C for an analysis of key factors distinguishing Kamehameha Schools from other Federal Indian Boarding Schools.

[31] NEWLAND REPORT, *supra* note 16, at 46–50.

[32] *Id.* at 37–46.

[33] *See generally* Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3 (analyzing the consequences of "white male control" over Kamehameha Schools that began in the 1880s). Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke and William O. Smith were the five original trustees of Kamehameha Schools/Bishop Estate. *See infra* notes 349–56 and accompanying text.

[34] *See* Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 25.

[35] *Id.* at 18, 25.

economic pigeonholing.[36] The five original trustees were the white sons of Protestant missionaries (though one was a missionary himself), staunch annexationists, capitalists, sugar investors, and Committee of Safety[37] members.[38] For actions like theirs, President Clinton—on behalf of the United States—formally apologized to Kānaka Maoli and committed to reconciliation efforts in 1993.[39]

Dispiritingly, promises of reconciliation to American Indians, Alaska Natives, and Native Hawaiians made by United States officials remain largely unfulfilled.[40] In 2000, for example, then-Assistant Secretary of the Interior Kevin Gover, a citizen of the Pawnee Tribe of Oklahoma, apologized

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[36] *See id.*; NEWLAND REPORT, *supra* note 16, at 81.

[37] Thirteen white men—mostly businessmen and lawyers—formed the "Committee of Safety" as part of a larger scheme to overthrow the Hawaiian monarchy and advance annexation. Melody Kapilialoha MacKenzie & N. Mahina Tuteur, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE (forthcoming 2025) (manuscript at 31) (on file with author); Ralph Thomas Kam & Jeffrey K. Lyons, *Remembering the Committee of Safety: Identifying the Citizenship, Descent, and Occupations of the Men Who Overthrew the Monarchy*, 53 HAWAIIAN J. HIST. 31–54 (2019). "On January 14, 1893, Lili'uokalani was on the verge of declaring a new constitution limiting voting to Hawaiian-born or naturalized citizens" and restoring power to the monarchy. MacKenzie & Tuteur, *supra*, at 30. These changes threatened the business interests of haole capitalists across Ka Pae 'Āina. *See id.* at 30–31. Two days later on January 16, 1893, Cristel Bolte, Andrew Brown, William Richards Castle, Henry Ernest Cooper, John Emmeluth, Theodore F. Lansing, John Andrew McCandless, Frederick W. McChesney, William Owen Smith, Edward Suhr, Lorrin Andrews Thurston, Henry Waterhouse, and William Chauncey Wilder held a citizen meeting in which they passed a resolution creating the Committee of Safety ostensibly for the "'maintenance of the public peace and the protection of life and property.'" Kam & Lyons, *supra*, at 32. They sought help from United States Minister to Hawai'i John L. Stevens who landed marines in Honolulu to "protect American lives and property" that very same day. MacKenzie & Tuteur, *supra*, at 31. The insurrectionists captured the "government building, declared the monarchy abolished, and proclaimed the existence of a Provisional Government until annexation by the United States could be negotiated." *Id.*

[38] Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 44 n.70; SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST 34–35 (2006).

[39] Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii"); *see infra* note 523.

[40] *See, e.g.*, Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

on behalf of the Bureau of Indian Affairs.[41] He expressed his "profound sorrow for what [the] agency ha[d] done in the past."[42] For the "ethnic cleansing and cultural annihilation the [Bureau of Indian Affairs] . . . wrought against American Indian and Alaska Native people[.]"[43] "Worst of all," Gover lamented, "the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually."[44] But Gover could only apologize on behalf of the agency[45] and did so arguably without the staunch support of President Clinton's administration.[46] As for Kānaka Maoli, "despite several efforts, the issue of reconciliation for [] past injustices has, thus far, eluded Native Hawaiians."[47]

Now, over twenty years later, the Department of the Interior is at last investigating the boarding schools with an eye toward social healing through reparative justice.[48] With Secretary Haaland at the agency's helm and a seemingly sympathetic presidential administration in office, efforts to revive

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[41] *Gover Apologizes for BIA's Misdeeds*, U.S. DEP'T INTERIOR INDIAN AFFS. (Sept. 8, 2000), https://www.bia.gov/as-ia/opa/online-press-release/gover-apologizes-bias-misdeeds. The Bureau of Indian Affairs ("BIA"), housed within the Department of the Interior, is the principal intermediary between the federal government and federally recognized tribes. *Bureau of Indian Affairs (BIA)*, U.S. DEP'T INTERIOR INDIAN AFFS., https://www.bia.gov/bia (last visited Oct. 1, 2023). The agency's mission has evolved over time in correlation with the federal government's shifting approaches to Federal Indian law and policy. *Id.* Today, most BIA employees are "American Indian or Alaska Native, representing a number larger than at any time in its history." *Id.* Various offices within the BIA provide a range of services including health care, disaster relief, reservation roads programs, law enforcement funding, and trust land management. *Id.* The agency partners with all 574 federally recognized tribes to "help them achieve their goals for self-determination while also maintaining its responsibilities under the Federal-Tribal trust and government-to-government relationships." *Id.*

[42] Kevin Gover, *Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs*, 25 AM. INDIAN L. REV. 161, 162 (2000).

[43] *Gover Apologizes for BIA's Misdeeds*, *supra* note 41.

[44] Gover, *supra* note 42, at 162.

[45] *Id.*

[46] Christopher Buck, *"Never Again:" Kevin Gover's Apology for the Bureau of Indian Affairs*, 21 WICAZO SA REV. 98 (2006) ("The irony is this: while the administration did not oppose [Gover], neither did it back him. The moment was golden, but the silence was deafening.").

[47] Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration's Effort of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. 273, 276 (2017) [hereinafter Andrade, *Legacy in Paradise*].

[48] NEWLAND REPORT, *supra* note 16, *passim*; *see infra* Part II (describing the *social healing through justice* framework).

the stalled initiative are underway.[49] After the department published the Federal Indian Boarding School Initiative Investigative Report in May 2022,[50] Secretary Haaland embarked on a country-wide "Road to Healing" listening tour.[51] Though she was scheduled to stop in Hawai'i in 2022, Secretary Haaland's visit was postponed and alternative dates are yet to be released at the time of this writing.[52]

What happens next at the federal and state level in the hotly divided present-day political milieu will determine whether "our country is to heal from [the] tragic [boarding school] era."[53] After passing through the Senate

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[49] Please, Go On with James Hohman, *Interior Secretary Deb Haaland on the Dark History of Indigenous Boarding Schools*, WASH. POST (June 25, 2021), https://www.washingtonpost.com/podcasts/please-go-on/interior-secretary-deb-haaland-on-the-dark-history-of-indigenous-boarding-schools/?itid=lk_interstitial_manual_3. Secretary Haaland described President Biden's support of Indigenous tribes in conversation with James Hohman:

> [W]ith respect to the leadership we have in The White House now, President Biden is wholeheartedly – he wants robust consultation with Indian tribes. He wants Indian tribes to have a seat at the table. He believes in us, you know, having an all-of-government approach, that we all need to work together to move our country forward. And I feel very strongly that his courageous leadership is something that we've needed, and I'm grateful for that.

Id. at 13:30.

[50] NEWLAND REPORT, *supra* note 16.

[51] Press Release, U.S. Dep't Interior, Department of the Interior Releases Investigative Report, Outlines Next Steps in Federal Indian Boarding School Initiative (May 11, 2022) [hereinafter DOI Next Steps], https://www.doi.gov/pressreleases/department-interior-releases-investigative-report-outlines-next-steps-federal-indian/. The tour responds to the report's third recommendation to "[d]ocument Federal Indian boarding school attendee experiences. . . . [and d]evelop a platform for now-adult Federal Indian boarding school attendees and their descendants to formally document their historical accounts and experiences, and understand current impacts such as health status, including substance abuse and violence." NEWLAND REPORT, *supra* note 16, at 97; *see* DOI Next Steps, *supra*.

[52] *See* Mary Annette Pember, *Road to Healing: Deb Haaland Pledges Boarding School Truths Will Be Uncovered*, INDIAN COUNTRY TODAY (July 9, 2022), https://indiancountrytoday.com/news/we-all-carry-the-trauma-in-our-hearts. I contacted the Department of the Interior, the Bureau of Indian Affairs, and the offices of Hawai'i Governor Josh Green and Senator Maizie Hirono, but did not receive answers regarding rescheduled "Road to Healing" tour dates for Hawai'i.

[53] Haaland, *My Grandparents Were Stolen*, *supra* note 14.

Indian Affairs Committee, the *Truth and Healing Commission on Indian Boarding School Policies Act* hangs in the balance, awaiting action by the full Senate.[54] And though the Supreme Court's decision upholding the 1978 Indian Child Welfare Act ("ICWA") in *Haaland v. Brackeen*[55] stunned many,[56] the case remains part of "a terrifying pattern[] in which attacks on Native children are a prelude to broader attacks on tribal sovereignty."[57]

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[54] Truth and Healing Commission on Indian Boarding School Policies in the United States Act, S. 1723 118th Cong. (2023) (proposing a formal Truth and Reconciliation Commission to investigate, document and acknowledge past injustices caused by the Federal Indian Boarding School System); Kalle Benallie, *Senate Bill Calls for Investigation into Indian Boarding Schools*, TRUTHOUT (June 10, 2023), https://truthout.org/articles/senate-bill-calls-for-investigation-into-indian-boarding-schools/.

[55] 599 U.S. 255 (2023).

[56] *See* Strict Scrutiny, *Good News for the Indian Child Welfare Act*, CROOKED MEDIA, at 06:44 (June 19, 2023), https://crooked.com/podcast/good-news-for-the-indian-child-welfare-act/. Many legal scholars were surprised by the Court's decision given that the "'conservative majority [] is . . . moving the goal posts . . . on every conceivable issue that you can imagine.'" Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NAT'L PUB. RADIO (July 5, 2022, 7:04 AM EST), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative. "The court produced more conservative decisions this term than at any time since 1931 . . . ." *Id.* "In an astounding 62% of the decisions, conservatives prevailed, and more importantly, often prevailed in dramatic ways." *Id.* Of course, political ideology does not guarantee a specific outcome – take Justice Gorsuch's concurrence in *Brackeen*, for example – but this Court's pattern of overturning fifty years' worth of precedent worried many as *Brackeen* climbed the appellate ladder. *See id.*; Amy Howe, *Closely Divided Court Scrutinizes Various Provisions of Indian Child Welfare Act*, SCOTUSBLOG (Nov. 9, 2022, 6:02 PM), https://www.scotusblog.com/2022/11/closely-divided-court-scrutinizes-various-provisions-of-indian-child-welfare-act/. Congress enacted ICWA in direct response to the damage caused by the Federal Indian Boarding School Program and, later, the Indian Adoption Project:

> Congress enacted the Indian Child Welfare Act as a response to a long and tragic history of separating Native American children from their families. The law establishes minimum standards for the removal of Native American children from their families and establishes a preference that when Native American children are taken from their homes, they be placed with extended family members or with other Native families, even if the families are not relatives. Opponents of the law say it exceeds Congress' power, violates states' rights, and imposes unconstitutional race-based classifications.

Howe, *supra*.

[57] Rebecca Nagle, *The Supreme Court Case that Could Break Native American Sovereignty*, ATLANTIC (Nov. 8, 2022), https://www.theatlantic.com/ideas/archive/2022/11/

Right-wing special interests[58] will likely continue their campaign against ICWA,[59] and "[t]he fear is that this case is like the first upright domino in a long row. If they can topple ICWA, they can topple everything else."[60]

In Hawai'i, some worry about what further investigation into Kamehameha Schools will unearth.[61] What is clear is the deliberate policy of cultural suppression, militarization, assimilation, and domestication shared by Kamehameha Schools and continental Federal Indian Boarding Schools.[62] And clear are the calls by Kanaka Maoli cultural practitioners, scholars, and political leaders for the United States to follow through on its 1993 promise to make "'amends with that specific part of history and the legacy of [the boarding schools].' Hawaiians, too, need reconciliation[.]"[63]

What remains unclear is whether Kamehameha Schools is rightfully included in the Department of the Interior's investigative report given its unique genesis.[64] Even more uncertain is Kamehameha Schools'

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scotus-native-american-sovereignty-brackeen-v-haaland/672038/. In *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), for example, the Court attacked tribal sovereignty by granting the states "unprecedented power to prosecute crimes in Indian country at the expense of Indigenous people and tribal sovereignty." Theodora Simon, *Tribal Sovereignty Under Attack in Recent Supreme Court Ruling*, AM. CIV. LIB. UNION (July 12, 2022), https://www.aclunc.org/blog/tribal-sovereignty-under-attack-recent-supreme-court-ruling.

[58] This Land, *9. Update: Supreme Court Decision*, CROOKED MEDIA, at 06:40 (June 23, 2023), https://www.crooked.com/podcast/9-update-supreme-court-decision/ ("An odd group of special interests, including adoption attorneys, corporate lawyers, and right-wing groups decided they wanted to strike ICWA down.").

[59] *Id.* at 27:07 ("If they think that the concurring opinion from Justice Kavanaugh is a signal to them that there is an audience for the equal protection argument, then they'll keep going.").

[60] *Id.* at 09:59.

[61] Mahealani Richardson, *In Wake of New Report, Native Hawaiians March to Raise Awareness About Dark History of Boarding Schools*, HAW. NEWS NOW (June 7, 2022, 8:37 PM HST), https://www.hawaiinewsnow.com/2022/06/08/hawaiians-march-after-federal-report-details-dark-history-boarding-schools/.

[62] See *infra* Part IV for an analysis of the undeniable similarities and pivotal differences between Kamehameha Schools and the other Federal Indian Boarding Schools identified in the Department of the Interior's report.

[63] Nick Grube, *Report Cites Mistreatment of Students at Native Hawaiian Boarding Schools*, HONOLULU CIV. BEAT (May 15, 2022), https://www.civilbeat.org/2022/05/report-cites-mistreatment-of-students-at-native-hawaiian-boarding-schools/.

[64] *See infra* Section IV.B.1.

responsibility[65] in redressing the persisting wounds of United States imperialism that the trust's early leaders helped inflict.[66] A final unknown is what enduring and comprehensive reconciliation for Native Hawaiian Kamehameha Schools graduates – and Kānaka Maoli more broadly – might look like.

Kamehameha Schools issued a (difficult to find) statement on May 13, 2022, following the investigative report's publication.[67] The statement did

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[65] See *infra* Parts II and V for a description of *responsibility*'s role in effective reconciliation efforts.

[66] *See infra* Section IV.B.2.

[67] I could not find Kamehameha Schools' statement through online research. I could not find it on Kamehameha Schools' website, social media or in local newspapers. This may reveal my own shortcomings as a budding researcher, but I am copying and pasting the statement's text shared with me by Trustee Noelani Goodyear-Kaʻōpua below:

> Earlier this week, the U.S. Department of the Interior (DOI) issued a report detailing its investigation into the troubled history and legacy of the Federal Indian boarding school system, which goes back more than 200 years.
>
> The DOI's *Federal Indian Boarding School Initiative Investigative Report* begins to scratch the surface of profound traumas inflicted on Native Hawaiian, American Indian and Alaska Native families for generations by federally-supported boarding schools. The initial findings are an appalling and sobering testimony to the imperialistic history of the United States, its treatment of Native people, and the need for redress.
>
> For Indigenous communities around the world, the legacies of oppression, forced assimilation and foreign greed are all too familiar. The diminishing of Native language, culture, and identity, the usurping of governance, and confiscation of land are textbook strategies of imperialism; they are intended to debilitate and dominate.
>
> Kamehameha Schools, the living legacy of Ke Aliʻi Bernice Pauahi Bishop, has devoted itself to improving the capability and well-being of Native Hawaiians through education. Grappling with the contradictions and internal conflicts of our own colonial history, we continue a process of transforming over time to serve and uplift our communities through Hawaiian culture-based education. Critical to this transformation is our own examination of the historical issues so we can better know our truths, engage in healing processes, and empower our communities.
>
> We proudly stand with all Native Hawaiian, American Indian, and Alaska Native peoples who have persevered through systematic violence over centuries, holding onto the strengths of our ancestors and innovating

not explicitly acknowledge that Kamehameha Schools is one of seven Federal Indian Boarding Schools that operated in Hawai'i.[68] Nor did it take a position on its inclusion.[69] Instead, the statement spoke to Native peoples' shared realities under western imperialism and racial capitalism.[70] It acknowledged the "contradictions and internal conflicts of [Kamehameha Schools'] own colonial history," and affirmed the institution's commitment to "transforming over time to serve and uplift our communities through Hawaiian culture-based education."[71] Investigating Kamehameha Schools' history is central to this transformation, the statement asserted, and to "better know[ing] our truths, *engag[ing] in healing processes*, and empower[ing] our communities."[72]

For those who believe in "transparency and accountability, at least in the abstract, and [] see value in recording and remembering history[,]"[73] this statement of *recognition*[74] may be all that is needed. Others believe Kamehameha Schools has not done enough to "address the actual substance of what occurred in its boarding schools"[75] since the Department of the Interior released its report. And for some legal formalists, examining past issues "through lenses that have developed in the interim" and making

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> Native ways of life that nurture vibrant communities now and for generations.
>
> "*Times will come when you will feel you are being pushed into the background. Never allow this to happen-stand always on your own foundation. But you will have to make that foundation. There will come a time when to make this stand will be difficult, especially to you of Hawaiian Birth; but conquer you can-if you will.*" – Ke Ali'i Bernice Pauahi Bishop

Email from Noelani Goodyear-Ka'ōpua, Trustee, Kamehameha Schools, to author (Apr. 6, 2023, 8:21 AM HST) [hereinafter Goodyear-Ka'ōpua Email] (on file with author).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* (emphasis added).

[73] Interview with Randall W. Roth, Co-author, BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST, in Kāhala, Haw. (Jan. 31, 2023) [hereinafter Roth Interview].

[74] See *infra* Part II for a description of the role *recognition* plays in social healing efforts.

[75] Grube, *supra* note 6363.

reconstructive or reparative "adjustments now to address those sorts of things that have happened in the past" is a "path that leads off a cliff."[76] What should Kamehameha Schools do, and what guidance exists for practically shaping and strategically charting Kamehameha Schools' next steps and overall aims?

Relying on Kanaka voices, this Article endeavors to shape, guide and, where needed, recalibrate Kamehameha Schools' response to the department's report. It assesses the concepts and particulars of the above questions through law professor and scholar Eric K. Yamamoto's multidisciplinary *social healing through justice* analytical framework[77] to suggest that while Kamehameha Schools should not have been included in the department's report, the trust should engage in a pragmatic, dynamic and strategic process to foster comprehensive and enduring healing for its students, itself as an organization and Kānaka Maoli generally.[78] "The kind of 'justice' that activates social healing . . . cannot be merely an idea or words on paper. It must be experienced."[79] This Article seeks to actualize that experience.

Actualizing social healing for Indigenous peoples demands a "contextual legal inquiry [that] start[s] with Native Peoples' unique history and cultural values, explicitly integrating them into a larger analytical framework that accounts for restorative justice and the key dimensions of self-determination."[80] *Social healing through justice* is the larger analytical framework guiding this Article's analysis, but it needs altering to properly

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[76] Roth Interview, *supra* note 73.

[77] *See* discussion *infra* Part II (describing the six multidisciplinary working principles and four inquiries forming the *social healing through justice* praxis). *See generally* YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 46–71 (drawing upon commonalities across numerous disciplines including theology, social psychology, and Indigenous conflict resolution to anchor the *social healing through justice* framework).

[78] *See* discussion *infra* Part II (illustrating that reparative justice efforts are often iterative and must adapt to ever-shifting political, social, economic, and legal landscapes). *See generally* YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 72–93 (distilling six multidisciplinary working principles into the *social healing through justice* framework's "language of the 4Rs"—*recognition*, *responsibility*, *reconstruction*, and *reparation*).

[79] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 48.

[80] Melody K. MacKenzie, D. Kapua'ala Sproat & Susan K. Serrano, *Framing Chapter*, *in* NATIVE HAWAIIAN LAW: A TREATISE (forthcoming 2025) (manuscript at 7) (on file with author).

account for Native Hawaiians' unique history and cultural values.[81] Kanaka Maoli scholar D. Kapua'ala Sproat[82] articulates a bespoke framework for her community that calls attention to "four realms (or 'values') of restorative justice embodied in the human rights principle of self-determination: (1) mo'omeheu (cultural integrity); (2) 'āina (lands and natural resources); (3) mauli ola (social determinants of health and well-being); and (4) ea (self-government)."[83] These four distinctly 'Ōiwi restorative justice values helps the *social healing through justice* framework home in on the precise medicine that may salve the historical and persisting wounds suffered by Kānaka Maoli.

Part II describes the six working principles and four main inquiries composing Professor Yamamoto's *social healing through justice* praxis. It then infuses the framework with Kumu Sproat's four Indigenous restorative justice values. Part III recounts how unfolding events in Canada catalyzed the United States' first-ever Federal Indian Boarding School investigation. It details the investigation's origins, key findings, and conclusions. Part IV explores Kamehameha Schools' inclusion in the report as one of Hawai'i's seven Federal Indian Boarding Schools by first situating the trust's creation in time and place. It then compares Kamehameha Schools' beginnings, reality, and legacy with that of continental Federal Indian Boarding Schools and embraces their damning similarities in operation and impact. Echoing critical distinctions drawn by Kanaka Maoli scholars, however, it concludes that the department likely should not have included Kamehameha Schools in its report. But Part V argues that—rather than attempting to remove itself from the list—Kamehameha Schools should accept its moral *responsibility* to finally, and fully, reckon with its history. Part VI concludes by affirming Kamehameha Schools' interest in releasing the ties that bind.

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[81] Professor Yamamoto's *social healing through justice* framework embraces Indigenous healing practices and concepts – notably the Native Hawaiian restorative justice practice of ho'oponopono – but D. Kapua'ala Sproat's uniquely Maoli restorative justice framework more fully infuses Kanaka 'Ōiwi values into the inquiry. *See infra* Section II.C.

[82] I refer to D. Kapua'ala Sproat as Kumu Sproat (rather than Professor Sproat) throughout this Article because, as a Kanaka 'Ōiwi scholar, educator, and cultural practitioner, "kumu" seems to be the most kūpono title.

[83] MacKenzie et al., *supra* note 80, at 13.

Braided throughout this piece are linkages to ho'oponopono, an ancient familial restorative justice practice for Kānaka Maoli.[84] The epigraph is one expression of kala, or release, that ho'oponopono participants invoke after the transgression has been forgiven so that both harmer and harmed are no longer bound together by the wrongdoing.[85] Kānaka Maoli—and other Indigenous groups—are not yet in a place to speak this prayer of release. The United States does not yet deserve it. Maybe Kamehameha Schools does not either. I hope this Article will help change that.

II. *SOCIAL HEALING THROUGH JUSTICE*: A MULTIDISCIPLINARY RECONCILIATION PRAXIS[86]

We are entangled. Caught in a net of our own making. A net fashioned by this country's first settlers, first presidents, and first departments with each unhealed transgression against this land's first peoples. In family conflict contexts Kānaka Maoli call this state of entanglement "hihia."[87] What begins "as a cord that binds culprit, offense and victim[]" soon transforms into a "larger[] yet tighter network of many cords tied in numerous stubborn knots" as unhealed wounds fester.[88]

For Kānaka Maoli, ho'oponopono empowers individuals and their families to loosen the ties that bind and, from that release, heal.[89] How can reconciliation initiatives seeking to heal the persisting wounds of mass historic injustice unbind not just individuals and families, but communities and societies?[90] Professor Yamamoto's *social healing through justice* framework distills the "integral parts of a larger, complex process of

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[84] Interview with Kamana'opono M. Crabbe, Ka Pouhana-CEO, Pouhana Consultation Services, in Mililani, Haw. (July 18, 2022) [hereinafter Crabbe Interview].

[85] 1 NĀNĀ I KE KUMU, *supra* note 1, at 75.

[86] I originally drafted Part II for my 2024 piece, *Unbound*, *supra* note 2. I have adapted this part by adding Section II.C to tailor Professor Yamamoto's framework to this uniquely Maoli issue.

[87] 1 NĀNĀ I KE KUMU, *supra* note 1, at 71–72.

[88] *Id.* at 71.

[89] Crabbe Interview, *supra* note 84. *See generally* Lynette K. Paglinawan, HO'OPONOPONO PROJECT NUMBER II: DEVELOPMENT AND IMPLEMENTATION OF HO'OPONOPONO PRACTICE IN A SOCIAL WORK AGENCY (1972) [hereinafter HO'OPONOPONO PROJECT NUMBER II]; Manu Meyer, *To Set Right—Ho'oponopono: A Native Hawaiian Way of Peacemaking*, 12 COMPLEAT LAW. 30 (1995).

[90] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 46; HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES 96–97 (1995); *see* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE].

unlocking painful bondage, of mutual liberation"[91] into points of inquiry that can shape, implement, evaluate and retool healing initiatives "to repair the persisting damage to people, communities and society itself."[92]

The quest for liberatory social healing is one of "pure, unadulterated struggle."[93] By incorporating this hard truth—and others—into its

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[91] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 49; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 90, at 174; *see also* ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000) (examining how restitution processes amplify and legitimize claims of past wrongs by studying struggles for restitution following World War II and western nations' colonization of Africa, Latin America, and Oceania); VAMIK. D. VOLKAN, THE NEED TO HAVE ENEMIES AND ALLIES: FROM CLINICAL PRACTICE TO INTERNATIONAL RELATIONSHIPS (1988) (viewing the intricacies of international diplomacy following acts of terrorism and violence through a developmental psychology lens, and explaining humanity's developmental need to identify enemies and allies); DAVID W. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS (1st ed., 1992) (exploring intercultural conflict processes, differences, styles, and patterns, and mediation's potential to "transform"); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1998) (analyzing the form and function of intergroup and interpersonal apologies through an inter-cultural and interdisciplinary lens); MICHAEL A. HOGG AND DOMINIC ABRAMS, SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES (1988) (unpacking intragroup dynamics and exploring how a collection of individuals coalesce and form a cohesive group "to the degree that they have needs capable of mutual satisfaction"); GEIKO MÜLLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION (1997) (discussing forgiveness as a process of mutual liberation that attempts to unbind the future from dark legacies of the past); LARISSA BEHRENDT, ABORIGINAL DISPUTE RESOLUTION: A STEP TOWARDS SELF-DETERMINATION AND COMMUNITY AUTONOMY (1995) (proposing that reconciliation between Australian Aboriginal peoples and the non-Aboriginal community should use traditional Aboriginal methods to balance inequalities); BRANDON HAMBER, TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH, RECONCILIATION, AND MENTAL HEALTH (Daniel J. Christie ed., 2009) (focusing on the South African Truth and Reconciliation Commission and the beneficial role mental health workers played in actualizing transitional justice for victims of profound political trauma following the end of apartheid); Harold Wells, *Theology for Reconciliation*, *in* THE RECONCILIATION OF PEOPLES: CHALLENGE TO THE CHURCHES 1, 1–14 (Gregory Baum & Harold Wells eds., 1997) (charting a Christian theological framework for reconciliation); Hiroshi Wagamatsu & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461 (1986) (comparing the role of apologies in dispute resolution in the United States and Japan).

[92] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 46–47, 49, 61.

[93] *Id.* at 46 (citing DALTON, *supra* note 90, at 97).

scaffolding, the *social healing through justice* framework "productively advances that pure, unadulterated struggle."[94] It recognizes that genuine social healing is not easy.[95] It takes time.[96] And reparative actions that "may be ideal theoretically may not be fully achievable practically (at least in the short-run)."[97] Navigating the liminal "space [Professor] Martha Minow identifies as 'Between Vengeance and Forgiveness'"[98] thus requires "messy, shifting, continual and often combined national and local efforts at reparative justice."[99] *Social healing through justice* embraces the mess and meets initiatives where they are at by "illuminating both salutary prospects and limitations."[100] Then it "[d]raw[s] on multidisciplinary insights" into "some of the dynamics of social healing" to unbind people, communities, and society from past (yet persisting) harm.[101]

A. *Six* Social Healing Through Justice *Multidisciplinary Working Principles*

Professor Yamamoto's *social healing through justice* framework distills six working principles from commonalities shared by human rights law, theology, social psychology, political theory, economics, and Indigenous conflict resolution methodologies (like ho'oponopono) that assess whether a

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[94] *Id.*; *see* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 90, *passim*.

[95] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 55, 57; 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, 187–89, 199–200 (2017).

[96] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 55, 57.

[97] *Id.* at 70; *see* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 90, at 133–34.

[98] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 47 (citing MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998) (describing attempts to effectively redress mass injustice that walk the path between the book's eponymous extremes)). Professor Minow is a prolific scholar and expert in the areas of human rights, disability justice, gender equity, and ethnic and religious conflict. Martha L. Minow, HARV. L. SCH., https://hls.harvard.edu/faculty/martha-l-minow/ (last visited Oct. 29, 2023). After clerking for Supreme Court Justice Thurgood Marshall, she "joined the Harvard Law faculty as an assistant professor in 1981[.]" *Id.* Professor Minow served as Dean of Harvard Law School for just under a decade. *Id.* During her tenure, she "strengthened public interest and clinical programs; diversity among faculty, staff, and students; [and] interdiscplinary studies[.]" *Id.*

[99] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 47.

[100] *Id.*

[101] *Id.* Notably, Professor Yamamoto leaves room for the *social healing through justice* framework to grow, acknowledging that the six working principles "offer a rough, incomplete, yet nevertheless compelling picture of some of the dynamics of social healing." *Id.* See generally *id.* at 46–71 12for a complete explanation of the framework's working principles.

particular initiative is likely to foster the kind of justice that heals.[102] Mutual engagement, the first principle, sits both harmer and harmed down at the proverbial roundtable to collaboratively shape the healing effort.[103] Solutions

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[102] *Id.* at 46–47. Multidisciplinary praxes can often produce results valuable to the legal process. *See* Jeremy Rinker, *Narrative Reconciliation as Rights Based Peace Praxis: Custodial Torture, Testimonial Therapy, and Overcoming Marginalization*, 48 PEACE RSCH.: CAN. J. PEACE & CONFLICT STUD. 121, 121 (2016) ("The testimonial therapy process is aimed at producing both legal testimony and cathartic release of suffering among torture survivors.").

[103] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 62–64. Not unlike a roundtable, Indigenous groups across the globe seek justice for harmed, harmer and communities through healing circles:

> A better description of the horizontal [justice] model, and one often used by Indians to portray their thought, is a circle. In a circle, there is no right or left, nor is there a beginning or an end; every point (or person) on the line of a circle looks to the same center as the focus. The circle is the symbol of Navajo justice because it is perfect, unbroken, and a simile of unity and oneness. It conveys the image of people gathering together for discussion.

Robert Yazzie*, Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180 (1994). Healing circles are used to address a range of harms from theft to child sexual assault.

> [T]he Community Holistic Circle Healing ('CHCH') model of Hollow Water, Canada, . . . was formed in 1987 as the community began to learn that sexual victimization and intergenerational sexual abuse was at the core of the poor wellbeing of many individuals and families. From their experience, the non-Indigenous adversarial legal system could not understand the complexity of this issue and what was needed for a community to break the cycle of abuse that impacted . . . so many of its members. They developed the model in an effort to take responsibility for what was happening in their community, to work to restore balance and make their community a safe place for future generations.

Hannah McGlade, *Justice as Healing: Developing Aboriginal Justice Models to Address Child Sexual Assault*, 7 INDIGENOUS L. BULL. 10, 11–12 (2007). Similar principles regarding participation of all those impacted by the injustice undergird the strength of truth and healing commissions. Professor Kim D. Ricardo (née Chanbonpin) writes, "The conciliatory power of a truth commission comes from the participation of all affected parties: those who were directly victimized, those who perpetrated the abuses, and even those who continue to be affected by the enduring legacy of the abuses." Kim D. Chanbonpin, *We Don't Want Dollars, Just Change: Narrative Counter-Terrorism Strategy, an Inclusive Model for Social Healing, and the Truth About Torture Commission*, 6 NW. J. L. & SOC. POL'Y 1, 31 (2011).

must center those harmed, and responsible parties must realize they have "a broad interest in healing the wounds of those suffering by reallocating some important degree of power."[104]

Secondly, healing initiatives must aim to repair damage to individuals and communities simultaneously by helping both to recover emotionally and rebuild economically.[105] Because subsequent generations are harmed by inherited trauma, the third principle rejects formalistic notions of legal justice and mends transgenerational wounds by preventing their continued transmission.[106] The fourth principle recognizes that healing "systemic discrimination, denials of self-determination, widespread past violence and culture suppression" requires economic justice measures to rebuild the capacity of those harmed so they can once again thrive.[107] Next, initiatives

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[104] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 63; see *id.* at 232–50 for a cogent discussion of Professor Derrick Bell's interest-convergence thesis; *see also* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (observing that those with entrenched power usually recognize the rights of vulnerable groups only when doing so serves their interests); Huma Haider, *Breaking the Cycle of Violence: Applying Conflict Sensitivity to Transitional Justice*, SWISSPEACE (2017) (articulating a conflict-sensitive transitional justice praxis that promotes widespread participation, resonance with local actors, social cohesion, public outreach, cross-sector collaboration, and appropriate sequencing); Verlyn F. Francis, *Designing Emotional and Psychological Support into Truth and Reconciliation Commissions*, 23 WILLAMETTE J. INT'L L. & DISP. RESOL. 2, 273–96 (2016) (describing the South Africa Truth and Reconciliation Commission's failure to include the communities harmed by apartheid at the process design table and the ensuing re-traumatization).

[105] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 64–66.

[106] *Id.* at 66–67. *See generally* Eduardo Duran, Bonnie Duran, Maria Yellow Horse Brave Heart & Susan Yellow Horse-Davis, *Healing the American Indian Soul Wound*, *in* INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA 341 (Yael Danieli ed., 1998) (discussing the "survivor's child complex" and historical trauma suffered by generations of Native children following the American Indian holocaust); Natan P.F. Kellermann, *Transmission of Holocaust Trauma – An Integrative View*, 64 PSYCHIATRY 256 (2001); John H. Ehrenreich, *Understanding PTSD: Forgetting "Trauma",* 3 ANALYSES SOC. ISSUES & PUB. POL'Y 15 (2003) (arguing the importance of using different terms to distinguish between circumscribed traumatic events versus collectively experienced mass violence).

[107] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 68–69; *see* Eric K. Yamamoto & Brian Mackintosh, *Redress and the Salience of Economic Justice,* 4 F. ON PUB. POL'Y 1 (2010) [hereinafter Yamamoto & Mackintosh, *Salience of Economic Justice*]; Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 23–24 (2007). Nussbaum defines the "Human Development Approach" or "Capability Approach" as a type of human rights approach that seeks to help people function in ten key areas: life; bodily health; bodily integrity; development and expression of senses, imagination, and thought;

that genuinely heal the wounds of people and communities are marathons, not sprints, with achievable goals and workable processes tailored to ever-shifting political landscapes.[108]

The final working principle cautions against the *darkside* of the reparative process—internal and external threats that, if ignored, derail restorative justice initiatives.[109] It anticipates (1) the ways in which healing efforts become lip service; (2) the danger of adopting formalistic framings of the injustice often deployed by opponents; and (3) the political backlash reconciliation initiatives inevitably face.[110] Acknowledging these potential pitfalls "counsels strategic framing of debate and action[,]" *not* the abandonment of healing efforts altogether.[111]

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emotional health; practical reason; personal and political affiliation; interacting with the environment and other species; play; and material and social control over one's environment. Nussbaum, *supra*, at 23–24; *see also* Koushik Ghosh, *Culture, Government and Markets*, 2 F. ON PUB. POL'Y 1 (2009). *See generally* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS (2005) [hereinafter JORDAN & HARRIS, ECONOMIC JUSTICE] (compiling case law and other materials that explore the nexus between race, gender, and class and the importance of economic and critical analyses to "unraveling the knot of racial and gender inequality").

[108] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 69–70; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 90, at 133–34 (approaching an initiative pragmatically means taking stock of specific and contextual influencing factors); Colette Rausch, *Reconciliation and Transitional Justice in Nepal: A Slow Peace*, 227 PEACEBRIEF 1 (2017) (explaining that incremental, piecemeal transitional justice steps can foster peace).

[109] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 70–71; *see* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 483 (1998) [hereinafter Yamamoto, *Racial Reparations*] (drawing out three darksides (formerly the "underside, the risks") of reparations efforts: the distorted legal framing of reparations claims; the dilemma of reparations process; and the ideology of reparations).

[110] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 70–71; *see* Yamamoto, *Racial Reparations*, *supra* note 109, at 487–88, 494; *see also* JOHN DAWSON, HEALING AMERICA'S WOUNDS: DISCOVERING OUR DESTINY 164–65 (1995); Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 23–26 (2007).

[111] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 71; Yamamoto, *Racial Reparations*, *supra* note 109, at 487 (explaining that reparations' attendant darksides should not lessen their significance when achieved nor preclude future redress efforts, but instead illuminate an effort's potential pitfalls requiring careful navigation).

Each of these working principles is further coalesced into four points of inquiry comprising the *social healing through justice* analytical framework.[112]

B. *Four* Social Healing Through Justice *Analytical Inquiries:* Recognition*,* Responsibility*,* Reconstruction*, and* Reparation

Social healing through justice offers four guideposts—*recognition*, *responsibility*, *reconstruction,* and *reparation*—that "aim[] to shape, assess and recalibrate social healing initiatives to foster the kind of reparative justice that heals."[113]

Recognition asks harmer and harmed to "see into the woundedness of self and others (then and now)."[114] Participants who empathize with and humanize each other are better positioned to critically and "fairly assess the specific circumstances and larger historical context of the justice grievances undergirding present-day tensions."[115] All with the goal of developing a "newly framed collective memory of the injustice [to serve] as a foundation for collaborative efforts to repair the damage."[116]

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[112] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 71.

[113] *Id.* at 72. Initially called "interracial justice," the first iteration of Professor Yamamoto's framework "mainly targeted grievances and reconciliation efforts among communities of color in the United States." *Id.* at 72 n.1; *see* YAMAMOTO, INTERRACIAL JUSTICE, *supra* 90note 90, at 175–85. "The framework and its 4Rs, though, were broadly cast, drawing from a range o[f] international initiatives and related theorizing. [Professor Yamamoto's] subsequent works expanded and refined the framework to expressly encompass a wide range of reparative justice initiatives, renaming the approach 'social healing through justice.'" YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* 12note 12*,* at 72 n.1; *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); 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, 57, 58 (2014); Eric K. Yamamoto & Sara Lee, *Korean "Comfort Women" Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences*, 11 KOREAN L. J. 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, 33 (2009).

[114] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 78; *see* Rachel López, *The (Re)collection of Memory After Mass Atrocity and the Dilemma for Transitional Justice*, 47 N.Y U. INT'L L. & POL. 799 (2015); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000).

[115] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 74, 78.

[116] *Id.* at 78.

Responsibility invites those involved in the healing effort to acknowledge the injustice's attendant harms and accept responsibility for healing persisting individual and collective wounds.[117] Guilt, shame, remorselessness, threats of punishment or retribution, and western cultural and legal norms obstruct efforts to take responsibility.[118] But we all benefit from "facing history, facing ourselves"[119] and disentangling each other from the net of historic injustice. Hoʻoponopono principles, for example, recognize that "[e]ven the 'innocent bystander' is part of *hihia*," meaning everyone in the group "must find ways to *kala* (free) themselves[.]"[120] Discussed further in Section V(A), *responsibility* is tiered; "[o]verlapping legal and ethical norms provide analytical structure."[121] Domestic or international law may hold a party legally responsible, and varying degrees of participation in the harm may implicate ethical (or moral) *responsibility*.[122] Democratic governments are interested in "reclaiming legitimacy as a society actually committed to civil and human rights."[123] Members of democratic

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[117] *Id.* at 79–82; *see* Joseph V. Montville, *The Healing Function in Political Conflict Resolution*, *in* CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 112 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993); *see also* Sovann Mam, *Beyond the Khmer Rouge Tribunal: Addressing a Lack of Reconciliation at the Community Level* 26, (Swisspeace, Working Paper 7/2019), https://www.swisspeace.ch/assets/publications/downloads/Working-Papers/a7e5743d3e/WP-5-Cambodia-Series-v2.pdf (identifying the Khmer Rouge perpetrators' failure to confess wrongdoing or to accept responsibility as key hindrance to reconciliation efforts in Cambodia); YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 90, at 185; Yamamoto, Pettit & Lee, *supra* note 113113, at 20.

[118] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 81–82.

[119] *Id.* at 48.

[120] 1 NĀNĀ I KE KUMU, *supra* note 1, at 72.

[121] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 119. See *infra* Section V.A for an articulation of *responsibility*'s myriad tiers.

[122] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 119–35.

[123] *Id.* at 48. Canada's Truth and Reconciliation Commission articulated the country's stake in restoring its legitimacy and stature within the global community in its 2015 report on Canadian residential boarding schools:

> In 2015, as the Truth and Reconciliation Commission of Canada wraps up its work, the country has a rare second chance to seize a lost opportunity for reconciliation. We live in a twenty-first-century global world. At stake is Canada's place as a prosperous, just, and inclusive democracy within that global world.

TRUTH & RECONCILIATION COMM'N CAN., *supra* note 14, at 7.

societies who did not directly participate in the injustice are obligated to help repair damage to the community because "[a]n injury to anyone in the polity also damages the community itself."[124] Often, we are all responsible.

Reconstruction is where the rubber meets the road. Where talk becomes walk. Apologies must be made and accepted.[125] In ho'oponopono processes "[t]he culprit must confess, repent and make restitution. The one who was wronged must forgive."[126] Places for people to learn about the injustice must be built, and messages sharing the new, collaboratively framed collective memory of the harm must be crafted and disseminated.[127] A final and crucial facet of *reconstruction* is restructuring institutions to "prevent 'it' – the injustice and the social, economic and political conditions giving rise to it – from happening again."[128] Institutional restructuring must transform the legal system, political and governmental apparatuses, education, economics, and health care.[129]

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[124] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 80; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 90, at 125; *see also* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014, at 54, 54–71, https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ (chronicling four centuries of racial terror and injustice suffered by enslaved Africans, their descendants and Black people generally to cogently articulate the need for reparations).

[125] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 82. Different cultures shape steps of *recognition* and *reconstruction* differently. *See, e.g.*, Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States,* 20 L. & SOC. REV. 461 (1986) (exploring an apology's significance and role in dispute resolution in Japan and the United States).

[126] 1 NĀNĀ I KE KUMU, *supra* note 1, at 75.

[127] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 83–84; Hom & Yamamoto, *supra* note 114, at 1756 (drawing upon multidisciplinary insights to illustrate how collective memory and perceptions of injustice each shape the other); *see also* Joshua F.J. Inwood & Derek Alderman, *Taking Down the Flag Is Just a Start: Toward the Memory-Work of Racial Reconciliation in White Supremacist America*, 56 SE. GEOGRAPHER 9, 10–12 (2016) (devalorizing and delegitimizing white supremacist symbols should accompany a broader call for a Truth and Reconciliation Commission tasked with critically examining white supremacy's historical and current impacts).

[128] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 84; *see* Nicole Summers, *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?*, 25 HARV. HUM. RTS. J. 219, 221–34 (2012) (assessing both salutary provisions and gaps in Colombia's 2011 Victims' Law and exploring legislation as an effective transitional justice tool).

[129] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 84.

Reparation is, at base, about rebuilding the capacity of harmed individuals and communities to once again "function productively and peaceably."[130] While this may include individual payments to "partially compensate for property or financial loss or psychological trauma," *reparation* digs deeper.[131] It uproots disabling structural conditions, making the necessary shifts to build out educational opportunities, job skills training, government and community support, and access to capital and health care.[132] But calls for *reparation*—and particularly for reparations (with an "s")[133]—are routinely met with vitriolic backlash.[134] As the *darkside* working principle counsels,

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[130] *Id.* at 89. Ho'oponopono, too, emphasizes the importance of reparation:

> The requirement of reparation is especially wise. For until stolen property, for example, is restored or replaced, the thief remains burdened with guilt and social discomfort. The victim, though he forgives, continues to feel the loss of possessions. Neither is free of the hala or wrong, and the attitudes and emotions the wrong engendered.

1 NĀNĀ I KE KUMU, *supra* note 1, at 75.

[131] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 87.

[132] *Id.* at 86–88; *see* Coates, *supra* note 124, at 70; AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997); Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, *in* WOMEN, CULTURE AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61 (Martha C. Nussbaum & Jonathan Glover eds., 1996).

[133] "Reparation" can include "reparations" in the form of individual monetary compensation for "property or financial loss or psychological trauma, or to symbolize acceptance of responsibility for serious wrongdoing[,]" but the two terms differ in important ways. YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 87. "Reparation as economic justice (repairing material harms of injustice) cuts deeper than monetary or property recompense." *Id.* Reparation is more about changing socioeconomic conditions and facilitating capacity-building for entire groups and communities. *Id.* at 87–88; *see also* SEN, *supra* note 132; Nussbaum, *Capabilities and Human Rights*, *supra* note 132.

[134] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 89. *See generally* ALFRED BROPHY, REPARATIONS PRO AND CON (2006). Reparations receive much backlash because polling research suggests that two-thirds of people in the United States with an "even higher share among white people" do not believe that descendants of those who were enslaved deserve reparations. Consider This From NPR, *How Do You Put a Price on America's Original Sin?*, NAT'L PUB. RADIO, at 11:29 (Mar. 27, 2023, 5:10 PM ET), https://www.npr.org/2023/03/27/1166353772/how-do-you-put-a-price-on-americas-original-sin. "This is not a question of logistics or economics. It's a question of deservedness." *Id.* at

those at the healing initiative's helm must strategically anticipate and proactively respond to the obstacles that claims for economic justice face.[135]

Together these four starting points of inquiry—*recognition*, *responsibility*, *reconstruction*, and *reparation*—endeavor to shape or reconfigure reconciliation initiatives to "bridge the justice chasm between aspiration and realization."[136] But, as Professor Yamamoto notes, the *social healing through justice* framework "offer[s] a rough, incomplete, yet nevertheless compelling picture of some of the dynamics of social healing."[137] He crafts the framework with room to grow.[138] Though *social healing through justice* is grounded in Indigenous healing concepts, Kumu Sproat's uniquely 'Ōiwi restorative justice values further tailor the framework to fit Native Hawaiians' justice grievances.[139]

C. *Kanaka Alterations: Indigenizing* Social Healing Through Justice

Indigenous peoples rightfully distrust western laws and legal systems.[140] Colonizing (or imperializing) nations foisted English common law and

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12:00. It is also an issue of "collective, willful ignorance" by (white) people who are "not just unaware, but somehow avoiding information on how Black people still face discrimination in the labor market, housing and banking." *Id.* at 12:39. Most people who participated in a racial wealth gap survey believe that for "every $100 white families have, Black families have about $90[,]" when in reality, the wealth gap is much larger and continues to grow. *Id.* at 13:20. But the prevailing core narrative in the United States is that everyone can pick themselves up by their bootstraps if they just work hard enough. *Id.* at 12:50. This is out of touch with the realities of the global majority. *Id.* at 13:25.

[135] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 89–90.

[136] *Id.* at 73–91. See *supra* Section II.A for a refresher on the framework's working principles and how they inform the four points of inquiry.

[137] *Id.* at 47.

[138] *See id.*

[139] MacKenzie et al., *supra* note 80, at 12–13.

[140] *See, e.g.*, Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes Are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/ (detailing provisions in the 1868 Fort Laramie Treaty designating the Black Hills as unceded Indian Territory until gold was discovered and the United States reneged on the agreement and redrew the treaty's boundaries); Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NAT'L PUB. RADIO (Jan. 18, 2015, 4:57 PM ET), https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit.

process on Native groups[141] and then reneged on treaties,[142] legislated cultural destruction,[143] and thwarted Indigenous economic advancement.[144] For this reason, "[a]rticulating how Indigenous understandings and conceptualizations underpin [restorative justice-based analytical frameworks] is especially important where law has historically been wielded as a tool of oppression and dispossession."[145] In other words, Native groups involved in reconciliation processes must be the ones who define the attendant social healing's contours to ensure reconciliation is genuine, enduring, and comprehensive.[146]

Kanaka ʻŌiwi lawyer and scholar D. Kapuaʻala Sproat offers a uniquely Maoli framework that reconciliation efforts can use to "actualize[]

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[141] Peter d'Errico, *Native Americans in America: A Theoretical and Historical Overview*, 14 WICAZO SA REV. 7, 15 (1999) ("Chief Justice John Marshall borrowed from [] papal bulls the essential legalisms needed to affirm American power over indigenous peoples. He encased Christian religious premises within the rhetoric of 'European' expansion in deciding *Johnson v. McIntosh* . . . .").

[142] Cutlip, *supra* note 140; Wang, *supra* note 140.

[143] *See, e.g.*, NEWLAND REPORT, *supra* note 16, at 35–36 & nn.88–89.

[144] *See* Randall Akee, *Sovereignty and Improved Economic Outcomes for American Indians: Building on the Gains Made Since 1990*, *in* BOOSTING WAGES FOR U.S. WORKERS IN THE NEW ECONOMY: TEN ESSAYS ON WORKER POWER, WORKER WELL-BEING, AND EQUITABLE WAGES 147–64 (2021) (reducing barriers to economic development for American Indians on reservation lands includes increasing access to capital, investing and expanding infrastructure, and boosting educational attainment and access).

[145] MacKenzie et al., *supra* note 80, at 7. Kumu Sproat cites various scholars for their differing perspectives on western imperialism's shaping of Hawaiʻi law and governance. *Id.* at 7 n.40. More recent scholarship suggests that law was not "simply a colonial imposition[,]" but "an extension of the continued exercise of chiefly governance[.]" *Id. See generally* NOELANI ARISTA, THE KINGDOM AND THE REPUBLIC: SOVEREIGN HAWAIʻI AND THE EARLY UNITED STATES (2019) (using Native Hawaiian historical paradigms to provide an accurate accounting of ʻŌiwi history, beyond and against the dominant narrative of American colonization); KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION (2014) (explaining how ruling aliʻi used western ideas and Indigenous customs to innovate a hybridized system of governance); SALLY ENGLE MERRY, COLONIZING HAWAIʻI: THE CULTURAL POWER OF LAW (2000) (explaining how Anglo-American law colonized and displaced Indigenous law); JONATHAN KAY KAMAKAWIWOʻOLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002) (articulating "a new moʻolelo" of colonialism's violence).

[146] *See* MacKenzie et al., *supra* note 80, at 7.

[restorative justice] on the ground in Kanaka Maoli communities[.]"[147] Four restorative justice "realms . . . embodied in the human rights principle of self-determination"[148] constitute the framework: "(1) mo'omeheu (cultural integrity); (2) 'āina (lands and natural resources); (3) mauli ola (social determinants of health and well-being); and (4) ea (self-government)."[149] The realms are not siloed.[150] Indigenous groups' holistic (physical, spiritual, and emotional) well-being is indivisible from their ability to access their ancestral lands and exercise self-determination.[151] Cultural practices are often place-based and thus depend on—and are shaped by—the land.[152]

[C]ulture cannot exist in a vacuum, and its integrity is bound to land and other resources upon which Indigenous Peoples depend for physical and spiritual survival. In turn, Native communities' well-being is defined by cultural veracity and access to, and the health of, natural resources. Finally, cultural and political self-determination influence who will control Indigenous Peoples' destinies—including the resources that define cultural integrity and well-being—and whether that fate will be shaped internally or by outside forces, including colonial powers.[153]

Mo'omeheu, 'āina, mauli ola, and ea are the framework's touchpoints.[154] They are also four areas of Kanaka life devastated by western imperialism.[155]

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[147] *Id.* at 12.

[148] *Id.*

[149] *Id.* Kumu Sproat explains how she drew upon James Anaya's framework for inspiration and guidance:

> James Anaya coalesced international human rights principles of self-determination to identify the four analytical categories utilized in this developing framework. . . . To make these values relevant to the Native Hawaiian community and this specific body of law, we have elected to use 'ōlelo Hawai'i knowing that these terms are embedded with meanings and significance beyond their mere definitions.

MacKenzie et al., *supra* note 80, at 12 n.70. *See generally* James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 342–60 (1994).

[150] *Id.* at 12–13.

[151] *See id.*

[152] *See id.*

[153] *Id.* (citations omitted).

[154] *Id.* at 13.

[155] *Id.*; *see* Anaya, *supra* note 149, at 342–60; United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

Persisting struggles to revitalize language and culture,[156] centuries-long conflicts over land and water access,[157] enduring poor health outcomes,[158] and scant opportunities to exercise self-determination[159] evince western imperialism's destructive legacy. Because *social healing through justice* means "restoring what was taken or repairing what was broken[,]"[160] effective reconciliation initiatives should seek to advance each of these four realms (or values).[161]

Whether a reconciliation initiative repairs the damage to moʻomeheu hinges on if it "appropriately supports and restores 'cultural integrity as a partial remedy for past harms, or [if it] perpetuate[s] conditions that continue to undermine cultural survival.'"[162] Similarly, the 'āina touchpoint asks whether an initiative "'perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way.'"[163] Inquiry into mauli ola examines whether an initiative improves social determinants of health and well-being like education, health care, "'living standards,' and other social conditions,"[164] or if it "perpetuates

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[156] *See generally* David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, *in* NATIVE HAWAIIAN LAW: A TREATISE 784–806 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapuaʻala Sproat eds., 2015) (describing the constitutional, statutory, and judicial bases for traditional and customary Native Hawaiian rights and practices).

[157] *E.g.*, *Ka Paʻakai O Kaʻ Aina v. Land Use Comm'n,* 94 Hawaiʻi 31, 7 P.3d 1068 (2000); *In re* Waiāhole Ditch Combined Contested Case Hearing (*Waiāhole I*), 94 Hawaiʻi 97, 9 P.3d 409, 455 (2000). *See generally* Forman & Serrano, *supra* note 155, at 790–801 (providing an overview of Hawaiʻi cases interpreting traditional and customary gathering rights); *Background on Na Wai 'Eha,* EARTHJUSTICE, https://earthjustice.org/feature/background-on-na-wai-eha (last visited Apr. 21, 2023) (describing the ongoing diversion of freshwater streams on Maui to private development projects).

[158] *E.g.*, OFF. HAWAIIAN AFFS., *Native Hawaiian Data Book 2021*, Chapter 7 Health & Vital Statistics, https://www.ohadatabook.com/go_chap07.21.html (last updated July 2023).

[159] Andrade, *Legacy in Paradise*, *supra* note 47, at 276.

[160] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 68 (citing Thomas M. Antkowiak, *A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples*, 25 DUKE J. COMP. & INTʻL L. 1, 1–80 (2014)).

[161] MacKenzie et al., *supra* note 80, at 13.

[162] *Id.* at 14 (citing D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawaiʻi's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 179 (2011)).

[163] *Id.* at 15 (citing Sproat, *Wai Through Kānāwai*, *supra* note 162, at 181).

[164] *Id.* at 17 (citing Sproat, *Wai Through Kānāwai*, *supra* note 162, at 182–83).

the status quo."[165] And ea asks reconciliation initiatives to "consider 'whether a decision perpetuates historical conditions imposed by colonizers or [if it] will attempt to redress the loss of self-governance.'"[166]

"[W]eaving these four values into a cohesive framework has tremendous transformative potential to heal the wounds of injustice and begin to produce real results"[167] for Kānaka Maoli. But healing cannot begin until the harm is recognized.[168] As with other sovereign nations around the globe[169] that are caught in the net of white supremacy's imperialist projects, "the recent history of Hawai'i 'is a story of violence, in which that colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government.'"[170] Federal Indian Boarding Schools facilitated Euro-American imperialism[171] in Hawai'i and the overthrow of the sovereign Hawaiian Kingdom's last monarch.[172] On Turtle Island (the continental United States), the violence of Federal Indian Boarding Schools was unmatched[173]—except by Canada.[174] What follows is an overview of the Federal Indian Boarding School Initiative's investigative report findings and conclusions which expose the harms perpetrated by the federal government against Native groups on the continent and in Hawai'i

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[165] *Id.*

[166] *Id.* at 19 (citing Sproat, *Wai Through Kānāwai*, *supra* note 162, at 185).

[167] *Id.* at 13. Conceptualizing the four values as an 'aho can help illustrate their interconnectedness:

> In a similar vein, Political Science Professor Noelani Goodyear-Ka'ōpua encourages Hawaiian Studies practitioners to look at four values or principles that can be seen as 'aho, single cords, that when braided together form what political scholar and poet Haunani Kay-Trask describes as a "rope of resistance": ea (life, breath, sovereignty), lāhui (collective identity and self-determination), kuleana (positionality and obligations), and pono (justice and healing).

Id. at 13 n.72 (citations omitted).

[168] See discussion *infra* Section II.B for a thorough exploration of *recognition* as one *social healing through justice* touchpoint guiding reparative justice initiatives.

[169] MacKenzie et al., *supra* note 80, at 19.

[170] *Id.* (citing OSORIO, DISMEMBERING LĀHUI, *supra* note 145, at 3).

[171] BEAMER, *supra* note 145, at 12 (explaining that "Euro-American imperialism" is a better fit to describe what Kānaka Maoli faced during the nineteenth-century and beyond because of Hawai'i's internationally recognized sovereign statehood).

[172] *See* discussion *infra* Section IV.A.

[173] *See* discussion *infra* Section III.B.

[174] *See generally* TRUTH & RECONCILIATION COMM'N CAN., *supra* note 14; Doyle, *supra* note 2.

during its centuries-long twin policy of land acquisition and cultural genocide.

III. THE UNITED STATES DEPARTMENT OF THE INTERIOR'S FEDERAL INDIAN BOARDING SCHOOL INITIATIVE[175]

Yaqui scholar Rebecca Tsosie describes the histories of the United States and Canada as closely linked.[176] Both are settler colonial nations born of British colonization and Euro-American imperialism.[177] Both alienated Indigenous nations from the whole of their ancestral territories when drawing the international border now dividing them.[178] And both devised policies for the "forcible acculturation of Indigenous peoples . . . which included displacement from their traditional territories . . . as well as the removal of Indigenous children to government-sponsored boarding schools."[179] Reconciliation is the point at which Canada and the United States diverge.[180]

Prompted by Canada's Tk'emlúps te Secwepemc First Nation's unearthing of the remains of 215 Indigenous children at Kamloops Indian Residential School,[181] United States Department of the Interior Secretary

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[175] I originally drafted Part III for my *Unbound* piece, *supra* note 2. The descriptions of the Department of the Interior's investigative report findings provide critical historical information to effectively compare and contrast Kamehameha Schools with other Federal Indian Boarding Schools named in the report. NEWLAND REPORT, *supra* note 16, at 69–79.

[176] Rebecca Tsosie, *Accountability for the Harms of Indigenous Boarding Schools: The Challenge of "Healing Persisting Wounds" of "Historic Injustice"*, 52 SW. L. REV. 20, 20 (2023).

[177] *Id.*; *see* BEAMER, *supra* note 145, at 12.

[178] Tsosie, *supra* note 176.

[179] *Id.*

[180] Doyle, *supra* note 2, at 174 (examining governmental responses to ninety-four calls to action issued by Canada's Truth and Reconciliation Commission and contrasting that progress with the United States' fledgling boarding school initiative). Where a 2006 class action settlement established Canada's Truth and Reconciliation Commission, and where that commission fulfilled its mandate in 2015, the United States struggles to get a bill proposing a similar Truth and Reconciliation Commission for United States Federal Indian Boarding Schools out of committee. *Id.*; TRUTH & RECONCILIATION COMM'N CAN., *supra* note 14, at 130; *see* Truth and Healing Commission on Indian Boarding School Policies in the United States Act, S. 1723 118th Cong. (2023); Cloud v. Can. (2004) 192 O.A.C 239 (Can.)14.

[181] DOI Memo, *supra* note 11, at 1; Coletta, *supra* note 20.

Deb Haaland launched the Federal Indian Boarding School Initiative on June 22, 2021.[182]

A. *The Initiative's Origins: Harbinger Priests*

The granddaughter of Federal Indian boarding school survivors and the United States' first Native American cabinet secretary, Secretary Haaland lives with the intergenerational harm caused by the schools.[183] Two generations of her grandparents were taken from their families and forcibly enrolled in federally supported programs designed to strip them of their Native identities.[184] In a *Washington Post* editorial (published two weeks before announcing the initiative), Secretary Haaland wrote of a conversation she had with her grandmother about the schools.[185] "It was the first time I heard her speak candidly about how hard it was — about how a priest gathered the children from the village and put them on a train, and how she missed her family. She spoke of the loneliness she endured. We wept together."[186]

Secretary Haaland now leads the department "responsible for operating or overseeing Indian boarding schools across the United States and its territories," and believes the agency is therefore "uniquely positioned to assist in the effort to recover the histories of these institutions."[187] The primary goal of the ten-month-long initiative was to "identify all boarding schools that participated in the Program and the students enrolled in each, along with each student's Tribal affiliation" with a "particular emphasis . . . on any records relating to cemeteries or potential burial sites associated with" the residential facilities.[188] By bringing to light what has been buried for so long, Secretary Haaland seeks to scale up the healing her grandmother experienced after she reclaimed her truth and spoke openly about what she survived.[189] "It was an exercise in healing for her and a profound lesson for me . . . about how important it is to reclaim what those schools tried to take from our people."[190]

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[182] DOI Memo, *supra* note 11, at 1.
[183] *See* Haaland, *My Grandparents Were Stolen*, *supra* note 14.
[184] *See id.*
[185] *Id.*
[186] *Id.*
[187] DOI Memo, *supra* note 11, at 1–2.
[188] *Id.* at 2.
[189] Haaland, *My Grandparents Were Stolen*, *supra* note 14.
[190] *Id.*

B. *Call Him Hanödaga:nyas, "Town Destroyer:"*[191] *Select Investigative Report Findings*

With further investigation to come, the report's preliminary findings demonstrate that the expansive Federal Indian Boarding School system traumatized multiple generations of American Indian, Alaska Native, and Native Hawaiian children who "the United States coerced, induced, or compelled" to attend the schools as part of its "twin Federal policy of Indian

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[191] In a 1779 letter to Major General John Sullivan, George Washington directed him to destroy Native American settlements and food systems. Letter from George Washington to John Sullivan (May 31, 1779), *in* 20 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, 8 APRIL TO 31 MAY 1779, at 716, 716–19 (Edward G. Lengel ed., 2010). He ordered him to capture every Native American in sight, regardless of age or gender:

> The expedition you are appointed to command is to be directed against the hostile tribes of the six nations of Indians, with their associates and adherents. The immediate objects are the *total destruction and devastation of their settlements* and the *capture of as many prisoners of every age and sex* as possible. It will be *essential to ruin their crops now in the ground and prevent their planting more*.
>
> . . . .
>
> *But you will not by any means listen to ⟨any⟩ overture of peace before the total ruin of their settlements is effected* . . . . Our future security will be in their inability to injure us the distance to which they are driven and in the terror with which the severity of the chastisement they receive will inspire ⟨them.⟩

Id. (emphasis added). George Washington earned the moniker Hanödaga:nyas, the Seneca word for "Town Destroyer." Letter from the Seneca Chiefs to George Washington (Dec. 1, 1790), *in* 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, 1 DECEMBER 1790 TO 21 MARCH 1791, 7, 7–16 (Jack D. Warren, Jr. ed., 1998); *see* WALLACE CHAFE, SENECA WORDS 127, https://senecalanguage.com/wp-content/uploads/Seneca-Words-Chafe.pdf. The Susquehannahs gave George Washington's great-grandfather, John Washington, a similar moniker meaning "devourer of villages" following a "massacre when five chiefs who had come out to negotiate under a flag of truce were murdered by colonists." *Conotocarious*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/conotocarious/ (last visited Nov. 7, 2023).

territorial dispossession and Indian assimilation through Indian education."[192]

As the United States emerged in the latter half of the eighteenth century, the country's founding fathers and first presidents were particularly concerned with acquiring land for the growing nation and its white inhabitants.[193] They set their sights on the "extensive forests" Native groups cared for and controlled.[194] But how could they wrest these territories from Native populations as cheaply as possible while preserving (white) life?[195] In part by "advanc[ing] an assimilation policy directed at Indian children[.]"[196]

> From the beginning, Federal policy toward the Indian was based on the desire to dispossess him of his land. . . .
>
> Beginning with President Washington, [known as Hanödaga:nyas, or "Town Destroyer," by certain Native groups], the stated policy of the Federal Government was to replace the Indian's culture with our own. This was considered "advisable" as the cheapest and safest way of subduing the Indians, of providing a safe habitat for the country's white inhabitants, of helping the whites acquire desirable land, and of changing the Indian's economy so that he would be content with less land. Education was a weapon by which these goals were to be accomplished.[197]

The United States weaponized education by focusing boarding school instruction on manual labor and vocational skills with limited value to the

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[192] NEWLAND REPORT, *supra* note 16, at 36, 91. "[T]he Department operated or supported 408 Federal Indian Boarding Schools across 37 states or then-territories, including 21 schools in Alaska and 7 schools in Hawaii. Given that an individual Federal Indian Boarding School may account for multiple sites, the 408 Federal Indian Boarding Schools comprised 431 specific sites." *Id.* at 82. The investigation documented over 1,000 institutions that did not meet the Federal Indian boarding school criteria, but that "may have involved education of Indian people, mainly Indian children[,]" including day schools, sanitariums, asylums and orphanages. *Id.* at 87.

[193] *Id.* at 21; SENATE SPECIAL SUBCOMM. ON INDIAN EDUC., COMM. ON LAB. & PUB. WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, Appendix I, at 142–43 (1969) [hereinafter KENNEDY REPORT].

[194] Letter from Thomas Jefferson to William Henry Harrison (Feb. 27, 1803), *in* 39 THE PAPERS OF THOMAS JEFFERSON, 13 NOVEMBER 1802 TO 3 MARCH 1803, at 589, 589–93 (Barbara B. Oberg ed., 2018); NEWLAND REPORT, *supra* note 16, at 21–22.

[195] *See* KENNEDY REPORT, *supra* note 193, at 142.

[196] NEWLAND REPORT, *supra* note 16, at 21.

[197] KENNEDY REPORT, *supra* note 193, at 142.

developing industrial economy.[198] Deemphasizing textbook instruction foreclosed many relevant employment opportunities to Native groups, further hampering their economic capacity-building ability.[199] Centering agricultural, domestic, and vocational training enabled the federal government to more easily pen Native groups into ever-diminishing territories by "discourag[ing] nomadic practices and [encouraging] . . . sedentary practices dominated by western agriculture development."[200] Concomitantly, the United States pushed Native groups to "purchase goods on credit so as to likely fall into debt," knowing they would have to pay the debt through land concessions.[201]

Not only were boarding schools weaponized to disrupt Tribal economies and sever the physical connection Native groups had with their ancestral lands, they also destroyed familial and cultural connections within Native

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[198] NEWLAND REPORT, *supra* note 16, at 7–8.

[199] *See id.* at 8, 59–60. "Training for jobs that didn't exist left many young adults with an inability to gain employment in the newly industrialized American society. . . . The resulting poverty of American Indian families was used as a justification for removing native children from their homes." KATHRYN E. FORT, AMERICAN INDIAN CHILDREN AND THE LAW: CASES AND MATERIALS 8 (2019).

[200] NEWLAND REPORT, *supra* note 16, at 21–22, 59–60.

[201] *Id.* at 22. In a confidential letter to Congress, President Jefferson wrote:

> [W]e wish to draw them to agriculture, to spinning & weaving . . . . when [sic] they withdraw themselves to the culture of a small piece of land, they will percieve [sic] how useless to them are their extensive forests, and will be willing to pare them off from time to time in exchange for necessaries for their farms & families. to [sic] promote this disposition to exchange lands which they have to spare & we want, for necessaries, which we have to spare & they want, *we shall . . . be glad to see the good & influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop th[em off] by a cession of lands*.

Letter from Thomas Jefferson to William Henry Harrison, *supra* note 194, at 589–93 (emphasis added). "In 1803 Harrison also became a special commissioner charged with negotiating with Native Americans 'on the subject of boundary or lands.' Succumbing to the demands of land-hungry whites, he negotiated a number of treaties between 1802 and 1809 that stripped Indians of millions of acres of land . . . ." The Editors of Encyclopaedia Britannica, *William Henry Harrison*, ENCYC. BRITANNICA, https://www.britannica.com/biography/William-Henry-Harrison (last updated Nov. 10, 2022).

communities.[202] "Federal records indicate that the United States viewed official disruption to the Indian family unit as part of Federal Indian policy to assimilate Indian children."[203] Early and modern reports reveal how the boarding school system "produced intergenerational trauma by disrupting family ties in Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community."[204] Young children were pried from their parents' arms, shipped off to schools in unfamiliar places sometimes hundreds of miles away from home, and then deliberately grouped with children from different tribes to "disrupt Tribal relations and discourage or prevent Indian language use[.]"[205] Upon arrival, "systematic militarized and identity-alteration methodologies"

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[202] NEWLAND REPORT, *supra* note 16, at 37–39. The first Federal Indian Boarding School opened in 1801 and the last in 1969. *Id.* at 6. Schools were financed through congressional appropriations and, most insidiously, through funds "from Tribal trust accounts for the benefit of Indians[.]" *Id.* at 92.

[203] *Id.* at 38.

[204] *Id.* at 38–39. In 1928 the Brookings Institution published what is colloquially known as the Meriam Report upon the Department of the Interior's request. LEWIS MERIAM, INSTITUTE FOR GOV'T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION (1928) [hereinafter MERIAM REPORT]. The study investigated and documented the economic and social conditions of Native groups, and determined that the Federal Indian boarding school system was the primary culprit in the disruption of family and Tribal relations:

> [O]n the whole government practices may be said to have operated against the development of wholesome [Indian] family life.
>
> Chief of these is the long continued policy of educating the [Indian] children in boarding schools far from their homes, taking them from their parents when small and keeping them away until parents and children become strangers to each other. The theory was once held that the *problem of the [Indian] could be solved by educating the children, not to return to the reservation, but to be absorbed one by one into the white population*. This plan involved the *permanent breaking of family ties,* but provided for the children a *substitute for their own family life by placing them in good homes of whites* for vacations and sometimes longer, the so-called "outing system." . . . Nevertheless, this worst of its features still persists, and *many children today have not seen their parents or brothers and sisters in years.*

NEWLAND REPORT, *supra* note 16, at 38–39 (alterations in original) (emphasis added) (quoting MERIAM REPORT, *supra*, at 573–74).

[205] NEWLAND REPORT, *supra* note 16, at 40. "The Department acknowledged that '[i]ntermarriage by the young graduates of different nations would necessitate the use of the English language, which their offspring would learn as their mother tongue.'" *Id.* (alteration in original).

deployed by the school system stripped children of their names, hair, clothing, language, cultural practices, and religions.[206]

Many children never saw their families while at the schools, driving the wedge between them even further.[207] Many children never returned home because they were placed with or adopted by non-Native (often white) families as part of the Indian Adoption Project.[208] And many never saw their families again because they died while in the schools. At least 500 children perished.[209] That number is expected to grow.[210] The initial investigation also identified fifty-three marked and unmarked burial sites.[211] That number is expected to grow, too.[212]

The children who survived the schools carried the trauma of physical, sexual, and emotional abuse into their adulthoods.[213] They carried the memories of public humiliation, beatings, starvation, and isolation in solitary confinement for failing to follow puritanical boarding school rules.[214]

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[206] *Id.* at 7, 51, 53, 92.

[207] Haaland, *My Grandparents Were Stolen*, *supra* note 14.

[208] NEWLAND REPORT, *supra* note 16, at 97; Frances Madeson, *My Childhood Was Stolen, Says Linda Raye Cobe, Indian Boarding School Survivor*, TRUTHOUT (Oct. 10, 2022), https://truthout.org/articles/my-childhood-was-stolen-says-linda-raye-cobe-indian-boarding-school-survivor/?eType=EmailBlastContent&eId=4ed73fbc-1174-4571-b8d6-206a199e1805. The Indian Adoption Project was not "repudiated by Congress until the enactment of the Indian Child Welfare Act of 1978." NEWLAND REPORT, *supra* note 16, at 97. The Supreme Court of the United States heard oral arguments on November 9, 2022, challenging the constitutionality of the seminal Indian Child Welfare Act. Nina Totenberg, *Supreme Court Considers Fate of Landmark Indian Adoption Law*, NAT'L PUB. RADIO (Nov. 8, 2022), https://www.npr.org/2022/11/08/1134668931/supreme-court-icwa.

[209] NEWLAND REPORT, *supra* note 16, at 9.

[210] *Id.*; Dana Hedgpeth (Haliwa-Saponi) & Emmanuel Martinez, *More Schools that Forced American Indian Children to Assimilate Revealed*, WASH. POST (Aug. 30, 2023, 5:00 AM EDT), https://www.washingtonpost.com/nation/2023/08/30/indian-boarding-schools/ ("Thousands are believed to have died, the [National Native American Boarding School Healing Coalition] said.").

[211] NEWLAND REPORT, *supra* note 16*,* at 86.

[212] *Id*.

[213] *Id.* at 56.

[214] *Id.* at 54. Dora Brought Plenty refused to hit her friend, Lucy, who was being punished for running away, with a hand towel soaked in hot water and studded with open safety pins. Dana Hedgpeth (Haliwa-Saponi), *'12 Years of Hell': Indian Boarding School Survivors Share Their Stories*, WASH. POST (Aug. 7, 2023, 7:00 AM EDT), https://www.washingtonpost.com/

Sometimes older children were ordered to punish younger children by court-martial.[215] Some worked backbreaking jobs because insufficient federal funding meant the exploitation of child manual labor—disguised as vocational training—kept the schools operational.[216]

C. *Thieving Indigenous Life, Land, Wealth, and Children: Investigative Report Conclusions*

From the above findings, the report developed the following conclusions about the Federal Indian Boarding School system.[217] "From the earliest days of the Republic, the United States' official objective . . . was to sever the cultural and economic connection" Native groups had with the land.[218] The federal government weaponized the schools to pilfer American Indian, Alaska Native, and Native Hawaiian territories.[219] At first Federal Indian Boarding Schools forcibly assimilated Native children to facilitate the United States' broader objective of Indian territorial dispossession.[220] Cultural assimilation quickly became its own federal policy objective, however, and boarding schools remained integral to that effort.[221]

Being intentionally targeted and removed from their communities traumatized the children who survived the boarding school system.[222]

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history/2023/08/07/indian-boarding-school-survivors-abuse-trauma/. "A matron grabbed Brought Plenty, ripped off her nightgown and pushed her into the gantlet. The other girls hit her." *Id.*

[215] NEWLAND REPORT, *supra* note 16, at 54–55. Denise Lajimodiere (Turtle Mountain Band of Pembina Chippewa (Ojibwe)) recounts her father's horrific memories with discipline via court-martial at Chemawa Industrial School: "Following Pratt's model, the military atmosphere of schools was reinforced by a strict discipline policy; corporal punishment was incorporated along with a court of older students to maintain adherence to the rules." Denise Lajimodiere, *A Healing Journey*, 27 WICAZO SA REV. 5, 10 (2012). Lajimodiere describes "the gauntlet," in which a boy lay face down on a bed while his classmates pinned his arms and feet and whipped him with a "leather belt embedded with studs." *Id.* Her father remembered a child who "died from the gauntlet—'his kidneys had ruptured.'" *Id.*

[216] NEWLAND REPORT, *supra* note 16, at 63. "[The schools] could not possibly be maintained on the amounts appropriated by Congress for their support were it not for the fact that students are required to do . . . an amount of labor that has in the aggregate a very appreciable monetary value." *Id*. (quoting MERIAM REPORT, *supra* note 204, at 376).

[217] *Id.* at 93–94.

[218] *Id.* at 93.

[219] *Id*.

[220] *Id.*

[221] *Id.*

[222] *Id.*

Hundreds—likely thousands or tens of thousands—of Native children died.[223] This trauma and death destabilized individual family units and entire communities for almost two centuries as multiple generations of children suffered at the schools.[224]

According to Secretary Haaland, "[s]urvivors of the traumas of boarding school policies carried their memories into adulthood as they became the aunts and uncles, parents, and grandparents to subsequent generations."[225] Their experiences impacted the way they parented,[226] and the stress of unrelenting trauma seeped into their bodies, creating chronic physical and mental health conditions.[227] The science of epigenetic inheritance suggests that their children's biological systems are likely altered, too.[228] At base, "the legacy of Indian boarding schools remains, manifesting itself in Indigenous communities through intergenerational trauma, cycles of violence and abuse, disappearance, premature deaths, and other undocumented bodily and mental impacts."[229]

Additional investigation is required to uncover the full extent of the harm inflicted by the boarding school system, but the report's preliminary findings

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[223] *Id.*; Hedgpeth (Haliwa-Saponi) & Martinez, *supra* note 210.

[224] NEWLAND REPORT, *supra* note 16, at 93–94.

[225] DOI Memo, *supra* note 1114, at 1.

[226] FORT, *supra* note 199, at 7. Fort elaborates on how one's boarding school experience might affect future parenting ability:

> Children taken from their parents and raised in non-Native environments were unable to learn the parenting techniques practiced in their communities since time immemorial. Instead, these children only had experience with the western style of abusive discipline that was practiced in the boarding schools. When these boarding school children in turn had their own children, they lacked the necessary parenting skills to raise their own children into mentally and physically healthy adults.

Id.

[227] NEWLAND REPORT, *supra* note 16, at 88–89. Boarding school survivors are more likely to have cancer, tuberculosis, high cholesterol, diabetes, anemia, arthritis, gall bladder disease, PTSD, depression, and unresolved grief than those who did not attend the schools. *Id.*; Ursula Running Bear et al., *The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes*, 42 FAM. CMTY. HEALTH 1, 3–5 (2019).

[228] NEWLAND REPORT, *supra* note 16, at 89.

[229] DOI Memo, *supra* note 11, at 114.

and conclusions make plain that the United States expressly pursued the boarding school policy to destroy Native groups' cultural connection to the land to render those lands ripe for the taking.[230] As illuminated below, American missionaries and capitalists brought to bear many of these same tactics in Hawai'i as part of the western settler imperialist project to obtain and exploit 'āina.[231]

IV. PIVOTAL CONGRUITIES AND DISCREPANCIES: DISENTANGLING KAMEHAMEHA SCHOOLS FROM THE 2022 FEDERAL INDIAN BOARDING SCHOOL INVESTIGATIVE REPORT

The United States ensnared Native Hawaiians in its imperialist and racial capitalist net just as it did American Indians and Alaska Natives.[232] Pre-western contact, Kānaka Maoli numbered at least 800,000 strong.[233] Within seventy years following western contact, rampant spread of foreign disease and extremely low birth rates contributed to the population's collapse.[234] Roughly nine out of ten people died.[235] Faith in the old ways wavered.[236] Missionaries found easy footholds in the fear.[237]

In the 1820s, Protestant missionaries deployed by the Calvinist American Board of Commissioners for Foreign Missions ("ABCFM") introduced both

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[230] NEWLAND REPORT, *supra* note 16, at 20–22; KENNEDY REPORT, *supra* note 193, *passim*.

[231] *See* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 12 (Univ. Haw. Press rev. ed. 1999) ("The United States, in collusion with white settlers in Hawai'i, moved inexorably to fulfill the prophecy of Manifest Destiny.").

[232] *See generally* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004) (drawing on Hawaiian-language primary source documents to demonstrate Native Hawaiians' resistance to the annexation of Hawai'i to the United States, a plan which ninety-five percent of the Indigenous population opposed); QUEEN LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN (1898) (chronicling events leading up to and including the overthrow of the Hawaiian monarchy, Queen Lili'uokalani's imprisonment and forced abdication, and her opposition to annexation).

[233] David E. Stannard, *Disease and Infertility: A New Look at the Demographic Collapse of Native Populations in the Wake of Western Contact*, J. AM. STUD. 325, 336 (1990).

[234] *See id.* at 334–36.

[235] *Id.* at 336; TRASK, *supra* note 231, at 6; *see infra* note 289.

[236] LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 142–45 (1992).

[237] *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 21–22 (2008).

Christianity and manual and industrial education to Hawai‘i.[238] As scholar, professor, and Kamehameha Schools graduate C. Kalani Beyer observes, "[i]n many ways, the use of manual and industrial education in Hawai‘i paralleled the way it was used for Blacks and Native Americans in the United States."[239] It "set in motion an educational system that resulted in Hawaiians becoming second-class citizens in their own land."[240] Today, Euro-American imperialism's fallout is manifest in "contemporary Native Hawaiians representing a disproportionate share of Hawai‘i's school dropouts, [incarcerated individuals], welfare recipients, . . . unemployed[,]"[241] and nearly half of the children touched by the child welfare system.[242]

Kamehameha Schools' history—as well as the Department of the Interior's report—implicates it in the "broader white supremacist project of subordinating and domesticating Kānaka[,]"[243] Native Americans, Alaska Natives, and Black Americans.[244] Grounding an analysis of Ke Ali‘i Pauahi's creation of the trust and the schools' formative years in nineteenth-century historical, sociopolitical, and economic context reveals that while Kamehameha Schools likely should not have been included in the Department of the Interior's report, the trust should use its inclusion as an opportunity to genuinely reckon with the "contradictions and internal conflicts of [its] own colonial history."[245] I ka wā mamua. We must first look to the past.[246]

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[238] C. Kalani Beyer, *Manual and Industrial Education for Hawaiians During the 19th Century*, 38 HAWAIIAN J. HIST., 2004, at 1, 7–8 [hereinafter Beyer, *Manual and Industrial Education*].

[239] C. Kalani Beyer, Manual and Industrial Education During Hawaiian Sovereignty: Curriculum in the Transculturation of Hawai‘i 268 (2004) [hereinafter Beyer, Dissertation] (Ph.D., dissertation, University of Illinois at Chicago) (ProQuest).

[240] *Id.* at 274–75.

[241] *Id.* at 275.

[242] OFF. HAWAIIAN AFFS., *Native Hawaiian Data Book 2021*, Chapter 8 Human Services tbl.8.05, https://www.ohadatabook.com/go_chap08.21.html (last updated July 2023).

[243] Goodyear-Ka‘ōpua, *Domesticating Hawaiians*, *supra* note 3, at 17.

[244] *See* NEWLAND REPORT, *supra* note 16, at 79–81.

[245] Goodyear-Ka‘ōpua Email, *supra* note 67.

[246] KAME‘ELEIHIWA, *supra* note 236, at 2.

A. *A Truncated History of a Nation Overthrown*

Kānaka Maoli are related by birth to ʻāina, akua, and "all the myriad aspects of the universe."[247] So says the "Kumulipo, the great cosmogonic genealogy."[248] This lineal and familial relationship with the land and its natural resources explains why "Hawaiian spiritual beliefs, customs, and practices focus[] on maintaining harmonious and nurturing relationships to the various life forces, elements, and beings of nature as ancestral spirits[.]"[249] Native Hawaiians did not privately own water, ʻāina, or the

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[247] *Id.* Dr. Kameʻeleihiwa describes the Kanaka Maoli orientation to past, present, and future.

> It is interesting to note that in Hawaiian, the past is referred to as *Ka wā mamua*, or "the time in front or before." Whereas the future, when thought of at all, is *Ka wā mahope*, or "the time which comes after or behind." It is as if the Hawaiian stands firmly in the present, with his back to the future, and his eyes fixed upon the past, seeking historical answers for present-day dilemmas. Such an orientation is to the Hawaiian an eminently practical one, for the future is always unknown, whereas the past is rich in glory and knowledge.

Id. at 22–23.

[248] *Id.* at 2.

[249] Davianna Pōmaikaʻi McGregor, *An Introduction to the* Hoaʻāina *and Their Rights*, 30 HAWAIIAN J. HIST. 3–4 (1996), VAN DYKE, *supra* note 237, at 12 ("The ʻĀina was not a commodity to be owned or traded, because such actions would disgrace and debase one's family and oneself."). Haunani-Kay Trask succinctly summarized Native Hawaiians' familial relationship with ʻāina as follows:

> *We are the children of Papa—earth mother—and Wākea—sky father—who created the sacred lands of Hawai'i Nei. From these lands came the taro, and from the taro, the Hawaiian people. As in all of Polynesia, so in Hawai'i: younger sibling must care for and honor elder sibling who, in return, will protect and provide for younger sibling. Thus, Hawaiians must nourish the land from whence we come. The relationship is more than reciprocal, however. It is familial. The land is our mother and we are her children. This is the lesson of our genealogy.*

TRASK, *supra* note 231, at vi. Dr. Jamaica Heolimeleikalani Osorio reminds us that it is ʻāina that teaches us how to love.

> To love someone, to be intimate with someone, is to share your ʻāina with them . . . . Aloha ʻāina is not patriotism . . . aloha ʻāina is the pull of a magnet that draws you completely and flush to your ʻāina . . . . When I say aloha is not straight, I'm not just saying aloha makes room for people

resources living within the sea or on the land before western contact.[250] Rather, a tiered land management system ensured productive land use that fed a "'tremendously peopled'"[251] archipelago.[252]

> In the traditional system, a hierarchy of *Ali'i*, *konohiki*, and *maka'āinana* (Chiefs, Land stewards, and commoners) administered and cultivated any given piece of *'Āina*. The *Ali'i* and his *konohiki* in this hierarchy were appointed by the *Mō'ī* (paramount Chief) upon his coming to power. This arrangement ensured coordinated cultivation by the *maka'āinana*, with each level of people having overlapping rights to, and interests in, the products of that *'Āina*.[253]

If mōʻī, aliʻi, or konohiki abused their power or otherwise failed to properly utilize ʻāina, they could be "rejected and even killed."[254] But "so long . . . as he did right" and "govern[ed] with honesty," a mōʻī or aliʻi would "prolong his reign and cause his dynasty to be perpetuated, so that his government . . . [would] not be overthrown."[255] Ruling with empathy and

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> like me who aloha other women, I'm saying that if I love you, I have to love the ʻāina to love you.

Puuhonua Puuhuluhulu, *Hi'iakaikapoliopele & Loving Like 'Āina Jamaica Heoli Osorio*, YOUTUBE (Sept. 21, 2020), https://www.youtube.com/watch?v=Yybe Hg68U_4&feature=youtu.be.

[250] McGregor, *supra* note 249, at 4.

[251] BEAMER, *supra* note 145, at 33 (quoting CURTIS J. LYONS, LAND MATTERS IN HAWAII 103 (1875)).

[252] *See* VAN DYKE, *supra* note 237, at 13.

[253] KAMEʻELEIHIWA, *supra* note 236, at 9.

[254] E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE AND ENVIRONMENT 63 (1972). Though aliʻi were viewed as akua (or at least closer in proximity to akua given their genealogies), "this was not equivalent to . . . [the] European concept of 'divine right.' The *ali'i nui*, in old Hawaiian thinking and practice, did not exercise personal dominion, but channeled dominion. In other words, he was a trustee." *Id.*

[255] DAVID MALO, MOʻOLELO HAWAIʻI 54 (Nathaniel B. Emerson, trans., 1898).

kindness[256] thus benefitted everyone as "Ali'i relied upon the skill and labor of maka'āinana for sustenance . . . [and their] basic needs . . . ."[257] Unlike medieval Europe's serfs, maka'āinana might band together to depose abusive konohiki or relocate to another ahupua'a where they would be treated fairly.[258] Resultingly, mō'ī and ali'i trained Hawai'i nei's future chiefs and chiefesses to "care for the people with gentleness and patience, with a feeling of sympathy for the common people, . . . to live temperately, . . . conducting the government kindly to all."[259]

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[256] *See infra* note 259; Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE 22, 30 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., 2015).

> Since the responsibility of an ahupua'a chief was to make the ahupua'a productive, and a stable workforce was necessary to achieve that end, abuses by ahupua'a chiefs were minimized. Hence the chiefs' powers were checked and balanced by their reliance on the mutual cooperation of the maka'āinana. If the people of an ahupua'a were ill-treated and moved to another district, it was likely that the high chief would replace the ahupua'a chief for failing to make the land productive.

MacKenzie, *supra*.

[257] VAN DYKE, *supra* note 237, at 14–15 (citing MALO, *supra* note 255, at 87–88).

[258] *See* HANDY & HANDY, *supra* note 254, at 41.

[259] MALO, *supra* note 255255, at 80. Malo illustrates the instruction future chiefs received to prepare them for their station.

> It was the policy of the government to place the chiefs who were destined to rule, while they were still young, with wise persons, that they might be instructed by skilled teachers in the principles of government, be taught the art of war, and be made to acquire personal skill and bravery.
>
> The young man had first to be subject to another chief, that he might be disciplined and have experience of poverty, hunger, want and hardship, and by reflecting on these things learn to care for the people with gentleness and patience, with a feeling of sympathy for the common people, and at the same time to pay due respect to the ceremonies of religion and the worship of the gods, to live temperately, not violating virgins (*aole lima koko kohe*), conducting the government kindly to all.

Id. at 79–80. Both Malo and Samuel M. Kamakau offer nuanced understandings of the ali'i and maka'āinana relationship. *See id.* at 83; SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAII 230 (1961). Malo writes that "[s]ome [chiefs] were given to robbery, spoliation, murder, extortion, ravishing. There were few kings who conducted themselves properly as Kamehameha I did. He looked well after the peace of the land." MALO, *supra* note 255, at 85. Kamakau writes, "The chiefs did not rule alike on all the islands. It is said that on Oahu and

When Spain's Juan Gaetano[260] and later Britain's Captain James Cook stumbled upon Ka Pae ʻĀina's shores in the mid-sixteenth and mid-eighteenth centuries respectively, they encountered this highly ordered and complex matrilocal[261] society.[262] Though the hierarchical land tenure system[263] and "comparatively modern" kapu system[264] structuring aliʻi and

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Kauai the chiefs did not oppress the common people. They did not tax them heavily and they gave the people land where they could live at peace and in a settled fashion." KAMAKAU, *supra*, at 230. Some chiefs, however, "such as Alapaʻi-malo-iki and Ka-uhi-wawae-ono, were murdering chiefs who did not keep the law against killing men, but went out with their men to catch people for shark bait." *Id.* at 232. This suggests that Hawaiʻi's history, like the histories of arguably every society, is pockmarked with good and bad actors, good and bad systems, and good and bad practices.

[260] EDMUND JANES CARPENTER, AMERICA IN HAWAII: A HISTORY OF UNITED STATES INFLUENCE IN THE HAWAIIAN ISLANDS 3 (1899) ("It is . . . believed that in the year 1555 Juan Gaetano was the first true discoverer of the [Hawaiian] Islands. . . . Gaetano apparently made no effort to reap any benefit from his discovery; and the natives remained in undisturbed possession of their country until the arrival of Captain Cook. . . .").

[261] *See* J. KĒHAULANI KAUANUI, PARADOXES OF HAWAIIAN SOVEREIGNTY: LAND, SEX, AND THE COLONIAL POLITICS OF STATE NATIONALISM 120 (2018). Native Hawaiian society was not strictly patriarchal or matriarchal:

> Hawaiian kinship was (and still is) reckoned bilaterally, through both the maternal and the paternal lines. . . . Kanaka Maoli traditionally practiced matrilocal (uxorilocal) residence patterns in which women drew in extra manpower in the form of 'husbands,' so that offspring were likely to be closely affiliated with the mother's kin. Childcare was not seen as specifically the mother's responsibility or even as a generally female concern.

Id.

[262] *See* BEAMER, *supra* note 145, at 34; VAN DYKE, *supra* note 237, at 11–18.

[263] VAN DYKE, *supra* note 237, at 12–13.

[264] David Malo, a nineteenth century Native Hawaiian historian, described the strict kapu system delineating appropriate kinds of conduct between the classes as a newer cultural development. MALO, *supra* note 255, at 83 ("In my opinion the establishment of the tabu-system is not of very ancient date, but comparatively modern in origin."). Kapu was a "system of sacred law." TRASK, *supra* note 231, at 5.

> Moral order, or the code upon which determinations of "right" and "wrong" were based, inhered in the *kapu* . . . . It was the *kapu* that

maka'āinana relationships characterized daily life, the "essential nature of precontact society was collective and cooperative through the 'ohana structure."[265] A flourishing population numbered in the hundreds of thousands, with estimates ranging from "at least 800,000"[266] to one million people.[267]

Native Hawaiians generally enjoyed productive, pleasureful lives. Highly efficient and systematized agricultural and fishing practices ensured a steady "supply [of food] was kept up for a long time."[268] Intimate relationships did not know the puritanical bounds later imposed by monogamous cisheteropatriarchy.[269] Cook's crew observed a culture that "attached no stigma or prohibition to same-sex relationships and indeed accepted and celebrated them, particularly when such relationships were chiefly, i.e., associated with the *ali'i*. . . ."[270] Ali'i and maka'āinana alike recreated by

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> determined everything from the time for farming and war-making to correct mating behavior among *ali'i* and *maka'ainana* alike.

Id.

[265] VAN DYKE, *supra* note 237, at 13.

[266] Stannard, *supra* note 233.

[267] TRASK, *supra* note 231, at 6 (citing Stannard, *supra* note 233).

[268] MALO, *supra* note 255, at 269–73.

[269] *See generally* OSORIO, REMEMBERING OUR INTIMACIES, *supra* note 3, *passim* (presenting the mo'olelo of Hi'iakaikapoliopele and her aikāne, Hōpoe, as representation and refuge for queer Kānaka Maoli). Dr. Osorio clearly articulates how queer people and relationships—defined as "all our peoples and practices that do not fit into the heteronormative standards cast before us"—have always been part of our traditional lifeways as Kānaka Maoli:

> Rather, I am calling attention to the fact that the need to mark myself as queer today is a direct result of the way I have been erased systematically from my own history. For fellow Kānaka, it is our resistance and refusal of heteropaternalism and heteronormativity that is essential to what makes us 'Ōiwi. When we embody our beautiful, complex, and overflowing expressions of aloha that desecrate heteropatriarchy, we step into the footprints of our ancestors.

Id. at 6.

[270] Robert J. Morris, *'Aikāne: Accounts of Hawaiian Same-Sex Relationships in the Journals of Captain Cook's Third Voyage (1776-80)*, 19 J. HOMOSEXUALITY 22 (1990).

playing games and sports including ume,[271] he‘e nalu,[272] holua[273] and noa.[274] Diseases were "relatively mild or had their main impact late in life and none of them were epidemic 'crowd-type' ecopathogenic diseases such as smallpox, typhoid, yellow fever, measles or malaria."[275] Nor were there "treponemic infections (such as syphilis) . . . ."[276] Then Cook arrived.[277] Ua hulihia ka Honua.[278] The world turned upside down.

Within twenty-five years of Cook's landfall,[279] the "host of bacteria, viruses, and diseases" he brought with him "ravaged the population, culture, and society of ka po‘e Hawai‘i."[280] "[T]he majority (ka pau nui ana) of the people from Hawaii to Niihau, died."[281] Kānaka Maoli, loyal to akua and observant of the kapu (traditional religious and spiritual codes of conduct), lay dead in the streets, their "bodies [] stacked like kindling wood, red as

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[271] MALO, *supra* note 255, at 281–306. Malo writes disparagingly of ume, a game in which couples were paired together regardless of marital status to enjoy a night together. *Id.* at 281–82.

> A husband would not be jealous of or offended at his own wife, if she went out with another man, nor would a wife be angry with her own husband because he went out to enjoy another woman, because each of them would have done the same thing if they had been touched with the *ume-stick*.

Id. at 282.

[272] Kānaka of all genders, ages and ranks enjoyed he‘e nalu, or surfriding. *Id.* at 293–94. "Surf-riding was one of the most exciting and noble sports known to the Hawaiians, practiced equally by king, chief, and commoner." *Id.* at 294 n.5.

[273] Like he‘e nalu, Kānaka of all ranks enjoyed hōlua, or sledding. *Id.* at 294–95. Players sledded down steep, grassy courses engineered specifically for the sport. *Id.*

[274] Noa resembles the modern-day shell game but seemingly without the element of fraud. *Id.* at 295–96.

[275] Stannard, *supra* note 233, at 328–29.

[276] *Id.* at 329.

[277] *Id.* at 328–30.

[278] Mahalo piha to my classmate, Palakiko Chandler IV, for helping me find the words.

[279] Stannard, *supra* note 233, at 330.

[280] VAN DYKE, *supra* note 237249, at 19.

[281] David Malo, *On the Decrease of Population on the Hawaiian Islands*, 2 HAWAIIAN SPECTATOR 121, 125 (L. Andrews trans., 1839). David Stannard estimates the death toll at 400,000. Stannard, *supra* note 233, at 330.

singed hogs."[282] Ali'i noticed haole settlers who flouted the kapu survived unscathed,[283] and subsequently abolished the kapu they believed failed to protect them and their people.[284] Missionaries "sailed into the heart of this spiritual vacuum" mere months later.[285] Christianity's "promise of everlasting life" appeared a panacea to "a nation whose numbers were dwindling at such an alarming rate[.]"[286]

As ali'i converted to Christianity believing it the "way to the salvation of the Hawaiian race,"[287] it "became an acceptable religion for Hawaiians, and the seed of self-doubt about the worth of Hawaiian culture was planted in the Hawaiian breast."[288] Twenty years after missionary arrival, "[Native] Hawaiians numbered less than 100,000, a population collapse of nearly 90 percent in less than seventy years."[289] When white businessmen and lawyers conspired with Minister John L. Stevens to illegally overthrow Queen Lili'uokalani in 1893,[290] the Native Hawaiian population numbered "less than 40,000."[291] Dr. Jamaica Heolimeleikalani Osorio names this for what it is: an apocalypse.[292] This is the catastrophic historical context in which Ke Ali'i Pauahi created the Kamehameha Schools charitable trust.[293]

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[282] Kamakau describes small pox's horrors after foreign doctors and ministers pressured the ruling chiefs to allow an infected ship passenger to leave the vessel and quarantine in Waikīkī. KAMAKAU, *supra* note 259, at 416. "Three months later the disease broke out like a volcanic eruption." *Id.*

[283] VAN DYKE, *supra* note 237, at 21–22.

[284] *See id.*

[285] *Id.* at 22. The first missionaries arrived on March 30, 1820. *Id.*; C. Kalani Beyer, *Comparing Native Hawaiian Education with Native American and African American Education During the Nineteenth Century*, 41 AM. EDUC. HIST. J. 59, 61 (2014) [hereinafter Beyer, *Comparing Native Hawaiian and Native American Education*].

[286] KAME'ELEIHIWA, *supra* note 236, at 142.

[287] *Id.* at 145.

[288] *Id.* at 144.

[289] TRASK, *supra* note 231, at 6; Stannard, *supra* note 233 (identifying high death rates from epidemics that became endemic and an extremely low birth rate as the causes of Native Hawaiian population collapse).

[290] *See supra* note 37.

[291] Stannard, *supra* note 233.

[292] *American Masters*, *Jamaica Heolimeleikalani Osorio: This Is the Way We Rise*, PBS (Oct. 14, 2020), https://www.pbs.org/video/jamaica-heolimeleikalani-osorio-this-is-the-way-we-rise-ndwixe/.

[293] Professor Derek Kauanoe shares his understanding of this historical context, informed in part by his cultural teachers prior to attending law school:

B. *Ke Aliʻi Pauahi's Life and Legacy*

Ke Aliʻi Bernice Pauahi was born in December 1831 to parents Konia—"a chiefess of the highest rank" who descended directly from Kamehameha I[294]—and Abner Paki, "a chief of high rank who [also] descended from the Kamehameha and Kiwalo families of Maui and Hawaii."[295] Aliʻi custom[296] meant Ke Aliʻi Bernice Pauahi became the hānai

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> Before I went to law school, my cultural teachers recognized that as chiefs intermingled with ship captains and westerners, and saw how they did things differently without negative impacts, you start to see this eroded loyalty to a belief system. And then we have a new belief system that is brought here that likely fills an important gap. Horrible things happened as a result; there was an impact on culture and a battle over this new religion. With Ke Aliʻi Pauahi, in a general sense, if I were in her position at that time without any type of hindsight, I think she tried to do what she thought was best.

Interview with Derek Kauanoe, Assistant Professor, Univ. of Haw. at Mānoa William S. Richardson Sch. L., in Mānoa, Haw. (Feb. 3, 2023) [hereinafter Kauanoe Interview] (cleaned up).

[294] KROUT, *supra* note 26, at 2; Loring G. Hudson, The History of the Kamehameha Schools 22 (1935) (M.A. thesis, University of Hawaiʻi) (on file with The Hamilton Library, University of Hawaiʻi).

[295] KROUT, *supra* note 26, at 6; Hudson, *supra* note 294, at 23. Both Konia and Paki were trusted advisers to Kamehameha III, and Paki "held various posts of importance" in the Hawaiian Kingdom. KROUT, *supra* note 26, at 6, 11. Paki served as "one of the judges of the Supreme Court, Acting Governor of Oahu, Privy Councillor, Member of the House of Nobles, and Chamberlain to the King." Hudson, *supra* note 294, at 23. "Konia in her own right was highly thought of, having been chosen as adviser by Kamehameha III when he formed his first body of high chiefs into a council of the government." *Id.*

[296] Queen Liliʻuokalani offers her hānai experience to illustrate the traditional custom practiced by both aliʻi and makaʻāinana:

> I was destined to grow up away from the house of my parents. Immediately after my birth I was wrapped in the finest soft tapa cloth, and taken to the house of another chief, by whom I was adopted. Konia, my foster-mother, was a granddaughter of Kamehameha I., and was married to Paki, also a high chief; their only daughter, Bernice Pauahi, afterwards Mrs. Charles R. Bishop, was therefore my foster-sister. I have adopted the term customarily used in the English language, but there was no such modification recognized in my native land. . . . My own father and mother

daughter of Kīna'u, the Kuhina Nui of the Hawaiian Kingdom and "one of the foremost patrons of the Royal School [also known as the Chiefs' Children's School]."[297] "Keenly aware of the changes sweeping over his kingdom, Kamehameha III believed that knowledge of the ways of the foreigners who had begun to settle in the islands was necessary for the kingdom's survival."[298] He established the Royal School in 1840, and charged "newly arrived American Congregationalist missionaries, Amos Starr Cooke and his wife, Juliette Montague Cooke,"[299] with "educating the

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> had other children, ten in all, the most of them being adopted into other chiefs' families . . . . This was, and indeed is, in accordance with Hawaiian customs. . . . As intelligible a reason as can be given is that this alliance by adoption cemented the ties of friendship between the chiefs. It spread to the common people, and it has doubtless fostered a community of interest and harmony.

QUEEN LILIUOKALANI, *supra* note 232, at 4. Mary Kawena Pukui defines hānai and explains how the practice differed between ali'i and maka'āinana:

> *Hānai* as it is most often used means a child who is taken permanently to be reared, educated and loved by someone other than natural parents. This was traditionally a grandparent or other relative.
>
> . . . .
>
> *Hānai* had a slightly different meaning among *ali'i* (persons of royal blood) who served, and were usually related to, a ruling chief. The idea was that the ruler "cared for" these members of the court and therefore became their *hānai*.

1 NĀNĀ I KE KUMU, *supra* note 1, at 49.

[297] KROUT, *supra* note 26, at 14, 16, 18–20.

[298] Julie Kaomea, *Education for Elimination in Nineteenth-Century Hawai'i: Settler Colonialism and the Native Hawaiian Chiefs' Children's Boarding School*, 54 HIST. EDUC. Q. 123, 124 (2014). Kamehameha III and other ali'i specifically sought out teachers and advisers who could educate "them on the foreign world as early as 1836." BEAMER, *supra* note 145, at 131. "[T]hey were gaining knowledge of how other countries were governed as part of a larger plan to conduct politics on the international level so that Hawai'i would be respected by foreign nations." *Id.* But those teachers and advisors often served their own self-interests while also serving the Kingdom in hugely beneficial ways. *See id.* at 131–38 (chronicling how William Richards came to Hawai'i as a missionary intent on "mold[ing] 'Ōiwi into 'noble savages,'" but later served as an assistant to Hawaiian Kingdom Ambassador Timoteo Ha'alilio and helped free Hawai'i from British occupation in 1843).

[299] Kaomea, *supra* note 298, at 124.

next generation of Hawaiian *ali'i*, the children of the chiefs."[300] "For the Cookes, civilization and proper education meant Christian living. And Christian living meant quarantining the young chiefs against Hawaiian living."[301] Eight-year-old Bernice left Kīna'u's care to attend the Chiefs'

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[300] Menton, *supra* note 25, at 222. Though outside the scope of this Article, research suggests that the Chiefs' Children's School was not designed to adequately prepare the young ali'i in its charge for a rapidly transforming world. *Id.* at 242. Rather, the school served western economic interests. *Id.*

> The Chiefs' Children's School did not, and, given its teachers' worldview, could not, produce men and women equipped to rule in the unfamiliar world of a constitutional monarchy, men and women prepared to cope with a society in transition, pressed from all sides by ever more encroaching Western ways. Ill-prepared to deal with the limiting effects of constitutional restraints, the complexities of capitalism, the critical issue of land tenure, or the economic and political demands of the outside world, Hawai'i's last rulers found themselves pitted against those who understood these issues very well, all too often missionary sons, who could turn them to their own advantage, particularly their economic advantage.

Id. Julie Kaomea studied the Chiefs' Children's School through the settler colonialism theoretical framework and contended that the school became part of a larger project to eliminate Native Hawaiian culture and society. Kaomea, *supra* note 298, at 125.

> Using settler colonialism as an analytical lens, this paper . . . argues that, beyond being woefully inadequate in preparing the Hawaiian kingdom's future ali'i for ruling in an era of foreign attacks on their sovereignty, the Chief's [sic] Children's School functioned as a crucial node in a larger, settler-colonial "elimination project" in which American settlers sought to eliminate and replace our Native Hawaiian society and these Native Hawaiian sovereigns in our native land.

Id. But see BEAMER, *supra* note 145, at 157–63 (critiquing Menton's narrative of the Chiefs' Children's School by noting that the school's mission was to internationalize (not Americanize) ali'i children). Dr. Kamanamaikalani Beamer offers a contrasting perspective of the Chiefs' Children's School and, through the 'Ōiwi optics lens, *see id.* at 12, proposes that "keiki ali'i selectively appropriated what was offered to them at the school." *Id.* at 161. This selective appropriation is evidenced by the nominal conversion, rather than genuine conversion, of keiki ali'i to Christianity, as lamented by the Cookes. *Id.* at 161–62.

[301] KING & ROTH, *supra* note 38, at 15.

Children's School[302] where she and other keiki ali'i were soon "introduced to missionary discipline."[303]

Thirty-five lashes for leaving the school at night.[304] A month-long confinement in a school room closet.[305] Physical "beatings, verbal berating, and/or isolation"[306] for "'improper conduct.'"[307] Food deprivation if children arrived late to meals.[308] This was the environment in which Bernice Pauahi was reared.[309] An environment in which Native Hawaiian worldviews were disregarded[310] and traditional practices punished.[311] An environment in which she was praised for her proximity to whiteness (her svelte figure and fair skin)[312] and her aptitude for all things western (the pianoforte, English language, and bible study).[313]

Juliette Cooke held Bernice Pauahi in high regard as the young student "helped with housework, child care, washing clothes, and scrubbing floors"[314] and demonstrated "great diligence and proficiency"[315] in her studies. "Bernice being the only pupil to be so favored[,]" enjoyed the

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[302] Kaomea, *supra* note 298, at 124; *see* KROUT, *supra* note 26, at 36.

[303] BEAMER, *supra* note 145, at 159.

[304] Kaomea, *supra* note 298, at 133.

[305] *Id.*

[306] *Id.* (citing JOHN PAPA 'Ī'Ī, FRAGMENTS OF HAWAIIAN HISTORY 53–55 (Dorothy B. Barrère ed., Mary Kawena Pukui trans., Bishop Museum Press 1959)).

[307] Kaomea, *supra* note 298, at 133 (quoting Cooke's reasoning behind the punishments).

[308] Menton, *supra* note 25, at 227.

[309] *See* Kaomea, *supra* note 298, at 133; Menton, *supra* note 25, at 227.

[310] KING & ROTH, *supra* note 38, at 16 ("When an eclipse of the sun occurred, the phenomenon was not taken as an omen of the inevitable death of a chief—it was explained scientifically, using a model planetarium.").

[311] Kaomea, *supra* note 298, at 131. To illustrate, Kaomea discusses how "[i]n traditional Hawaiian society, sexual expression and sexual encounters between biologically mature individuals was an acceptable and healthy way of growing the nation and, in the case of sexual encounters between ali'i, ensuring the survival of the monarchy." *Id.* But at the "Chiefs' Children's School[,] [the Cookes] imbued [the future ali'i] with new and negative ideas about sex as they learned to connect sexuality with anxiety, sin, and shame." *Id.* at 132.

[312] *See* KROUT, *supra* note 26, at 41–42. *See generally* SABRINA STRINGS, FEARING THE BLACK BODY: THE RACIAL ORIGINS OF FAT PHOBIA (2019) (revealing that the modern obsession with thinness is rooted in misogynoir).

[313] KROUT, *supra* note 26, at 36–37 ("From the first, Mrs. Cooke perceived [Bernice's] superior intelligence, and felt for her the affection of a mother for a loving and dutiful child. The pupil returned this interest with confidence, respect, and affection. The friendship between them never altered; it endured as long as Bernice lived."); KING & ROTH, *supra* note 38, at 17.

[314] KING & ROTH, *supra* note 38, at 17.

[315] KROUT, *supra* note 26, at 33–34.

"freedom of the *tabu* yard, reserved for the Cooke children."[316] Dr. Kamanamaikalani Beamer[317] writes that Ke Aliʻi Pauahi "clearly saw value in the Christian and secular teachings of the Cookes."[318] She was not the first—nor the last—Native Hawaiian to believe replacing the old ways with westernization and Christianity would save her people.[319] It is little wonder, then, that Ke Aliʻi Pauahi anchored her charitable trust in the Christian teachings of her missionary mentors.[320]

1. *Kamehameha Schools' Nuanced Origins: Contextualizing Ke Aliʻi Pauahi's Exercise of ʻŌiwi Agency*

Considering Ke Aliʻi Pauahi's loyalties to both the Cookes and the lāhui, Kamehameha Schools' genesis is undoubtedly and uniquely complex. Instilled in Hawaiʻi Nei's mōʻī and aliʻi was an ancient kuleana to care for

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[316] Hudson, *supra* note 294, at 25.

[317] "Dr. Beamer is an ʻŌiwi, Aloha ʻĀina, farmer, author, [and] songwriter." *A Few Words About Me.,* DR. KAMANAMAIKALANI BEAMER, https://www.kamanabeamer.com/about (last visited Nov. 24, 2023). He is a professor at the Center for Hawaiian Studies at the University of Hawaiʻi at Mānoa, and teaches courses at the William S. Richardson School of Law and the Hawaiʻinuiākea School of Hawaiian Knowledge. *Id.* Dr. Beamer studies ʻŌiwi governance, land tenure, and resource management. *Id.*

[318] BEAMER, *supra* note 145, at 246 n.16.

[319] *See* KAMEʻELEIHIWA, *supra* note 236, at 144 ("In her last *kauoha*, Keōpūolani urged Kalanimōkū and all the other *Aliʻi Nui* to renounce the old ways and embrace Christianity.").

[320] *See* BEAMER, *supra* note 145, at 246 n.16. Queen Liliʻuokalani seemingly wrote somewhat critically of the "Protestant-only" provision of Ke Aliʻi Pauahi's will. *See* QUEEN LILIUOKALANI, *supra* note 232, at 111.

> The privileges of this commendable charity were likewise restricted by the benefactor [Pauahi] to those of the Protestant faith. The Presbyterian churches in Hawaii may profit by this devise; but those of the English Catholic or Roman Catholic Missions are excluded because of their religion, which scarcely makes the institution a national benefit.

Id.

their people.[321] Living through population collapse[322] and the "multifold threats of European and American imperialism[] [and] land alienation,"[323] ali‘i selectively appropriated western law[324] to creatively fulfill their traditional obligations to maka‘āinana.[325] Ke Ali‘i Pauahi, for example, preserved and dedicated her substantial assets through western charitable trust law[326] to ensure keiki ‘Ōiwi received an education that would enable them to survive a rapidly changing world.[327]

Ke Ali‘i Pauahi endowed the trust with all her personal and real property—approximately 378,506 acres at the time she passed—for the construction of

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[321] Nicholas A. Mirkay, Ashley Kaiao Obrey & Susan K. Serrano, *Ali‘i Trusts: Native Hawaiian Charitable Trusts*, *in* NATIVE HAWAIIAN LAW: A TREATISE (forthcoming 2025) (manuscript at 2) (on file with author); Interview with Troy Andrade, Assistant Professor, University of Hawai‘i at Mānoa William S. Richardson School of Law, in Mānoa, Haw. (Feb. 21, 2023) [hereinafter Andrade Interview]; Goodyear-Ka‘ōpua, *Domesticating Hawaiians*, *supra* note 3, at 16. The symbiotic relationship between maka‘āinana and ali‘i is well documented.

> Notwithstanding their legal implications, [*the ali‘i*] *trusts reflect the reciprocal duties of the ali‘i and the maka‘āinana (common people).* Traditionally, the *maka‘āinana had the duty to care for the land, and wise management of the people and land enhanced the right of the ali‘i to rule*. Productive use of the land and mutual cooperation ensured the right of the maka‘āinana to live off the land and use its resources. Although the traditional social structure was dramatically altered through the creation of private property rights in the mid-nineteenth century and the transition from a subsistence to a market economy, the *creation of these trusts suggests that the ali‘i understood and attempted to fulfill their obligation to provide for the needs of their people.*

Mirkay et al., *supra*, at 2 (emphasis added); see *supra* Section IV.A for additional detail regarding the ali‘i-maka‘āinana relationship.

[322] TRASK, *supra* note 231, at 6; Goodyear-Ka‘ōpua, *Domesticating Hawaiians*, *supra* note 3, at 16.

[323] Goodyear-Ka‘ōpua, *Domesticating Hawaiians*, *supra* note 3, at 16.

[324] BEAMER, *supra* note 145, at 104.

[325] Goodyear-Ka‘ōpua, *Domesticating Hawaiians*, *supra* note 3, at 16; Mirkay et al., *supra* note 321, at 3 (citing GEORGE HU‘EU SANFORD KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY 176 (2002)). "Each of the ali‘i trusts was intended to address a specific social need: Kamehameha Schools/Bernice Pauahi Bishop Estate, education; the Queen Lili‘uokalani Trust, care for orphans and indigent children; the King William Charles Lunalilo Trust, care for indigent and elderly Hawaiians; and the Queen Emma Trust, medical care." *Id.* at 2.

[326] *Id.*

[327] *See* Will of Bernice Pauahi Bishop, *supra* note 28, at cl. 13; Mirkay et al., *supra* note 321. Ke Ali‘i embraced "education as the primary means of restorative justice by furthering the advancement of [Native] Hawaiian children." Mirkay et al., *supra* note 321, at 5.

two schools (one for boys and the other for girls).[328] In the five-member board she housed the "power to determine to what extent said school shall be industrial, mechanical, or agricultural,"[329] but instructed them to "*provide first and chiefly a good education in the common English branches*, . . . and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women . . . ."[330]

While Ke Aliʻi Pauahi intended for the schools to provide manual and industrial education and training, so too did she intend the schools to "train the future leaders among the Hawaiian people."[331] Given her deep aloha for her people, it stretches credulity to think that Ke Aliʻi Pauahi wanted to permanently pigeonhole generations of Kānaka Maoli into servitial lifetimes as "industrial and domestic laborers for a growing plantation capitalist economy[.]"[332] Yet that was precisely the pedagogical vision perpetuated by "white members of the business elite"[333] who exclusively controlled Ke Aliʻi Pauahiʻs trust and the schools' operations from their inception through "well past the mid-twentieth century."[334]

And while the trust's establishment undoubtedly endures as an exercise of aliʻi agency[335] and proof of Ke Aliʻi Pauahi's "'absorbing interest in the welfare of her race[,]'"[336] it is also irrefutably entangled with the "broader white supremacist project of subordinating and domesticating Kānaka[,]"[337]

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[328] Will of Bernice Pauahi Bishop, *supra* note 28, at cl. 13; Mirkay et al., *supra* note 321, at 7.

[329] Will of Bernice Pauahi Bishop Codicil 2 cl. 4 (Oct. 9, 1884), *in In re* Estate of Bishop, Probate No. 2425 (Haw. Sup. Ct. 1884) (filed in Certificate of Proof of Codicil); KING & ROTH, *supra* note 38, at 302.

[330] Will of Bernice Pauahi Bishop, *supra* note 28, at cl. 13 (emphasis added); KING & ROTH, *supra* note 38, at 302.

[331] C. Kalani Beyer, *The Connection of Samuel Chapman Armstrong as Both Borrower and Architect of Education in Hawai'i*, 47 HIST. EDUC. Q. 23, 38–39 (2007) [hereinafter Beyer, *Connection of Samuel Armstrong*].

[332] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 25.

[333] *Id.* at 17.

[334] *Id.* at 17–18.

[335] *See generally* Kamanamaikalani Beamer, *Emergence of the Hawaiian State*, *in* NO MĀKOU KA MANA, *supra* note 145 (demonstrating that aliʻi selectively appropriated western legal tools to further ʻŌiwi interests).

[336] KROUT, *supra* note 26, at 232 (quoting Letter from James B. Williams to Charles Reed Bishop (July 10, 1907)).

[337] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 17.

Native Americans, Alaska Natives, and Black Americans.[338] Indeed, it was Samuel Chapman Armstrong, the Hawai'i-born son of American Protestant missionaries,[339] who spoke at length with Ke Ali'i Pauahi and her husband, Charles Reed Bishop, then the Kingdom's Board of Education president,[340] about the "establishment of the Kamehameha Schools."[341]

Armstrong was the architect of Virginia's Hampton Institute, a teacher-training school for formerly enslaved Black people established in 1865.[342] Armstrong drew upon the pedagogical formula he observed at Hilo Boarding School to "moral[ly] reform" Hampton's Black (and, later, Native American) students through "hard labor, Christian training, and military order."[343] The infamous and archetypal Carlisle Indian Industrial School—"the first

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[338] *See* NEWLAND REPORT, *supra* note 16, at 79–81.

[339] Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 27; Beyer, *Comparing Native Hawaiian and Native American Education*, *supra* note 285, at 59, 63.

[340] Goodyear-Ka'ōpua illuminates Charles Reed Bishop's damning history as president of the Board of Education:

> In 1883, Kalākaua's privy council compelled Charles Bishop to resign from his position as president of the Board of Education. Pauahi's will establishing Kamehameha Schools was written that same year. He addressed the Hawaiian League—a segregated organization of white businessmen and missionary descendants—when they met on the eve of their action forcing Kalākaua to approve the illegitimate "Bayonet Constitution" of 1887. This faction re-appointed Bishop to the BOE presidency shortly after their grab for power. The Kamehameha School for Boys, also known as the "Manual Department," was designed and built during the four-year interim between Bishop's first and second stint as head of the BOE.

Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 43 n.57.

[341] Beyer, *Connection of Samuel Armstrong*, *supra* note 331, at 36; Beyer, *Comparing Native Hawaiian and Native American Education*, *supra* note 285, at 66. Uldrick Thompson provides a differing account, however, writing that William Brewster Oleson (the soon-to-be first principal of Kamehameha Schools) contacted "Mrs. Bishop[] before her last illness, calling her attention to the need of Industrial training for Hawaiian youth; and urging her, as she had no direct heirs, to use her vast estates for founding two Industrial schools[.]" ULDRICK THOMPSON, REMINESCENCES OF KAMEHAMEHA SCHOOLS 78 (1922).

[342] Beyer, *Connection of Samuel Armstrong*, *supra* note 331, at 30; Beyer, *Comparing Native Hawaiian and Native American Education*, *supra* note 285, at 63; Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 27; NEWLAND REPORT, *supra* note 16, at 81.

[343] Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 27.

government-run boarding school for Native Americans"[344]—was in turn modeled after the Hampton Institute.[345]

Current Kamehameha Schools Trustee Noelani Goodyear-Kaʻōpua cogently articulates the white supremacist and racial capitalist bedrock of Armstrong's educational philosophy that later bolstered Kamehameha Schools' curriculum[346] during the early years of its operation.[347]

> While seen as "progressive" in the context of the post-slavery US South, Hampton's assimilationist approach still operated within a white supremacist frame, in which black and brown students could be educated to fit into their place within the social hierarchy. . . .
>
> . . . Armstrong described the "Hampton method" as his invention that "only boosted darkies a bit, and so to speak, lassoed wild Indians all to be cleaned and tamed."[348]

But Armstrong was not the only white haole who critically shaped Kamehameha Schools' trajectory for generations. The five original estate trustees Ke Aliʻi Pauahi named in her will—Charles R. Bishop,[349] Samuel

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[344] *Past*, CARLISLE INDIAN SCH. PROJECT, https://carlisleindianschoolproject.com/past/ (last visited Nov. 24, 2023).

[345] Beyer, *Comparing Native Hawaiian and Native American Education*, *supra* note 285, at 70 ("After Carlisle School proved to be successful with the industrial education model borrowed from Hampton Institute, industrial training joined manual labor in the curriculum of most schools involved with the education of Native Americans and African Americans.").

[346] Beyer, *Connection of Samuel Armstrong*, *supra* note 331, at 36 (citing THOMPSON, *supra* note 341) ("According to Uldrich [sic] Thompson, a longtime staff member [and vice principal] of the [Kamehameha] Boys' School, once it was agreed to begin the schools, Armstrong had a great deal of influence in determining the curriculum at the school.").

[347] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 27.

[348] *Id.*

[349] "Charles R. Bishop, who served as president of the Board of Education throughout the 1870s and early 1880s, significantly increased funding for English-language schools while cutting from Hawaiian-language common schools." *Id.* at 24.

M. Damon,[350] Charles M. Hyde,[351] Charles M. Cooke[352] and William O. Smith[353]—"were all *haole*, Protestant, and very much in favor of annexation to America as the best thing for Hawai'i."[354] Bankers; businessmen; sugar investors; a trust lawyer who joined the "armed anti-Kalākaua militia and then in 1893 was part of the Committee of Safety, the driving force in the overthrow of the monarchy[;]"[355] missionary sons or missionaries themselves—these were Kamehameha Schools' original trustees.[356] And "[they] hired someone very like themselves as the first principal of the boys' school at Kamehameha: William Brewster Oleson."[357]

Oleson, a New England Protestant pastor, settled in Hawai'i to direct Hilo Boarding School, one of the seven named Federal Indian Boarding Schools in the Department of the Interior's report.[358] "Hilo Boarding School proved to be unique, not only in Hawai'i, but worldwide; it was an early innovator in preparing students for a trade [and] in making training of the hands as important as the training of the mind[.]"[359] As celebrated in a 1908 issue of *Handicraft*, a Kamehameha Schools' student publication, Hawai'i played host to "a manual training school before one existed in what is now the United States mainland[.]"[360]

When Oleson transferred to Kamehameha Schools from Hilo Boarding School, he packed his teaching philosophy and select students already familiar with the manual and industrial training program.[361] Before he could

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[350] "Damon was a banker to his core and, thanks to Pauahi's generosity, also a large landowner; in a codicil to her will, Pauahi gave Damon the *ahupua'a* (district) of Moanalua." KING & ROTH, *supra* note 38, at 34.

[351] "Hyde was a strong-minded clergyman who saw little value in Hawaiian culture. . . . Hyde, himself a missionary, had come to Hawai'i to train Hawaiians to be missionaries." *Id.* at 35.

[352] "Cooke, whom Pauahi had looked after at the Royal School, had become a successful businessman, a major investor in sugar and shipping." *Id.* at 34–35.

[353] "And Smith, a lawyer with a specialty in trusts, had been a member of an armed anti-Kalākaua militia and then in 1893 was part of the Committee of Safety, the driving force in the overthrow of the monarchy." *Id.* at 35.

[354] *Id.* at 34; Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 36–37, 44 n.70.

[355] KING & ROTH, *supra* note 38, at 34–35.

[356] *Id.*

[357] *Id.* at 35.

[358] *Id.*; Beyer, *Connection of Samuel Armstrong*, *supra* note 331, at 29; NEWLAND REPORT, *supra* note 16, at 78.

[359] Beyer, *Manual and Industrial Education*, *supra* note 238, at 12–13.

[360] XIV *Handicraft* 3 (1908).

[361] Beyer, *Connection of Samuel Armstrong*, *supra* note 331, at 37.

get his feet wet, the board shipped him off "immediately . . . to the United States to study methods in vogue in schools, particularly those in Hampton Institute."[362] Consequently, "Kamehameha was modelled considerably after Hampton[,]"[363] and its early curricula were cast from the same mold as other federally recognized Indian boarding schools.[364]

2. *Racist Curricula and Repressive Conditions at Kamehameha Schools*[365]

A review of Kamehameha Schools course catalogues and registers from 1903, 1913, and 1922 makes plain the disquieting congruities between Kamehameha Schools and its continental analogs.[366] Boys began their days with reveille at 5:45 in the morning.[367] For over a decade after the school's inception, students labored for an hour and a half "*before breakfast*" on the "grounds; help[ed] about the kitchen and dining room; cut[] wood for the school fires and for the teachers; and [] clear[ed] the Campus of rocks and

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[362] Hudson, *supra* note 294, at 50. *See* Beyer, *Connection of Samuel Armstrong*, *supra* note 331, at 37. "The Trustees sent Mr. Oleson to the State to visit schools and report." THOMPSON, *supra* note 341, at 79.

[363] Hudson, *supra* note 294, at 48–49.

[364] Beyer, *Connection of Samuel Armstrong*, *supra* note 331, at 37.

[365] This Article focuses on the Kamehameha School for Boys and does not discuss the curricula or conditions at the Kamehameha School for Girls. The Kamehameha School for Girls was similarly highly regimented. *Catalogue of The Kamehameha Schools 1922–1923*, at 44 (on file with The Hamilton Library, University of Hawai'i). The School for Girls sought to prepare students "to be good wives, mothers and wage earners," as "[h]ousehold management, weaving, dietetics, cooking, sewing, millinery and nursing were but a few of the domestic arts offered." SHARLENE CHUN-LUM & LESLEY AGARD, LEGACY: A PORTRAIT OF THE YOUNG MEN AND WOMEN OF KAMEHAMEHA SCHOOLS 1887–1987, at 32 (1987). See Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 28–38, for a critical and thorough examination of the Kamehameha School for Girls curriculum and her compelling argument that it "aimed to put Native women in their place—the home." *Id.* at 29.

[366] *Compare* The Kamehameha Schools, *Register of The Kamehameha Schools 1903–1904*, THE KAMEHAMEHA Q. 12–13 (1904) (on file with The Hamilton Library, University of Hawai'i) [hereinafter *Register 1903–1904*], The Kamehameha Schools, *Register 1913–1914* 17–25 (1913) (on file with The Hamilton Library, University of Hawai'i) [hereinafter *Register 1913–1914*], *and Catalogue of The Kamehameha Schools 1922–1923*, *supra* note 365, *with* NEWLAND REPORT, *supra* note 16, *passim*.

[367] *Catalogue of The Kamehameha Schools 1922–1923*, *supra* note 365, at 20.

weeds."[368] In 1899, former principal Uldrick Thompson justified a policy change to serve students breakfast *before* morning work because of an uptick in colds "attributed to exposure to rain and to severe exercise without food."[369]

Students donned gray military suits modeled after the "United States Military Academy at West Point."[370] Kamehameha School for Boys added a military training program in 1888[371] that the United States' War Department later recognized as a military school in 1908.[372] It stationed a War Department officer on campus shortly after.[373] Every boy joined the school battalion where they were trained in "military drill by an expert tactician."[374] From 1916 to 2002, Kamehameha Schools participated in the "Junior Division of the Reserve Officers' Training Corps [JROTC]"[375] for which it received federal funding under the National Defense Act.[376]

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[368] THOMPSON, *supra* note 341, at 42–43. Moreover, ostensibly "[a]s part of the manual labor philosophy, the boys maintained the school buildings and grounds, built and repaired machinery, and sewed the uniforms, sheets, napkins, tablecloths and mattresses that were used at the school. Students [also] staffed the school's dairy and prepared meals." Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 27.

[369] THOMPSON, *supra* note 341, at 43.

[370] *Register 1903–1904*, *supra* note 366, at 12.

[371] NEWLAND REPORT, *supra* note 16, at 75.

[372] *Catalogue of The Kamehameha Schools 1922–1923*, *supra* note 365366, at 18. Other sources list 1910 as the year that the War Department recognized Kamehameha Schools for Boys as a military school. NEWLAND REPORT, *supra* note 16, at 75 (citing Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd in part*, *rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *reh'g en banc granted*, 441 F.3d 1029 (9th Cir. 2006)).

[373] *Catalogue of The Kamehameha Schools 1922–1923*, *supra* note 365, at 18.

[374] *Register 1903–1904*, *supra* note 366, at 13.

[375] *Catalogue of The Kamehameha Schools*, *supra* note 365, at 18; NEWLAND REPORT, *supra* note 16, at 75.

[376] *See* NEWLAND REPORT, *supra* note 16, at 75; KAMEHAMEHA SCHOOLS KAPĀLAMA MUSEUM ARCHIVE R.O.T.C., J.R.O.T.C. AND MILITARY TRAINING COLLECTION: FINDING AID 7 (rev. 2015), https://www.ksbe.edu/assets/archives/ROTC-finding-aid-revised-2015.pdf ("The program participated in many military oriented programs and competitions earning several distinctions including Honor Unit with Distinction in 2001—the highest U.S. Army ranking."). This federal funding partly explains Kamehameha Schools' inclusion in the Department of the Interior report, as federal support is one of the four criteria used to identify Federal Indian Boarding Schools. NEWLAND REPORT, *supra* note 16, at 17–18. Kamehameha Schools withdrew itself from the JROTC program and all federal funding because of lawsuits in the early 2000s challenging its admissions policy which prioritizes Native Hawaiian applications. *See Kamehameha Schs.*, 295 F. Supp. 2d 1141.

"Every student [was] expected to take the complete curriculum: academic, vocational, and military[,]"[377] and their days were divided between the classroom and the workroom.[378] Academic classes instructed students in English, arithmetic, geography, history, music, hygiene, civics, social science, general science, and military science.[379] Certain course offerings were explicitly racist. "Beginning with 1912 –1913," for example, "Eugenics was introduced as a regular subject. . . . While waiting for something better, the pamphlet, *Eugenics for Young People* [was] used, as a text-book."[380] Teachers reiterated main points from the eugenics readings and subsequent class discussions during monthly Sunday-evening review sessions.[381] One main point, for example, affirmed the purpose behind teaching eugenics: "'We study Agriculture to learn how to produce a better crop of cane. We should study Eugenics to learn how to produce a better class of children.' 'There is no Wealth but Life.'"[382] The academic subjects were admittedly "'elementary.'"[383] But Kamehameha Schools "'[did] not aim to make scholars.'"[384] It aimed to make laborers.[385] It provided just enough education in English and arithmetic so as to make students "quick and accurate in everyday problems."[386]

John L. Stevens, United States Minister to Hawai'i and conspirator in the 1893 coup d'état that toppled the monarchy,[387] penned a propagandist love letter to labor's virtues that Kamehameha Schools printed and circulated throughout the student body.[388] "You are to learn that labor is something good to be desired, to be sought and not to be shunned. . . . The noblest beings

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[377] *Catalogue of The Kamehameha Schools 1922–1923*, *supra* note 365, at 19.

[378] *See id.*

[379] *Id.* at 21.

[380] *Register 1913-1914*, *supra* note 366, at 23.

[381] *Id.*

[382] *Id.* at 23–24.

[383] *Id.*

[384] Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 28 (quoting an unpublished document, on file with the Kamehameha Schools Archives, Kapālama, O'ahu).

[385] *Id.* at 25–26.

[386] *Id.* at 28 (quoting an unpublished document, on file with the Kamehameha Schools Archives, Kapālama, O'ahu).

[387] TRASK, *supra* note 231, at 12–15; MacKenzie & Tuteur, *supra* note 37, at 31.

[388] *See* His Ex. John L. Stevens, *Advice To Young Hawaiians* 1–12 (1892) (on file with author).

the world has ever known have loved work."[389] Comparing pre-contact Indigenous groups to animals, Stevens decried a life without extractive labor as "laziness . . . one of the meanest things in all the universe."[390]

> In savage life, in a barbarian condition of things, when there were no good schools, no skilled teachers, no finely made tools and machinery, the boy or man could accomplish but little. . . . His state of life was low and brutal. His enjoyments were much like those of the animals around him.[391]

He spoke of 'āina—innate to Native Hawaiian identity and spirituality[392]—as a mere commodity to be exploited.[393] "These beautiful islands in mid-ocean need the industry of your hands[,]" Stevens urged.[394] "They are only partially developed. The riches on their plains, mountain sides, in their valleys, in their bays and around their shores are yet to be unlocked and improved by the busy hands of labor."[395] Stevens simply echoed existing sentiment among American missionaries, foreign sugar planters, and profit-driven businessmen regarding the moral and economic value of vocational education.[396]

Resultingly, students received extensive vocational training with "one quarter year each in forge, carpentry, electricity, [and] machine"[397] until grade nine.[398] Kamehameha Schools required its pupils to spend the majority

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[389] *Id.* at 2.

[390] *Id.*

[391] *Id.* at 3.

[392] All My Relations Podcast, *For The Love of The Mauna, Part 1*, at 04:07 (Dec. 9, 2020), https://www.allmyrelationspodcast.com/podcast/episode/4bab2c15/for-the-love-of-the-mauna-part-1. Dr. Noe Noe Wong-Wilson explains that 'āina is an inseparable part of Native Hawaiian identity and spirituality because "with the land comes . . . these inanimate things that cannot be produced by a human, [so they] are what we call the gods. So, we revere the very rocks we walk on . . . ." *Id.*

[393] *See* Stevens, *supra* note 388, at 7.

[394] *Id.*

[395] *Id.*

[396] *See generally* Beyer, *Connection of Samuel Armstrong*, *supra* note 331, *passim*. "I think it my right and my duty to commend to you, now in the early morning of life—WORK, WORK, WORK, as a divine agency, by which you can secure the most valuable acquisitions this earth can afford you—those alone which render manhood worth having." Stevens, *supra* note 388, at 11.

[397] *Catalogue of The Kamehameha Schools 1922–1923*, *supra* note 365366, at 21.

[398] *Id.*

of their time in vocational or military classes.[399] Once in grade nine, students could select a focus trade,[400] and were "expected to master . . . or specialize in practical Agriculture[,] Carpentry, Forging, Machine Work, Painting, or Electrical Work."[401] They earned "trade certificates upon graduation" if they sufficiently mastered the trade.[402]

Kamehameha Schools evaluated student performance in the above curricula using report cards geared toward the school's patrons rather than the students' parents.[403] Moreover, the institution "crafted [its report cards] to demonstrate that [Kamehameha School] boys [were] desirable for hire by white businessmen . . . ."[404] Uldrick Thompson attested that "'[n]early every business man and every professional man of these islands was pleased when the Kamehameha Schools was organized. They believed young Hawaiians would be trained to do all kinds of mechanical and office work . . . ."[405] Tellingly, "[t]he trustees did not see Hawaiians as becoming anything more than workers—certainly not leaders. . . . None of the trustees ever hired a single Kamehameha graduate or, for that matter, any other Hawaiian to work in a supervisory position."[406] The institution's curricula and culturally repressive policies worked in tandem to permanently Americanize and subordinate Kanaka students.[407]

Repressive conditions at Kamehameha Schools drove some students away after attending for mere weeks.[408] "A founding principle at Kamehameha had been that the further from Hawaiian ways students could be kept, the better they would be, and the better Hawai'i would be."[409] Oleson, the school's first principal, banned 'ōlelo Hawai'i in every facet of student life.[410]

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[399] *Id.* Students were required to enroll in Agriculture and Military Drill. *Id.*

[400] *Id.*

[401] *Register 1903–1904*, *supra* note 366, at 14.

[402] *Id.*

[403] Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 28.

[404] *Id.*

[405] CHUN-LUM & AGARD, *supra* note 365, at 3.

[406] KING & ROTH, *supra* note 38, at 41–42.

[407] *See* Grube, *supra* note 63.

[408] Andrade Interview, *supra* note 321 (describing how Professor Andrade's grandmother went to Kamehameha Schools for two weeks never to return due to the school's policy of cultural suppression).

[409] KING & ROTH, *supra* note 38, at 40.

[410] *Id.* at 40–41.

Kamehameha School for Girls expelled a student for dancing a standing hula in the 1930s.[411] It did not stamp out every trace of "Hawaiianness," however, because having "a certain amount of culture [was] seen as desirable and charming."[412] Exotification depends on differences that charm and excite.[413] "At Kamehameha certain aspects of Kanaka Maoli culture were forbidden, but a certain kind of Hawaiianness—shorn of political resistance and linked with new gendered and classed sensibilities—was encouraged."[414] What remained through the mid-twentieth century was the "'veneer of [Native Hawaiian] culture[.]'"[415]

Beyond an explicit policy of cultural suppression, Kamehameha School for Boys pitted student against student in meting out discipline.[416] Depending on the rule broken, students could be whupped with rawhide or rulers.[417] They might be ordered to perform asinine, Sisyphean tasks like "transferring piles of rock from one place to another and back again, cutting wood for school purposes, . . . pulling weeds from the campus grounds[] . . . [or] walking or running the circle around the area in front of Bishop Hall."[418] Or they might lose certain privileges or be "led to solitary confinement."[419]

In these ways, Kamehameha Schools mirrored the Federal Indian Boarding Schools listed alongside it in the Department of the Interior's report. For the better part of its history, the institution operated to "prop a plantation economy with semi-skilled tradesmen who could be 'civilized' and subordinated, thus protecting and increasing white capitalist investment and political power."[420] Generations of Kanaka Maoli students experienced

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[411] Grube, *supra* note 63.

[412] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 35 (citing KROUT, *supra* note 26, at 116) ("For some years [Ke Aliʻi Pauahi] adhered to many picturesque Hawaiian customs, which added, in the eyes of the stranger, to the charm and novelty of her entertainments.").

[413] Exotification and commodification of Native Hawaiian people and culture has and continues to fuel the tourism industry. *See* MAILE ARVIN, POSSESSING POLYNESIANS: THE SCIENCE OF SETTLER COLONIAL WHITENESS IN HAWAʻI AND OCEANIA 195–97 (2019).

[414] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 19.

[415] Grube, *supra* note 63.

[416] *Register 1913–1914*, *supra* note 366, at 16 ("The student council deals with all cases of discipline reported by the [student] officers or by members of the faculty.").

[417] Beyer, Dissertation, *supra* note 239, at 224.

[418] *Id.*

[419] *Id.*

[420] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 27.

a Kamehameha Schools that set bounds around what they could do, who they could be and how high they could rise.[421] Then it evolved.[422]

3. *Kamehameha Schools' Evolution: Centering College, Community, and Culture*

Roughly eighty years passed before Kamehameha Schools pivoted toward foregrounding higher education, college preparation, and Native Hawaiian culture-based programming.[423] Current Kamehameha Schools Trustee Noelani Goodyear-Kaʻōpua notes that despite the introduction of "[h]igher academic subjects and college preparation" in the 1930s, it took another forty to fifty years before they became Kamehameha Schools' "main focus."[424] "Statehood accelerated those changes during the sixties as Hawaiʻi's population expanded and tourism became the foremost industry."[425] The trustees hired a malihini consulting firm to reenvision how Kamehameha Schools might operationalize its "mission to develop 'the minds, bodies and Protestant Christian values of young people, especially those of Hawaiian ancestry[.]'"[426] A three-pronged approach emerged.[427]

First, Kamehameha Schools revamped its existing campus instruction to provide "[s]tudents who were college-bound" with a "solid academic background, [and] vocational students [with] high quality training for gainful

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[421] *See id.* at 27–28.

[422] Kuʻuwehi Hiraishi, *Trustee Noelani Goodyear-Kaʻōpua on Kamehameha Schools' 140-year Cultural Evolution*, HAW. PUB. RADIO (Mar. 30, 2023, 9:04 AM HST), https://www.hawaiipublicradio.org/local-news/2023-03-30/trustee-noelani-goodyear-kaopua-on-kamehameha-schools-140-year-cultural-evolution.

[423] *See* CHUN-LUM & AGARD, *supra* note 365, at 113–18; Neil J. Hannahs*, Indigenizing Management of Kamehameha Schools' Land Legacy*, *in* I ULU I KA ʻĀINA: LAND 62, 64 (Jonathan Osorio ed., 2014). It was not until the 1970s and 1980s that Kamehameha Schools required students to enroll in Hawaiian language and culture classes as a prerequisite for graduation. CHUN-LUM & AGARD, *supra* note 365, at 118.

[424] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 30 n.67.

[425] CHUN-LUM & AGARD, *supra* note 365, at 86. Dr. Haunani-Kay Trask offered critical insights regarding statehood, including that the "statehood vote was taken when Hawaiians were a minority in our own country." TRASK, *supra* note 231, at 30. She highlighted how "settlers voted overwhelmingly for statehood, while Hawaiians did not, a fact conveniently overlooked by statehood promoters." *See id.*

[426] CHUN-LUM & AGARD, *supra* note 365, at 87; KING & ROTH, *supra* note 38, at 53–54.

[427] CHUN-LUM & AGARD, *supra* note 365, at 87.

employment."[428] The second prong involved developing extension, or outreach, programs to offer a variety of classes (reading, writing, Hawaiian culture studies) and other services (counseling, special education assistance) to predominantly Native Hawaiian communities.[429] The final prong—a robust scholarship program—targeted "outstanding Hawaiian youth" who, through scholarship support, "would be encouraged to continue their post-high school education.[430] Young people with potential were to be placed in positions of leadership, supported in their college goals or encouraged in useful employment at technical and lower management levels."[431]

In the early 1960s, Kamehameha Schools scrapped an eighty-year-old standing hula ban and incorporated the ancient, spiritual practice into its Native Hawaiian culture-based education programming.[432] Hawaiian Movements (known also as Hawaiian Renaissances) of the 1970s and 1990s brought sweeping sociopolitical, legal, and cultural change that touched nearly every state and private institution in Hawai'i.[433] Kamehameha Schools grew its community outreach efforts and sought input from "a community advisory committee [that] recommended . . . the Schools' administration 'do more for more of Hawai'i's youth, particularly Hawaiian young people with

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[428] *Id.*

[429] *Id.*; KING & ROTH, *supra* note 38, at 54. Explorations and Nā Pono Hawai'i were two of the first and most successful extension programs, emphasizing the "sharing of Hawaiian cultural materials in an educational setting. Explorations is a week-long summer program open to fifth grade Hawaiian children." CHUN-LUM & AGARD, *supra* note 365, at 120.

[430] CHUN-LUM & AGARD, *supra* note 365, at 87.

[431] *Id.*

[432] *See* KING & ROTH, *supra* note 38, at 55–59. Kamehameha Schools retained its military training program, however, and students learned the "three ways to kill somebody in military science [class] and all the knife maneuvers without them making noise. And they used to teach us what a battleground smell like." FIGHT FOR THE LAND – THE WALTER RITTE STORY (Quazifilms forthcoming). "I learned how to calibrate 180 millimeter mortar and how to field strip an M-1 in sixty seconds and military strategy and all that and I didn't know how to count in Hawaiian from one to five." *Id.* (cleaned up). Walter Ritte describes his experience at Kamehameha Schools as one of acculturation: "It almost separated us from being Hawaiians. I think that was on purpose because I remember my parents telling me that you have to learn the American way in order to survive and everybody bought into that. We didn't know nothing about ourselves, our generation." *Id.* (cleaned up).

[433] *See* Yamamoto & Obrey, *Reframing Redress*, *supra* note 113, at 44 (placing the 1993 Congressional Apology Resolution in the Hawaiian cultural renaissance and sovereignty movement context); TRASK, *supra* note 231, at 66 ("Beginning in 1970, the Hawaiian Movement evolved from a series of protests against land abuses, through various demonstrations and occupations to dramatize the exploitative conditions of Hawaiians, to assertions of Native forms of sovereignty based on indigenous birthrights to land and sea.").

special educational needs; help them to integrate into the mainstream of American society, yet retain a sense of their own identity, an awareness of their culture."[434] "From admission to graduation" Kamehameha aimed to provide students with personalized, holistic support including financial aid, housing, healthcare, and counseling.[435]

Today, Kamehameha Schools is a vast institution with a $14.6 billion endowment supporting ninety-seven percent of its operations.[436] Three K–12 campuses and thirty preschools serve just over 7,000 students.[437] In Fiscal Year 2022–2023, it awarded $31.4 million in scholarships and invested $64.4 million in communities across the state.[438] Given the institution's 140-year trajectory, Dr. Noelani Goodyear-Kaʻōpua is excited to be a trustee at this particular moment in time.[439] She says Kamehameha is where it is today because of external community movements to revitalize language and re-envision Hawaiʻi's economic future, as well as internal movements to shift toward providing Hawaiian culture-based education.[440]

> Kamehameha Schools' amazing campus leadership at every level is rethinking how to do Hawaiian culture-based education in ways that center students and connect them to the lands and waters, fishponds, loʻi, winds, rains—all the elements of this place that we are blessed to be in—while also reaching high- and low-achieving students and supporting their mental health.[441]

Agreeing that there is always more to do, Dr. Goodyear-Kaʻōpua uplifts Kamehameha Schools' recent community-based cultural revitalization effort

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[434] CHUN-LUM & AGARD, *supra* note 365, at 115.

[435] *Id.* at 116.

[436] KAMEHAMEHA SCHOOLS, REPORT ON FINANCIAL ACTIVITIES: JULY 1, 2022 – JUNE 30, 2023 (2024), https://www.ksbe.edu/assets/annual_report/Financial_Activities_2023.pdf.

[437] *Id.* Maui, Oʻahu, and Hawaiʻi Island each have a K–12 campus. *Id.*

[438] *Id.*

[439] Telephone Interview with Noelani Goodyear-Kaʻōpua, Professor, Univ. of Haw. at Mānoa (Apr. 8, 2023) [hereinafter Goodyear-Kaʻōpua Interview].

[440] *Id.*

[441] *Id.*

at Kahalu'u Ma Kai.[442] The effort involves "lands that were incredibly significant to Kamehameha Pai'ea and his political power and nation-building. A whole complex of heiau exist in the area, two of which were devastated by hotel development in the post-statehood era."[443] For more than a decade, Kamehameha Schools worked with Kona community members to physically dismantle the old hotels, restore the heiau, and reopen the area as a community gathering place.[444] Lineal descendants toured the property at the community launch, and emotions overflowed as they began to recognize the 'āina again.[445]

Beyond its community outreach and cultural revitalization work, Kamehameha Schools made possible the careers of several prominent Kanaka Maoli scholars, legal practitioners, and activists, many of whom were interviewed for or referenced in this Article.[446] Legal scholar and law professor Dr. Troy Andrade,[447] for example, shared that he would not be a law professor, let alone a college graduate, had it not been for Kamehameha Schools.[448]

> I will tell you right now that I would not be here as a law professor was it not for Kamehameha Schools. The Kamehameha Schools I had wasn't perfect, but it provided opportunities for me, my brother, and most of my classmates

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[442] Crystal Kua, *Final Phase Underway to Transform Kahalu'u Ma Kai into World-Class Educational Site*, KAMEHAMEHA SCHOOLS (Sept. 21, 2020), https://www.ksbe.edu/article/final-phase-underway-to-transform-kahaluu-ma-kai-into-world-class-education.

[443] Goodyear-Ka'ōpua Interview, *supra* note 439; *see* Kua, *supra* note 442.

[444] Goodyear-Ka'ōpua Interview, *supra* note 439.

[445] *Id.*

[446] *E.g.*, Andrade Interview, *supra* note 321.

[447] Dr. Andrade is Native Hawaiian and a first-generation college graduate. *Troy J.H. Andrade '11*, UNIV. HAW. MĀNOA WILLIAM S. RICHARDSON SCH. L., http://hoku.law.hawaii.edu/person/troy-jh-andrade-11 (last visited Nov. 24, 2023). His research focuses on the "intersection of American jurisprudence and history, particularly in the context of the pursuit of Native Hawaiian political and social justice." *Id. See generally* Troy Andrade, *Hawai'i '78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PENN. J. L. & SOC. CHANGE 85 (2021) (discussing Native Hawaiians who, in 1978, "capitalized on an indigenous cultural and political revival to change the law and secure reparative action"); Andrade, *Legacy in Paradise*, *supra* note 47 (critiquing President Barack Obama's administrative rule that created a process to reestablish a government-to-government relationship with Native Hawaiians as not going far enough to achieve genuine reconciliation and social healing).

[448] Andrade Interview, *supra* note 321.

> to change our lives. It broke the cycle for my family. . . . I adamantly believe that if it wasn't for Kamehameha, I would not have gone to college. So, I have a lot of aloha for the school and the mission and vision that Pauahi had for Native Hawaiian children.[449]

Kamehameha Schools educated some of the lāhui's most notable activists and thought-leaders including Hinaleimoana Wong-Kalu,[450] Walter Ritte,[451] Dr. Haunani-Kay Trask,[452] Dr. Jonathan Kamakawiwoʻole Osorio,[453] Dr. Jamaica Heolimeleikalani Osorio,[454] Dr. Noelani Goodyear-

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[449] *Id.* Professor Andrade explains what he means by saying Kamehameha Schools "broke the cycle for [his] family:" "Paying very little for a high-quality pre-college education was invaluable because it allowed my parents to work long hours and save for a home knowing I was safe on campus and involved in extracurricular activities." *Id.*

[450] *A Conversation with Hinaleimoana Wong-Kalu*, ʻĀINA MOMONA (Feb. 3, 2021), https://www.kaainamomona.org/post/hinaleimoana-kwai-kong-wong-kalu. Hinaleimoana Wong-Kalu, or Kumu Hina, is a transgender woman and māhū, a third gender in ʻŌiwi tradition who possesses both masculine and feminine energies. *Id.* She is a filmmaker, kumu hula, and community leader. *Id.* She has helped unearth the moʻolelo of the healer stones of Kapaemahu. *About,* THE HEALER STONES OF KAPAEMAHU, https://kapaemahu.com/about/ (last visited Nov. 24, 2023); *Legend,* THE HEALER STONES OF KAPAEMAHU, https://kapaemahu.com/legend/ (last visited Oct. 30, 2023).

[451] *Leadership*, ʻĀINA MOMONA, https://www.kaainamomona.org/leadership (last visited Dec. 22, 2023). Uncle Walter Ritte has been advocating for Native Hawaiian rights and resource protection for over forty years. *Id.* Uncle Walter was one of the "Kahoʻolawe Nine," a group of activists who landed on the island off of Maui to bring attention to its destruction by the U.S. Navy, which used Kahoʻolawe as target practice for decades. *Id.*; Ian Lind, *Ian Lind: Kahoolawe 40 Years Later*, HONOLULU CIV. BEAT (Dec. 30, 2015), https://www.civilbeat.org/2015/12/ian-lind-kahoolawe-40-years-later/.

[452] *Haunani-Kay Trask*, ʻĀINA MOMONA, https://www.kaainamomona.org/haunani-kay-trask (last visited Nov. 24, 2023). Haunani-Kay Trask was an activist, educator, author, ʻŌiwi sovereignty movement leader, and poet. *Id.* A key figure in the Hawaiian Renaissance of the 1990s, her aloha for ka lāhui fueled her sovereignty praxis. Annabelle Williams, *Haunani-Kay Trask, Champion of Native Rights in Hawai'i, Dies at 71*, N.Y. TIMES (July 12, 2021), https://www.nytimes.com/2021/07/09/us/haunani-kay-trask-dead.html.

[453] *Leadership*, ʻĀINA MOMONA, https://www.kaainamomona.org/leadership (last visited Dec. 22, 2023); Kyle Galdeira, *Lāhui Rising: Alumni Share Perspectives on 'Ōiwi Agency*, KAMEHAMEHA SCHS. (Nov. 18, 2019), https://www.ksbe.edu/article/lahui-rising-alumni-share-perspectives-on-oiwi-agency.

[454] *A Conversation with Jamaica Heolimeleikalani Osorio*, ʻĀINA MOMONA (Nov. 24, 2023), https://www.kaainamomona.org/post/jamaica-heolimeleikalani-osorio.

Ka'ōpua,[455] and D. Kapua'ala Sproat,[456] to name a few. Many of them hold the institution's nuance with an aloha resonant of Ke Ali'i Pauahi's aloha for her people.[457] A number of them are outspoken in their criticism of Kamehameha Schools' assimilationist pedagogy and legacy.[458] But they also draw critical distinctions differentiating Kamehameha Schools from the other Federal Indian boarding schools.[459]

C. *Distinguishing Kamehameha Schools.*

Discerning difference first necessitates understanding sameness. Native Hawaiian researchers of education in nineteenth century Hawai'i illuminate the "many similarities between the education provided Native Americans . . . and Native Hawaiians."[460] Hilo Boarding School influenced Hampton Institute which influenced Kamehameha Schools and Carlisle Industrial Indian School.[461] "[B]oth Native Americans and Native Hawaiians were subjected to a training that was meant for them to assume secondary roles in their society's respective economies[.]"[462] Illustratively, Native Hawaiian graduates of "Kamehameha Schools, Hilo Boys' Boarding School, Lāhaināluna Technical High School, or the female seminaries were not trained for leadership positions. Instead, they were educated to perform in industrial or service positions."[463]

Kanaka Maoli scholars Maenette K. P. Benham and C. Kalani Beyer reveal the extent to which schools founded and/or operated by white missionaries—and later supported by the federal government—

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[455] Goodyear-Ka'ōpua Interview, *supra* note 439.

[456] Interview with D. Kapua'ala Sproat, Professor, Univ. of Hawai'i at Mānoa William S. Richardson Sch. L., in Honolulu, Haw. (Jan. 18, 2023).

[457] *E.g.*, Andrade Interview, *supra* note 321.

[458] Hiraishi, *supra* note 422 ("It's not at all a stretch to say that Kamehameha was an assimilationist institution for a majority of its history."). In a forthcoming documentary, Walter Ritte describes his struggles with "Kamehameha being a military school. I couldn't follow all those crazy rules they had at that school. They don't allow you to think for yourself." FIGHT FOR THE LAND – THE WALTER RITTE STORY, *supra* note 431. *See generally Fight for the Land – The Walter Ritte Story,* QUAZIFILMS, https://www.quazifilms.com/ritte-documentary (last visited Nov. 27, 2023).

[459] *E.g.*, Andrade Interview, *supra* note 321; Kauanoe Interview, *supra* note 293.

[460] Beyer, *Comparing Native Hawaiian and Native American Education*, *supra* note 285, at 69.

[461] *Id.* at 63–70.

[462] *Id.* at 70.

[463] Beyer, Dissertation, *supra* note 239, at 271.

resembled and fit into the broader Federal Indian Boarding School context.[464] Benham situates the "Hawaiian experience . . . [in the] larger, dominant cultural ideology that shaped educational policy toward native cultures and immigrants, as the country expanded westward across open frontier lands and the Pacific."[465] Moreover, Benham argues education in Hawai'i "served Western interests, [and] was a disservice to Hawaiians, who like the Native Americans, lost their culture and land."[466] Beyer acknowledges that "[l]earning by the hands and the mind was and still is a worthwhile form of education[,]"[467] and that many people, haole and Kanaka ʻŌiwi alike, genuinely believed the "manual training form of manual and industrial education served their interest."[468] Ke Ali'i Pauahi might be rightfully placed within this group. Maybe Kamehameha Schools' first trustees, first principals, and first staff members can be, too. Crucially, however, Beyer demonstrates how the school's white supremacist ideological underpinnings irrevocably altered Kanaka Maoli potential for generations.[469]

> It was the low level of the academic curriculum that was joined with manual training and the transition to teaching in English that was a disservice to Hawaiians. *Because the missionaries wished to remain superior to Hawaiians, the elementary level of the academic course work taught in Engish* [sic] *provided the means to deny Hawaiians from reaching their full potential*. Eventually, *with fewer leaders to emulate* and a *curriculum, that did not include their language, history, and culture, Hawaiians would become secondary members* in their own society."[470]

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[464] *Id.* at 271–72; *see also* MAENETTE K. P. BENHAM & RONALD H. HECK, CULTURE AND EDUCATIONAL POLICY IN HAWAI'I: THE SILENCING OF NATIVE VOICES 32–35 (1998).

[465] BENHAM & HECK, *supra* note 464, at xii.

[466] Beyer, Dissertation, *supra* note 239, at 271 (citing BENHAM & HECK, *supra* note 465).

[467] *Id.*

[468] *Id.*

[469] *Id.* at 271–72.

[470] *Id.* (emphasis added).

Additionally, Samuel Armstrong, the pedagogical mastermind behind Hampton Institute and Kamehameha Schools,[471] believed the "duty of the superior race [was] to rule over the weaker dark-skinned races until they were appropriately civilized[,] [and that] [t]he civilization process would require several generations of moral and religious development."[472] Armstrong's philosophy shaped the way Hawai'i's federally supported boarding schools taught and treated the children entrusted to their care for generations.[473] "No doubt, this had an impact on the self-efficacy of Hawaiians, leading directly to contemporary Native Hawaiians representing a disproportionate share of Hawai'i's school drop outs, prison inmates, welfare recipients, and unemployed."[474] Kamehameha Schools is thus indisputably entangled in the harmful history of Federal Indian Boarding Schools.

But what distinguishes Kamehameha Schools (in part) is the fact that Ke Ali'i Pauahi established the institution through an act of ali'i agency for the benefit of her people.[475] Though likely influenced by American missionaries Samuel Armstrong and William Oleson, Ke Ali'i Pauahi's exercise of agency fits into a broader pattern of Native Hawaiian ali'i collaborating with westerners in myriad areas, including education.[476]

> [T]he dominant class of *whites worked with the Hawaiian rulers to accomplish most of the educational practices serving Hawaiian students*. This was also true for Native Americans during the colonial era; however,

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[471] *See generally* Beyer, *Connection of Samuel Armstrong*, *supra* note 331 (documenting Samuel Chapman Armstrong's establishment of the Hampton Institute and his—and the institute's—connection to Hawai'i's missionary boarding schools).

[472] Beyer, *Comparing Native Hawaiian and Native American Education*, *supra* note 285, at 67.

[473] *Id.* ("Once the concept of [Kamehameha Schools] was agreed upon, Armstrong had a great deal of influence in determining the curriculum and the staffing of the schools . . . . Besides his involvement with several schools in Hawai'i, Armstrong was also quite influential in providing a philosophy of education for other members of the missionary his [sic] family to follow.").

[474] Beyer, Dissertation, *supra* note 239, at 275.

[475] See *supra* Section IV.B.1 for a discussion of Ke Ali'i Pauahi's agency in establishing the perpetual charitable trust that is Kamehameha Schools for the education of Native Hawaiian children.

[476] Beyer, *Comparing Native Hawaiian and Native American Education*, *supra* note 285, at 70.

> after the United States embarked on its removal and reservation policies, education decisions were made without the consent of Native American leaders.[477]

Some might scorn this collaboration, condemning it as a lack of foresightedness. Others might view it as aliʻi adapting to the inevitable. Either way, "the Hawaiian Kingdom . . . was not a perfect institution[,]" though "[u]ndoubtedly progressive in many ways[.]"[478]

At times, for example, "[l]ike other nation-states, [the Kingdom] facilitated the spread of capitalism, depleted natural resources and taxed its subjects. Tragic events occurred throughout its existence. It imported immigrants to make up the laboring class, at times privileged [men] over [women], and imprisoned innocent people."[479] We might add to this list of tragic events the permission given to missionaries seeking to establish the first boarding schools.[480] But Dr. Kamanamaikalani Beamer's ʻŌiwi optics lens reveals that those were still aliʻi decisions.[481] And Hawaiʻi is still the "only country that ʻŌiwi have ever had, . . . remain[ing] a symbol of Hawaiian nationalism for many Hawaiians today."[482]

Who created the schools—and why—matters. *How* colonizing "ideas are introduced" matters.[483] Intention and impact are both essential restorative justice inquiries.[484] Dr. Beamer traces the "[o]ften narrow path [that] lies between negotiating and adopting a new technology or ideal, and acknowledging how that technology, concept,

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[477] *Id.* (emphasis added). Beyer also notes, though, that the 1893 overthrow of the Hawaiian Kingdom's last reigning monarch, Queen Liliʻuokalani, placed "educational decision-making . . . entirely in the hands of the white dominant class[.]" *Id.*

[478] BEAMER, *supra* note 145, at 16.

[479] *Id.*

[480] *See* Beyer, *Connection of Samuel Armstrong*, *supra* note 331, *passim*.

[481] BEAMER, *supra* note 145, at 12–13.

[482] *Id.* at 16.

[483] *Id.* at 12.

[484] *See generally* Mia Mingus, *The Four Parts of Accountability & How to Give a Genuine Apology*, LEAVING EVIDENCE (Dec. 18, 2019, 7:48 AM), https://leavingevidence.wordpress.com/2019/12/18/how-to-give-a-good-apology-part-1-the-four-parts-of-accountability/ (articulating the role intention and impact play in transformative justice processes).

or tool may have changed the individual."[485] For Ke Ali'i Pauahi, someone who "clearly saw value in the Christian and secular teachings of the Cookes[,]"[486] and whose relationship with her Indigeneity was likely complicated,[487] this path is especially thin. How much sway did the Cookes, Charles Bishop, Samuel Armstrong, William Oleson, Samuel Damon, Charles Hyde, Charles Cooke, and William Smith exert over Ke Ali'i Pauahi and the trust's establishment?[488] Does assessing the level of haole influence strip Ke Ali'i Pauahi of her agency? Does it paint her a victim of white supremacist indoctrination rather than a Native agent whose "choices and actions were proactive and were asserted from a position of power–not reactive and endured from a subjugated role[?]"[489]

These are worthwhile investigations, but, at base, Ke Ali'i Pauahi did something uniquely 'Ōiwi when she established the trust. She possessed a particularly 'Ōiwi obligation to her people, and she carried out this kuleana—shared by mō'ī and ali'i since time immemorial—in a uniquely 'Ōiwi way.[490] Where missionaries established the other boarding schools to exert "continuous influence" over their pupils "away from the bad influences of . . . Hawaiian culture," Ke Ali'i Pauahi founded the schools for the "general betterment of [Native

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[485] BEAMER, *supra* note 145, at 12.

[486] *Id.* at 246 n.16.

[487] *See* KING & ROTH, *supra* note 38, at 55 ("Although many members of the royal families converted to Christianity, most of them saved a privileged place in their lives for *hula*, making it part of their royal observances. Pauahi was different. In all her years of entertaining, no *hula* was danced at Haleakalā.").

[488] Outside this Article's scope is an exploration of the "interesting dynamic" between the ali'i and members of the business elite. Andrade Interview, *supra* note 321. Charles Reed Bishop made strategic decisions that preserved and grew Pauahi's estate. *Id.* He bequeathed the real property he accumulated during his lifetime to the trust when he passed. *Id.* Ke Ali'i Pauahi reportedly maintained "warm and trust[ing] friends[hips]" with each of the trustees she named in her will. KROUT, *supra* note 26, at 239. As for Queen Lili'uokalani, William Smith served as her personal attorney at the end of her life. Andrade Interview, *supra* note 321. And her husband, John Dominis, may have played a mediating role between her and the racist and sexist business community. *Id.* For example, John Dominis died the year Queen Lili'uokalani assumed the throne. *Id.* Rhetoric regarding the overflow amplified immediately upon his death, ultimately culminating in the 1893 coup d'état that ousted Queen Lili'uokalani. *Id.*

[489] BEAMER, *supra* note 145, at 12.

[490] See Section IV.B.1 for additional discussion regarding traditional ali'i obligations to maka'āinana. *See generally* Mirkay et al., *supra* note 321; Andrade Interview, *supra* note 321; Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 16.

Hawaiians'] material conditions and their mode of living."[491] Bequeathing all her 'āina to Hawai'i's children—Hawai'i's future—to ensure their survival is thus an enduring act of 'Ōiwi agency.[492]

A second critical distinction is the degree of violence Kamehameha Schools students suffered.[493] All—American Indians, Alaska Natives, and Native Hawaiians alike—endured the violence of land dispossession, physical genocide (whether by war or disease),[494] cultural genocide, sexual abuse,[495] and near (or total) language death.[496] All were subjected to largely futile assimilationist attempts to eradicate every trace of Indigenous identity.[497] All were disciplined with physically, psychologically, and emotionally abusive methods.[498]

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[491] KROUT, *supra* note 26, at 238. Witnessing a precipitous population decline presumptively orphaning countless keiki 'Ōiwi, she dedicated a portion of her trust's annual "income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood . . . ." Will of Bernice Pauahi Bishop (Oct. 31, 1883), *in In re* Estate of Bishop, Probate No. 2425 (Haw. Sup. Ct. 1884) (filed in Certificate of Proof of Will).

[492] The Kamehameha Schools, An Official Prospectus 1 (Dec. 23, 1885, mimeo. Sept. 1, 1963) (on file with author).

[493] *See* Grube, *supra* note 63.

[494] *See generally* JARED M. DIAMOND, GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES (1997).

[495] Reported instances of sexual abuse at Kamehameha Schools occurred largely in the 1970s and 1980s. Yoohyun Jung, *Kamehameha Schools Faces a Spate of Sex Abuse Claims*, HONOLULU CIV. BEAT (Apr. 24, 2020), https://www.civilbeat.org/2020/04/kamehameha-schools-faces-a-spate-of-sex-abuse-claims/.

[496] *See* NEWLAND REPORT, *supra* note 16, at 40; Grube, *supra* note 63. *See generally* DAVID CRYSTAL, LANGUAGE DEATH 70, 77, 89 (2002) (contributing factors to language death include the death of its speakers, cultural assimilation, and the incorporation of outsiders into the minority language community).

[497] *See* Richard Henry Pratt, Speech at the National Conference of Charities and Correction: The Advantages of Mingling Indians with Whites (1892).

> A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.

Id.

[498] NEWLAND REPORT, *supra* note 16, at 56.

All suffered the enactment of these harms in federally supported boarding schools.[499] Yet Kamehameha Schools students were not forced to attend the institution.[500] No knock on the door signaled the arrival of a priest or Indian agent come to forcibly remove keiki ‘Ōiwi from their homes.[501] And crucially, records do not indicate—thus far—that Native Hawaiian children died while at Kamehameha Schools.[502]

In contrast, one hundred and ninety children died while attending Carlisle Boarding School.[503] Native Hawaiians tend to embrace this critical distinction.[504] Dr. Jonathan Kay Kamakawiwo‘ole Osorio acknowledges the "'historical reality'" that "'what happened in Hawai‘i . . . [is] something fundamentally different from what happened on the mainland. . . . It doesn't make what happened here better. It just makes it less physically violent.'"[505] Honolulu City Council Vice Chair Esther Kia‘āina reiterated that:

> [It is] important to distinguish between the trauma suffered by her people and those who were on the mainland. "What happened to our brothers and sisters on the mainland was atrocious and our hearts break for them," Kiaaina said. "The federal government needs to

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[499] *See id.*

[500] *See Catalogue of The Kamehameha Schools 1922–1923*, *supra* note 365, at 56 (describing requirements that applicants for admission must meet).

[501] *See generally* TRUTH AND RECONCILIATION COMMISSION OF CANADA, A KNOCK ON THE DOOR: THE ESSENTIAL HISTORY OF RESIDENTIAL SCHOOLS (2015) (explaining the traumatic ways government agents, priests, and even Indian agents took children from their homes to place them in residential schools)

[502] *See* Grube, *supra* note 63 ("Hawaii's Native children were spared much of the systemic brutality and bloodshed that occurred on the U.S. mainland . . . .").

[503] *Cemetery Information*, CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/cemetery-information?field_cemetery_admin_title_value=&sort_by=field_cemetery_name_value&sort_order=ASC&page=0.

[504] Kauanoe Interview, *supra* note 293 ("I think the issue with the Indian boarding schools is the extent of physical harm and potential murders. And I have not heard stories of deaths at Kamehameha. I have heard informal recollections of being punished for certain things in general. I don't know how much of that is attributable to assimilation efforts as opposed to [previous corporal punishment norms].").

[505] Grube, *supra* note 63.

> make amends with that specific part of history and the legacy of that."[506]

Because Kānaka Maoli were "forced to give up their land, their language and their culture to outsiders seeking to profit from the islands[,]"[507] Vice Chair Kiaʻāina[508] is "glad Hawaiians were included in the latest investigation."[509] But given how Kamehameha Students were "spared much of the systemic brutality and bloodshed that occurred on the U.S. [continent],"[510] an arguably fine line separates Kamehameha Schools from schools like Carlisle.

In interviewing graduates of Kamehameha Schools who attended in the 1990s and early 2000s,[511] a common response emerged. Kamehameha Schools can and should be distinguished from the remaining 407 Federal Indian Boarding Schools identified in the Department of the Interior's report.[512] Its inclusion gave nearly everyone pause.[513] In deferring to Kanaka voices, considering Ke Aliʻi Pauahi's intentions and agency in establishing the trust, and honoring the differences in the degree of violence suffered by Native students, Kamehameha Schools likely should not have been included in the final report. For some, its inclusion begs the question of whether any Native Hawaiians were involved in the development of the report.[514] The Department of the Interior might have consulted with the Native

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[506] *Id.*

[507] *Id.*

[508] *Id.* Esther Kiaʻāina served in an appointed Interior Department position during the Obama administration. *Id.*

[509] *Id.*

[510] *See id.*

[511] *See, e.g.*, Andrade Interview, *supra* note 321; Goodyear-Kaʻōpua Interview, *supra* note 439. Given this Article's time constraints, I could not feasibly interview Kamehameha Schools alumni outside the law school setting other than Trustee Noelani Goodyear-Kaʻōpua. I believe centering the voices of those pushed to the margins is essential. I hope to build on this Article and incorporate those voices in this Article's future iterations.

[512] *See* NEWLAND REPORT, *supra* note 16. This conclusion is specific to Kamehameha Schools as an examination of the other Hawaiʻi Federal Indian boarding schools exceeds the scope of this Article.

[513] *E.g.*, Andrade Interview, *supra* note 321; Kauanoe Interview, *supra* note 293; Roth Interview, *supra* note 73.

[514] Goodyear-Kaʻōpua Interview, *supra* note 439.

Hawaiian community or employed additional criteria including who (or what) established each school to filter out institutions like Kamehameha that were created by a Native Hawaiian for the benefit of Native Hawaiians. That said, Kamehameha Schools' inclusion in the report is an opportunity for the trust to fully reckon with its history in a way it has failed to do thus far.

V. I KA WĀ MAMUA, I KA WĀ MAHOPE: ASSESSING KAMEHAMEHA SCHOOLS' *RESPONSIBILITY* AND RECKONING WITH ITS PAST TO CHART ITS FUTURE

Social healing through justice's second inquiry invites participants implicated in causing group-based injustices to assess their varying degrees of *responsibility*.[515] Accepting *responsibility* for interpersonal harm can be humbling at best and terrifying at worst.[516] Accepting *responsibility* for mass harm spanning generations is an even more formidable challenge.[517] It is a challenge that those who directly caused the harm often cannot accept and one that those indirectly responsible for the harm are often reluctant or unwilling to accept.[518]

So, what does Kamehameha Schools' acceptance of *responsibility* look like? What does reconciliation grounded in Indigenous restorative justice principles and values look like for its students who attended prior to its evolution? What does it look like for their descendants, current students and future generations of Kamehameha scholars? Assessing Kamehameha Schools' *responsibility* first requires an

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[515] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 79.

[516] Mia Mingus, *Dreaming Accountability*, LEAVING EVIDENCE (May 5, 2019, 10:00 AM), https://leavingevidence.wordpress.com/2019/05/05/dreaming-accountability-dreaming-a-returning-to-ourselves-and-each-other/. Certain Indigenous restorative justice processes—like ho'oponopono—teach us that reconciliation is possible only when all parties (harmed and harmer), or their representatives, sit with each other at the proverbial roundtable genuinely intending to set things right. 1 NĀNĀ I KE KUMU, supra note 1, at 71–72; Crabbe Interview, *supra* note 84. If the harmer is honestly repentant and makes restitution, those harmed are obligated to forgive. 1 NĀNĀ I KE KUMU, *supra* note 1, at 71–72. Only then are the ties binding them loosened. *Id*.

[517] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 136.

[518] *Id*. at 81–82, 136. Often, perpetrators of mass harm cannot accept *responsibility* because they have passed away before reconciliation efforts are initiated or completed. United States Holocaust Memorial Museum, *Robert Ley*, HOLOCAUST ENCYC., https://encyclopedia.ushmm.org/content/en/article/robert-ley (last visited Dec. 22, 2023).

expanded discussion of the imbricated norms and tiers composing this *social healing through justice* inquiry.[519]

A. *Not "If," But "How:"* Responsibility*'s Four Tiers*

One group has harmed another. Some people created the damaging policies. Others implemented them. Still others suspected the negative ramifications and ignored them. And some did nothing but benefit from the harmed group's subjugation. Each bears some level of responsibility for repairing the damage. In instances of group-based harm, then, the question is often "*how* am I responsible?" rather than "*am I* responsible?"[520] *Responsibility* stems from certain legal and/or ethical norms derived from the level of participation in the wrongdoing.[521]

Relevant legal norms implicated in this inquiry apply to the state and federal government through their respective restorative justice commitments to Kānaka Maoli enshrined in the state constitution and various federal laws.[522] While legal frameworks holding Kamehameha

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[519] *See generally* YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 119–43 (exploring overlapping legal and ethical norms giving rise to varying levels of *responsibility*).

[520] I first heard this "not if, but how" concept articulated by Sonya Renee Taylor. Sonya is a "renowned activist and thought leader on racial justice, body liberation and transformational change, international award winning artist, and founder of The Body Is Not an Apology, a global digital media and education company exploring the intersections of identity, healing, and social justice through the framework of radical self-love." *About,* SONYA RENEE TAYLOR, https://www.sonyareneetaylor.com/about (last visited Oct. 30, 2023).

[521] *See*, *e.g.*, YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 119–36.

[522] The State of Hawai'i committed to restorative justice for Kānaka Maoli in its state constitution and myriad statutes protecting traditional and customary rights and practices. *See* HAW. CONST. art. XII, § 7 (amended 1978); HAW. REV. STAT. § 7-1 (2013); HAW. REV. STAT. § 1-1 (2013). The federal government committed to acknowledging the "ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Joint Resolution to [A]cknowledge the 100th [A]nniversary of the January 17, 1893 [O]verthrow of the Kingdom of Hawaii"); *see also* Hawaiian Homes Commission Act, 42 Stat. 108 (1921). Though outside the scope of this Article, the state and federal government are legally and ethically responsible for repairing

Schools accountable may not apply, the trust is ethically responsible for repairing the damage done by the first several generations of its trustees, principals and faculty members, and the school policies they devised and enforced.[523] Ethical responsibility can "arise in several related ways"[524] depending on a party's direct participation,[525] complicity,[526] receipt of benefits,[527] or polity membership.[528]

Direct participation in the harm is *responsibility*'s most easily understood tier as it often overlies legal responsibility.[529] Those who developed and implemented damaging policies are directly responsible for the harm, "generat[ing] an obligation to officially acknowledge the victims' suffering and participate in repairing the damage."[530] Complicit individuals or groups are responsible when they "(1) know[] of the abusive actions by others, [and possess] (2) some degree of power or authority over the others and [had] (3) an opportunity to prevent or intervene," but failed to do so.[531] Receipt of benefits is the first *responsibility* tier that is less readily accepted, especially by those who "receive benefits by virtue of membership in or affiliation with the dominant group. . . . [and who may be] unaware of other group members' past or current transgressions."[532] But the hardest tier to accept is the *responsibility* born simply from "membership in a democratic polity committed to civil and human rights[.]"[533]

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the damage inflicted by the Federal Indian Boarding Schools that operated in Hawai'i. *See, e.g.*, HAW. CONST. art. XII, § 7 (amended 1978); Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[523] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 126–36.

[524] *Id.* at 126.

[525] *Id.* at 126–27.

[526] *Id.* at 127–32.

[527] *Id.* at 132–34.

[528] *Id*. at 134–36.

[529] *Id.* at 126.

[530] *Id.* at 127.

[531] *Id.*

[532] *Id.* at 133.

[533] *Id*. at 134.

Individuals and groups alike avoid taking *responsibility* for myriad reasons.[534] Certain groups with much power to lose may worry about the reallocation of group power once they accept responsibility.[535] "[E]ven when group members desire some form of healing, 'each side comes to . . . fear . . . that if they were to 'admit' mistakes and wrongdoing, this would weaken [the] position' of their group or would 'likely be misused for propaganda or political purpose.'"[536]

Still another impediment is the unconscious (or deliberate) refusal to acknowledge the wrongdoing[537] as the "human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right."[538] And a final obstacle is the "pull of [American] legal culture . . . [which] tends to focus on individual, not group, rights and duties."[539] Each of the foregoing tiers of legal or ethical *responsibility*, however, "generates a corresponding responsibility to act."[540]

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[534] *Id.* at 136–37. The United States is a punitive and carceral nation with the largest prison population in the world. *See generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? *passim* (2003) (revealing how private corporations seeking to exploit prison labor to increase their profits partner with government, correctional communities, and the media to fill prisons by targeting communities of color). Little about the criminal punishment or civil adjudication systems incentivize those who have caused harm to come forward for fear of retribution. *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 136–37.

[535] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 136.

[536] *Id.* (quoting Rafael Moses, *Acknowledgment: The Balm of Narcissistic Hurts*, *in* 3 AUSTIN RIGGS CTR. REV. 5–6 (1990)).

[537] *See id.*

[538] Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

[539] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 136. For example, a formalist tort law framing of wrongdoing typically seeks (1) an identifiable and present perpetrator, and (2) a distinct harm to (3) a specific victim. *See* ANDREAS KUERSTEN, CONG. RSCH. SERV., IF11291, INTRODUCTION TO TORT LAW (2023). The law is reluctant to extend responsibility or a right to recover much further. *See id.*

[540] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 136.

B. *Kamehameha Schools' Ethical Responsibility to Heal the Persisting Wounds of Its Early Curricula and Conditions*

While Kamehameha Schools is sufficiently distinguishable from the other Federal Indian Boarding Schools, its inclusion in the department's report is an opportunity for the trust to reckon with its past and chart its future by accepting ethical *responsibility* for the harmful actions of its progenitors.[541] It can follow in the footsteps of former Interior Assistant Secretary Kevin Gover and current Interior Secretary Deb Haaland who accepted direct *responsibility* on their institution's behalf and rejected "traditional notion[s] of causality"[542] and formalist tort law paradigms that so often suffocate reparations claims.[543] Each acknowledged, assumed *responsibility* and apologized for the agency's misdeeds despite not personally heading those institutions at the time the boarding school programs were in effect.[544]

> And so today I stand before you as the leader of an institution that in the past has committed acts so terrible that they infect, diminish, and destroy the lives of Indian people decades later, generations later.
>
> . . . .
>
> And while the BIA employees of today did not commit these wrongs, we acknowledge that the institution that we serve did. *We accept this inheritance, this legacy, of racism and inhumanity*. And by accepting this legacy *we accept also the moral responsibility of putting things right*.[545]

Secretary Haaland took up Gover's mantle in her memorandum launching the initiative.

> The Department of the Interior . . . must address the intergenerational impact of Indian boarding schools to shed light on the traumas of the past. For more than a century, the Department was responsible for operating or overseeing Indian boarding schools across the

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[541] *Id.* at 126–36.
[542] *Id.* at 134.
[543] *Id.*
[544] Gover, *supra* note 42, at 162.
[545] *Id.* (emphasis added).

> United States and its territories. The Department is therefore uniquely positioned to assist in the effort to recover the histories of these institutions.[546]

Kamehameha Schools as an institution is similarly directly responsible for healing the persisting wounds of Kānaka Maoli because it inherited the racist and paternalistic legacy of its first seventy-five years of operation.[547] This is an undertaking rife with potential *darkside* threats.[548] The first might be invoked by individuals currently involved in the institution who did not directly cause the harm: "why should I be punished for something I did not do?"[549] *Social healing through justice* scholars argue that the "wrongful systemic exclusion of others"[550] and the attendant "benefits or privileges accrued over generations . . . gives rise to an important degree of responsibility for participating in efforts to repair the damage through generations."[551] Expanding upon this slightly, *responsibility* to redress

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[546] DOI Memo, *supra* note 11, at 1–2.

[547] *See generally* Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, *passim* (discussing "the consequences of white male control" over Kamehameha Schools).

[548] See *supra* Section II.A for a more detailed explanation of the *darkside* of reparative justice initiatives.

[549] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 134. In the context of slavery, for example, most white people do not believe they have an obligation to engage in reparative action—particularly action that asks them to relinquish unearned privileges—because they did not personally enslave Black people. For some, neither did their ancestors. But "[w]hites need not have been slaveowners or proponents of Jim Crow segregation to have benefitted from systemic white supremacy – in the form of better schools and healthcare, expanded job prospects, increased homeownership, business financing and more." *Id.* at 133. Moreover, homeownership and income level are two key contributors to wealth creation and generation. Benjamin Harris & Sydney Schreiner Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEP'T TREASURY (Sept. 15, 2022), https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap; Tami Luhby, *White Americans Have Far More Wealth Than Black Americans. Here's How Big the Gap Is*, CNN (Oct. 23, 2023), https://www.cnn.com/2023/10/31/us/us-racial-wealth-gap-reaj/index.html. With lower incomes and rates of homeownership, "Black family wealth, on average, is less than one tenth that of white families. And long-standing discrimination shuts Black [people] out of housing, job and business finance opportunities available to whites." YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 133.

[550] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 133–34.

[551] *Id.*

harm exists not only because members of a privileged group receive manifold benefits from mass injustice, but because they too are harmed by policy-making rooted in white supremacy.[552] Take, for example, the community pool that permanently closes rather than desegregate.[553] Every child and every family loses out.[554] The interests of harmer and harmed converge.[555]

Kamehameha Schools must recognize its interest in extricating itself from the "broader white supremacist project of subordinating and domesticating Kānaka"[556] that continues to harm Native Hawaiians today.[557] Though its current leaders did not create repressive school curricula or ban ʻōlelo Hawaiʻi, Kamehameha Schools can begin to set things right by "work[ing] to actively question . . . pedagogies [that] continue to support settler colonialism and racism[.]"[558] Dr. Goodyear-Kaʻōpua delivers a powerful critique of "Kamehameha's curriculum" for "obscur[ing] the clear historical facts of the overthrow, in which its own trustees were implicated and from which they benefited, while school leaders claimed the school was strictly apolitical and told tales about the Bishops' love instead."[559] Kamehameha Schools' modern Hawaiian-culture based curriculum is necessarily incomplete if it does not adequately educate Kamehameha students as to its raison d'être.

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[552] Heather C. McGhee, *Racism Has a Cost for Everyone*, TED (Dec. 2019), https://www.ted.com/talks/heather_c_mcghee_racism_has_a_cost_for_everyone [hereinafter McGhee, *Racism Has a Cost*] ("This zero-sum thinking that what's good for one group has to come at the expense of another, it's what has gotten us into this mess. I believe it's time to reject that old paradigm and realize that our fates are linked. An injury to one is an injury to all."). Take Gary, for example, a white man whose self-admitted "prejudice has caused him to suffer fear, anxiety, isolation. . . . Is it possible that our society's racism has likewise been backfiring on the very same people set up to benefit from privilege?" *Id.*

[553] *Id. See generally* HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER (2021). McGhee provides an example of Montgomery, Alabama's city council that closed a community pool rather than desegregate. McGhee, *Racism Has a Cost*, *supra* note 552. "This destruction of public goods was replicated across the country. Towns closed their public parks, pools, and schools all in response to desegregation orders all throughout the 1960s. In Montgomery, they shut down the entire parks department for a decade. . . . Racism has a cost for everyone." *Id.*

[554] *See* McGhee, *Racism Has a Cost*, *supra* note 552.

[555] *See id.*

[556] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 17.

[557] *E.g.*, Beyer, Dissertation, *supra* note 239239, at 275.

[558] Goodyear-Kaʻōpua, *Domesticating Hawaiians*, *supra* note 3, at 38.

[559] *Id.*

In an official statement issued on May 13, 2022, responding to the Department of the Interior's investigative report, Kamehameha Schools ostensibly recognized that it must confront its colonial entanglements to better empower Native Hawaiian children and the lāhui.[560]

> Grappling with the contradictions and internal conflicts of our own colonial history, we continue a process of transforming over time to serve and uplift our communities through Hawaiian culture-based education. Critical to this transformation is our own examination of the historical issues so we can better know our truths, engage in healing processes, and empower our communities.[561]

Some criticized Kamehameha Schools for doing "little [else] to address the actual substance of what occurred in its boarding schools."[562] Others may believe this statement of *recognition* sufficient, valuing its "transparency and accountability" and commitment to "recording and remembering history."[563] *Recognition* is usually referred to as the "first step" or starting point, however.[564] And *social healing through justice*'s cautionary *darkside* principle observes the "danger of incomplete, insincere acknowledgments and ameliorative efforts – how words of recognition without economic justice and institutional restructuring can mask continuing oppression."[565] This is why we must remember that reconciliation takes time.[566] As Trustee Noelani Goodyear-Kaʻōpua recognizes, no

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[560] Grube, *supra* note 63; Goodyear-Kaʻōpua Email, *supra* note 67.

[561] Grube, *supra* note 63; Goodyear-Kaʻōpua Email, *supra* note 67.

[562] Grube, *supra* note 63.

[563] Roth Interview, *supra* note 73. Yet Kamehameha Schools does not make the original board of trustees meeting minutes available to researchers. For Kamehameha Schools to genuinely increase transparency and accountability and fully reckon with its past likely means making these primary source documents available to researchers.

[564] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 73.

[565] *Id.* at 70 (citing DAWSON, *supra* note 110110, at 164–65.)

[566] *See id*. at 55, 57; *supra* Part II.

single moment of reckoning will adequately address the issues raised in the report.[567]

And what shape should this reckoning take? An Indigenized *social healing through justice* framework lends guidance.[568] For Kamehameha Schools to adequately address the persisting wounds it inflicted by "occlud[ing] the political struggles of K[ā]naka Maoli for land, sovereignty, and control of education futures, . . . [and for] naturaliz[ing] . . . white male control of the lands and resources of Pauahi's estate, and US imperial rule over the islands[,]"[569] the institution must "tailor[] the reparative acts so that they correlate with the kind and degree of harms suffered[.]"[570] For Native Hawaiians, salving these wounds means advancing the four Maoli restorative justice realms articulated by Kumu D. Kapua'ala Sproat: mo'omeheu, 'āina, mauli ola, and ea.[571]

To a degree, Kamehameha Schools (1) strengthens mo'omeheu and 'āina through its cultural revitalization work and 'Ōiwi-based culture education; (2) benefits mauli ola by providing essential services for children in need; and is (3) ea embodied as the "living legacy" of Ke Ali'i Pauahi's agency.[572] But Kamehameha Schools is also a massive Native Hawaiian institution with a $14.6 billion endowment and substantial landholdings[573] that often opposes Native Hawaiian cultural practitioners in land development and water disputes.[574]

Reparative acts tailored to mo'omeheu, 'āina, mauli ola, and ea means, for example, that Kamehameha Schools must stop being the "primary culprit of water diversion" for kuleana families and kalo

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[567] Goodyear-Ka'ōpua Interview, *supra* note 439.

[568] See *supra* Section II.C for a full description of this framework.

[569] Goodyear-Ka'ōpua, *Domesticating Hawaiians*, *supra* note 3, at 30.

[570] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 68.

[571] MacKenzie et al., *supra* note 80, at 13.

[572] *See* Goodyear-Ka'ōpua Interview, *supra* note 439; Andrade Interview, *supra* note 321; Goodyear-Ka'ōpua Email, *supra* note 67.

[573] KAMEHAMEHA SCHOOLS, REPORT ON FINANCIAL ACTIVITIES: JULY 1, 2022 – JUNE 30, 2023 (2024), https://www.ksbe.edu/assets/annual_report/Financial_Activities_2023.pdf.

[574] *See*, *e.g.*, Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000); *In re* Waiāhole Ditch Combined Contested Case Hearing (*Waiāhole I*), 94 Hawai'i 97, 9 P.3d 409 (2000).

farmers in rural Hawai‘i.[575] It must work with Kanaka Maoli cultural practitioners to perpetuate traditional and customary Native Hawaiian rights and practices rather than hindering them.[576] It must throw its full institutional weight behind advancing ea—self-determination and sovereignty efforts—so that Native Hawaiians are no longer "secondary members in their own society."[577] This could mean, in part, that Kamehameha does *not* "object to being on the boarding school list because it provides an additional layer of legitimacy to Native Hawaiians' claims concerning political independence, sovereignty and equal protection arguments. It's the federal government again reasserting that Native Hawaiians occupy a special place as an Indigenous community, though not federally recognized."[578] These are

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[575] Kamehameha Schools owns approximately 2,673 acres of land in Lahaina, the majority of which is agricultural. *Kamehameha Schools Expands ʻĀina Stewardship with Acquisitions on Maui that Include Kaupō Ranch Lands*, KAMEHAMEHA SCHS. (July 6, 2023), https://www.ksbe.edu/article/kamehameha-schools-expands-aina-stewardship-with-acquisitions-on-maui-that-include-kaupo-ranch-lands. That Kamehameha Schools is the primary culprit of stream water diversion for lineal descendants of various ahupuaʻa in West Maui was shared with me by an unnamed member of one of these ʻohana. *Id.*; *see also* Comm'n on Water Res. Mgmt., Update on Water Resources in the Lahaina Aquifer Sector Area, Agenda Item C-1(b) Interim Instream Flow Standards, Sept. 19, 2023, at 31, 39, 62, 74, https://files.hawaii.gov/dlnr/cwrm/submittal/2023/sb20230919C1.pdf. Recently, Kamehameha Schools' land management practices have come under fire following the devastating August 2023 inferno that engulfed Lahaina. Imogen Piper, Joyce Lee, Elahe Izadi & Brianna Sacks, *Maui's Neglected Grasslands Caused Lahaina Fire To Grow With Deadly Speed*, WASH. Post (Sept. 2, 2023), https://www.washingtonpost.com/investigations/interactive/2023/lahaina-wildfires-invasive-grass-destruction/ ("The fields where the fires started and spread are primarily owned by three parties: Kamehameha Schools . . . ; the state of Hawaii; and Peter Martin, a prominent local developer.").

[576] *See, e.g.*, *Ka Paʻakai O Kaʻ Aina*, 94 Hawai‘i 31, 7 P.3d 1068; *Waiāhole I*, 94 Hawai'i 97, 9 P.3d 409.

[577] *See generally* Beyer, *Connection of Samuel Armstrong*, *supra* note 331 (explaining that in the 1880s, second-generation missionaries assumed control over Hawai‘i's public and private schools to "Americanize" ʻŌiwi and solidify their status as secondary members of an American dominated society).

[578] Andrade Interview, *supra* note 321; Roth Interview, *supra* note 73 ("It just seems to me that Hawaiians are not a good fit for [the boarding school report], you know, and obviously there is a lot of resistance within the Hawaiian community to the whole idea of portraying them as a tribe. That doesn't strike me as a good fit or as helpful. But there are some people

a sampling of ideas proposed by Kānaka Maoli Kamehameha Schools graduates and cultural practitioners—those most impacted.[579]

The above is not an exhaustive list; reparative justice can mean many things and look many ways.[580] It entails much trial and error.[581] What appears most important at this stage is that Kamehameha Schools take additional concrete action to heal the persisting wounds of its colonial legacy so that its initial response not become a "tepid or partial effort[] . . . to acquire 'cheap grace' or to deflect or even subvert organizing efforts for substantial changes in systemic power structures."[582] If it does not, it will remain ensnared in the "contradictions and internal conflicts of [its] own colonial history[.]"[583] It will not speak the epigraph's pule kala.[584]

VI. CONCLUDING THOUGHTS

We are in a time of hulihia—a time of reckoning and transformation.[585] Interior Secretary Deb Haaland pursued this reckoning with the spirit of ʻoiaʻiʻo, "unvarnished truth,"[586] when she launched the Department of the Interior's Federal Indian Boarding School Initiative.[587] ʻOiaʻiʻo "is the spirit of truth specified in *hoʻoponopono*."[588]

Hoʻoponopono teaches us that only when the "'telling of all the essential material, no matter how painful,'"[589] is complete, can harmer and harmed reach remedy and release.[590] Hard truths about

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who feel that, at a minimum, it can be helpful on the sovereignty issue. And that's a big, big deal. It's hard to imagine the state of Hawaiʻi becoming the independent nation of Hawaiʻi at some future point in time, but I'm not sure that would be a bad thing for the people who are here, regardless of race.").

[579] *See, e.g.*, Andrade Interview, *supra* note 321321.

[580] YAMAMOTO, HEALING THE PERSISTING WOUNDS, *supra* note 12, at 25 ("[A]chievable goals and workable processes likely will need to embody considerable flex.").

[581] *Id.* at 53 (sharing observations by Indigenous scholars that healing processes require an average of ten years with substantial collaboration).

[582] *Id.* at 25.

[583] *See* Goodyear-Kaʻōpua Email, *supra* note 67.

[584] 1 NĀNĀ I KE KUMU, *supra* note 1, at 74–75.

[585] *See* Finding Our Way with Prentis Hemphill, *supra* note 3.

[586] 1 NĀNĀ I KE KUMU, *supra* note 1, at 72–73.

[587] *See* DOI Memo, *supra* note 11.

[588] 1 NĀNĀ I KE KUMU, *supra* note 1, at 73.

[589] *Id.*

[590] *Id.*

Kamehameha Schools emerged from Secretary Haaland's initiative.[591] Further investigation by the Department of the Interior or Kamehameha Schools itself may unearth even more.[592] Whether the department appropriately included Kamehameha Schools' in the report—alongside Carlisle Indian Industrial School and other infamous institutions—is a worthwhile inquiry and part of this Article's focus.[593] But for all its pivotal differences, Kamehameha Schools' unvarnished truth comprises its legacy of cultural repression.[594] It comprises its existing contentious relationships with ʻohana across Ka Pae ʻĀina seeking to exercise their constitutionally protected traditional and customary rights and practices.[595]

Hoʻoponopono principles suggest that Kamehameha Schools is "burdened with [the] guilt and social discomfort"[596] flowing from its western imperialist entanglements (past and present).[597] This Article seeks to facilitate kala, the "mutual process in which both the instigator and recipient of an offense are released from the [attendant] emotional bondage."[598] It does so by urging Kamehameha Schools to engage in an Indigenized *social healing through justice* reparative process to dress western imperialism's persisting wounds through strengthening moʻomeheu, ʻāina, mauli ola, and ea.[599]

Only then can "[b]oth [Kamehameha Schools and Kānaka Maoli] 'let go of the cord,' freeing each other completely, mutually and permanently."[600] Only then can they speak the words. "*Ke kala aku nei au iā ʻoe a pēlā nō hoʻi ai e kala ia mai ai,'* or, 'I unbind you from the

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[591] *See* Newland Report, *supra* note 16, at 75.

[592] *See* Goodyear-Kaʻōpua Email, *supra* note 67.

[593] *See supra* Section IV.C.

[594] *See supra* Section IV.B.2.

[595] *E.g.*, HAW. CONST. art. XII, § 7 (amended 1978); HAW. REV. STAT. § 7-1 (2013); HAW. REV. STAT. § 1-1 (2013); Ka Paʻakai O Kaʻ Aina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000); *In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 9 P.3d 409, 455 (2000).

[596] 1 NĀNĀ I KE KUMU, *supra* note 1, at 75.

[597] *See* Goodyear-Kaʻōpua Email, *supra* note 67.

[598] 1 NĀNĀ I KE KUMU, *supra* note 1, at 75.

[599] *See supra* Section V.B.

[600] 1 NĀNĀ I KE KUMU, *supra* note 1, at 75.

fault, and thus may I also be unbound from it.'"[601] That is the collective prayer of release.[602] And this is mine: "Ua pau ka hana. Ku'ua nā 'ōlelo. The work is complete. Release the words."[603]

[601] *Id.* (modern orthography inserted by author).

[602] Goodyear-Ka'ōpua Email, *supra* note 67.

[603] 2 MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, NĀNĀ I KE KUMU: LOOK TO THE SOURCE ix (1979).

Reconciling Maoli Interests in a Haole Forum: Limitations to the U.S. Department of the Interior's Consultation Policy That Undermine Native Hawaiian Self-Determination

Mallorie Chiemi ʻAiwohi*

ABSTRACT

Nearly one hundred thirty years after the United States illegally overthrew the Hawaiian Kingdom, the U.S. Department of the Interior unilaterally drafted the United States' first consultation policy with the "Native Hawaiian Community." The policy recognizes a "government-to-sovereign" relationship between the United States and the Native Hawaiian Community resembling, in part, yet distinct from its existing "government-to-government" relationships with American Indian tribes and Alaska Native corporations. Despite recognition as the Indigenous people of Hawaiʻi by the federal legislative and executive branches, Native Hawaiians have not received comparable exemption from the Fifteenth Amendment's supposed prohibition on ancestry-based voting restrictions. The U.S. Supreme Court's decision in Rice v. Cayetano crucially stunted Native Hawaiians' ability to organize a representative government

* J.D. 2023, University of Hawaiʻi at Mānoa William S. Richardson School of Law with a Certificate in Native Hawaiian Law; B.A. in Philosophy, Boston University, 2019. This Article is dedicated to the Nā ʻAikāne o Maui Cultural Center in Lāhainā, Maui – the birthplace of the Hawaiian Kingdom, and a puʻuhonua for minds, bodies, and souls. Though wildfires destroyed Nā ʻAikāne's gathering place for cultural groups and their irreplaceable collection of historical artifacts on August 8, 2023, beneath the rubble remains a kīpuka for our lāhui waiting to be restored. Mahalo piha e nā kumu a me ke kūpuna. My deepest appreciation extends to Professor Derek H. Kauanoe for inspiring this Article and for his support throughout the various stages of this work. I owe immense grattitude, as well, to the entire faculty at the Ka Huli Ao Center for Excellence in Native Hawaiian Law for their work in courtrooms, classrooms, and loʻi to perpetuate ea through advocacy. Mahalo, always, to my ʻohana whose support has only ever been conditioned upon my acting pono. Until our diginity and independence are restored, ʻonipaʻa kākou e kuʻu lāhui Hawaiʻi.

recognized by the United States, holding Hawaiian ancestry was a "proxy" for race. Consequently, Rice significantly limits consultation efforts because the Court's failure to apply the self-determination principles extended to other Indigenous peoples in America denied Native Hawaiians a means of forming a recognized government required for meaningful consultation. To forecast the kinds of futures the Department of the Interior's policy could enable for Native Hawaiians, this Article analyzes emerging political issues that Native Hawaiians have faced in the United States as a consequence of Rice – specifically, the foreign political management of our internal affairs.

* * *

I. INTRODUCTION

Nearly one hundred thirty years after the United States illegally overthrew the Hawaiian Kingdom, the U.S. Department of the Interior ("DOI" or "the Department") announced a unilateral draft of its first consultation policy with the "Native Hawaiian Community" ("NHC").[1] The DOI defines the NHC as the distinct Native Hawaiian Indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.[2] Yet, because an independent Hawaiian government has not been allowed to organize since the 1893 overthrow of the Hawaiian Kingdom, no politically recognized Hawaiian government took part in drafting the policy.[3] For the same reason, no politically recognized Hawaiian

[1] *See* U.S. DEP'T. OF THE INTERIOR, DEPARTMENT MANUAL, POLICY ON CONSULTATION WITH THE NATIVE HAWAIIAN COMMUNITY (proposed Oct. 18, 2022) (to be adopted as pt. 513, ch. 1) [hereinafter DOI Policy on Consultation]. The illegal overthrow occurred in 1893. *See* discussion *infra* Section II.A.

[2] DOI Policy on Consultation, *supra* note 1, at 1.4(G).

[3] *See* Off. of Native Hawaiian Rels., *Frequently Asked Questions – Consultation*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/hawaiian/frequently-asked-questions-consultation (last visited Nov. 30, 2023) (noting that federal consultation with Native Hawaiians would occur through "informal representatives of the community, which does not currently have a unified formal government.").

government participated in drafting the agency policy's associated procedures.[4] As a result, the consultation rules omit certain provisions that would ensure meaningful consultation.[5]

The DOI policy recognizes a "government-to-sovereign" relationship between the United States and the NHC, resembling in part – yet distinct from – existing "government-to-government" relationships with American Indian tribes and Alaska Native corporations.[6] The federal courts, however, have treated Kānaka Maoli[7] differently from the recognized Indigenous peoples of the continental United States, notably in the existential matter of political identity.[8]

As analyzed in this Article, the Court's decision in *Rice v. Cayetano* significantly limited the ability of Kānaka Maoli to organize as a governing entity or assert political sovereignty.[9] In *Rice*, the Court held that Native Hawaiian ancestry was a "proxy for race" and concluded that a state-run

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[4] *See id.*

[5] *See* U.S. DEP'T. OF THE INTERIOR, DEPARTMENT MANUAL, PROCEDURES FOR CONSULTATION WITH THE NATIVE HAWAIIAN COMMUNITY (proposed Oct. 18, 2022) (to be adopted as pt. 513, ch. 2) [hereinafter DOI Procedures on Consultation].

[6] The DOI has coined the term "government-to-sovereign relationship" to describe the "special political and trust relationship that exists between the United States and the NHC in the absence of a 'government-to-government' relationship." *See* U.S. DEP'T. OF THE INTERIOR, PROPOSED NATIVE HAWAIIAN COMMUNITY CONSULTATION POLICY & PROCEDURES: FREQUENTLY ASKED QUESTIONS (2022), https://www.doi.gov/sites/doi.gov/files/20221205-faqs-doi-draft-dm-1-2-onhr.pdf. The DOI states that the term "government-to-sovereign relationship" also speaks to the NHC's "unrelinquished inherent sovereignty" and claims the proposed consultation policy and procedures reflects its "respect for the NHC's unique legal relationship with the United States, which Congress has recognized in over 150 statutes." *Id.*

[7] "Kanaka maoli" means a "Hawaiian native." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 240 (1986) [hereinafter HAWAIIAN DICTIONARY]. "Kānaka" is the plural form of "kanaka." *Id.* at 127. While federal documents distinguish some Native Hawaiians from others based upon an arbitrary blood quantum, this Article uses "Kānaka Maoli" to refer to all Native Hawaiians – descendants of the aboriginal people living in Hawai'i prior to 1778. *See, e.g.*, 42 U.S.C. § 3057k (defining "Native Hawaiian" as "any individual . . . whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778"). Accordingly, this Article references "Kanaka Maoli," "Kānaka Maoli," and "maoli" interchangeably with "Native Hawaiian" and "Native Hawaiians," respectively.

[8] *Compare* Rice v. Cayetano, 528 U.S. 495, 521 (2000) (concluding that limiting voters to "native Hawaiians" violated the Fifteenth Amendment by using ancestry as proxy for race), *with* Morton v. Mancari, 417 U.S. 535, 542 (1974) (holding that employment preferences for Indians in the Bureau of Indian Affairs did not constitute racial discrimination because of the political status of Indian tribes).

[9] Rice v. Cayetano, 528 U.S. 495 (2000). Justice Kennedy delivered the 7–2 opinion in favor of the plaintiff. *Id.* at 497. Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, Thomas, and Breyer joined in the majority opinion, while Justices Stevens and Ginsburg each authored dissenting opinions. *Id.* at 495, 497; *see also infra* Section IV.A.

election for trustees of the Office of Hawaiian Affairs ("OHA"), a quasi-state agency responsible for the wellbeing of Native Hawaiians,[10] violated the Fifteenth Amendment by recognizing votes of only Native Hawaiian citizens.[11] By crucially mischaracterizing the caucasian plaintiff as "Hawaiian" merely on account of his residence in Hawai'i, the Court also cast ambiguity on what it means to be Hawaiian.[12] Compared to other Indigenous peoples engaging in federal consultation through recognized tribal governments, *Rice* stunts meaningful consultation efforts because it continues to deny Native Hawaiians a means of electing individuals to represent Native Hawaiian interests within Hawai'i.[13] This Article examines the post-*Rice* political status of Kānaka Maoli to analyze potential impacts of the DOI's recent consultation policy and to recommended changes to the policy.[14]

A. Political Status of Native Hawaiians in the United States

The United States has yet to reconcile historic Native Hawaiian justice claims for the illegal overthrow of the Hawaiian Kingdom.[15] Colonization and settler colonialism in Hawai'i and Indigenous lands in North America have led to a "crucial similarity" among Native Hawaiians and Native Americans: "the destruction of their sovereign autonomy and authority over their lands and resources."[16] Yet, divergent histories surrounding induction of Native lands into the United States distinguish the current political and social status of Native Hawaiians from federally recognized American

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[10] Although administratively housed within Hawai'i's executive branch of government, OHA is often referred to a "quasi-state" agency for its distinct function in maintaining the state government's accountability to its constituents of Native Hawaiian ancestry described further in Section II.D of this article. *See* About, Off. of Haw. Aff., https://www.oha.org/about/ (last visited Jan. 28, 2024); Chad Blair, *OHA: Agency at a Crossroads Is Caught in a Power Struggle*, HONOLULU CIV. BEAT (Sept. 21, 2015), https://www.civilbeat.org/2015/09/oha-agency-at-a-crossroads-is-caught-in-a-power-struggle/.

[11] *Rice*, 528 U.S. at 499; *see infra* Section IV.A.

[12] *See id*.

[13] *See id*. at 531–32, 538 (Stevens, J., dissenting) (rejecting the majority opinion that because Native Hawaiians lack federal recognition, they are therefore not entitled to the political, rather than racial, classification of federally recognized tribes, designed to help promote self-governance).

[14] *See infra* Parts IV and V.

[15] President Dwight D. Eisenhower dissolved the Territory of Hawai'i and established the State of Hawai'i in 1959. *See* Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4.

[16] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 144 (1998).

Indians and Alaska Natives.[17] As a consequence of westward expansion, federally recognized American Indian tribes typically secured their political status from the numerous treaties entered into between individual tribes and the federal government.[18] More recently, the Alaska Native Claims Settlement Act of 1971 departed from the United States' reservation system by extinguishing aboriginal land title in Alaska through the mandated creation of twelve private, for-profit Alaska Native regional corporations and over 200 village corporations owned by enrolled Alaska Native shareholders.[19] Unlike the Alaska Native corporations or tribes recognized through formal treaties, Hawai'i became a part of the United States through an illegal overthrow followed by annexation.[20] None of these historic distinctions, however, adequately excuse the federal government's failure to assume comparable responsibilities for the protection of Kānaka, their ancestral lands, and their political sovereignty.[21]

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[17] *See* Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857, 860 (2001) (discussing Native Hawaiians being the only group within the class of "Native American" not extended federal recognition); *see infra* note 248 and accompanying text. The term "Indian" specifically refers to those Native tribes in the continental United States that have been federally recognized as subject to Federal Indian Law principles. *See* S. REP. NO. 110-260 (2008); S. REP. NO. 107-66 (2001); S. REP. NO. 675 (2012). For the purposes of this Article, "Indian" refers to federally recognized "American Indian" tribes and Alaska Native Corporations.

[18] *See Indian Treaties and the Removal Act of 1830*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1830-1860/indian-treaties (last visited Sept. 19, 2023).

[19] *About the Alaska Native Claims Act*, ANCSA REG'L ASS'N, https://ancsaregional.com/about-ancsa/ (last visited Sept. 19, 2023). In 1975, amendments to the Alaska Native Claims Act established a thirteenth Alaska Native regional corporation "to ensure that Alaska Native people who were not permanent residents of Alaska but who were otherwise eligible to enroll in an Alaska Native regional corporation were included in the land claims settlement." *Id.*

[20] *See* discussion *infra* Section II.B.

[21] *See* DAVID H. GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 994 (7th ed. 2017); *see also* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 145 (2011) ("In light of Hawai'i's unique history . . . issues impacting Kānaka Maoli implicate restorative justice principles that underscore the importance of respecting Indigenous rights in partial redress for the harms of American colonialism."); N. Mahina Tuteur, *Reframing Kānāwai: Towards a Restorative Justice Framework for Indigenous Peoples*, 7 INDIGENOUS PEOPLES' J.L., CULTURE & RESIST. 59, 69–70 (2022) ("Reparative justice for group-based human rights violations can take a variety of forms, including restitution of land and personal property, compensation for personal property, compensation for specific losses, and institutional reforms to guarantee non-repetition of abuses."); 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) (describing the concept of reparatory justice and the "Four R's of Social Healing" consisting of recognition, responsibility, reconstruction, and reparation).

While Kānaka lack a federally recognized government, Native Hawaiians nonetheless embody the elements of people who are "Indigenous" under the United Nations' working definition.[22] One United Nations study found:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal system.[23]

Partially in response to the *Rice* decision and drawing from the bodies of law applicable to American Indians and Alaska Natives, legislation has been introduced in the U.S. Congress since *Rice* to clarify the political status of Native Hawaiians and to support Native Hawaiian governance recognized by the United States.[24] Daniel Kahikina Akaka, the only Native Hawaiian to represent the State of Hawai'i in the U.S. Senate thus far,[25] proposed several measures between 2000 and 2011 to clarify the U.S. government's policy regarding its relationship with Native Hawaiians.[26] Titled the Native Hawaiian Government Reorganization Act, but often called the "Akaka Bill" after its primary sponsor, the proposed legislation sought, in part, to facilitate

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[22] José R. Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study on the Problem of Discrimination against Indigenous Populations*, 29, U.N. Doc. E/CN/Sub.2/1986/7/Add.4 (1987).

[23] *Id.*

[24] Melody K. MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE 5, 35 (Melody K. MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat, eds., 2015); *see, e.g.,* S. REP. NO. 110-260 (2008); S. REP. NO. 107-66 (2001); S. REP. NO. 675 (2012).

[25] Alex Dobuzinskis, *Former Senator Akaka, First Native Hawaiian in Senate, Dies at 93*, REUTERS (Apr. 6, 2018, 1:54 PM), https://www.reuters.com/article/us-usa-congress-akaka/former-senator-akaka-first-native-hawaiian-in-senate-dies-at-93-idUSKCN1HD32X.

[26] *See*, *e.g.*, S. 2899, 106th Cong. (2000); S. 81, 107th Cong. (2001); S. 344, 108th Cong. (2003); S. 147, 109th Cong. (2005); S. 310, 110th Cong. (2007); S. 1011, 111th Cong. (2009); S. 675, 112th Cong. (2011).

a process for federal recognition of a Native Hawaiian governing entity.[27] The Akaka Bill also sought to establish what is now known as the DOI's Office of Native Hawaiian Relations ("ONHR")[28] as well as require interagency coordination between federal agencies that administer programs and implement policies impacting Native Hawaiians such as the DOI consultation policy.[29]

While Congress never passed the original Akaka Bill or its later versions, local efforts created a registry of eligible Kānaka Maoli in Hawai'i for future participation in nation-building activities such as voting.[30] Creating a registry represents the first step in legally replicating what the *Rice* Court prohibited the State of Hawai'i from organizing: a method for Kānaka Maoli to determine the management of lāhui[31] resources temporarily held by the state.[32] In other words, a first step towards asserting political self-

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[27] *See*, *e.g.*, S. 2899, 106th Cong. (2000); S. 81, 107th Cong. (2001); S. 344, 108th Cong. (2003); S. 147, 109th Cong. (2005); S. 310, 110th Cong. (2007); S. 1011, 111th Cong. (2009); S. 675, 112th Cong. (2011).

[28] Native Hawaiian Government Reorganization Act, S. 675, 112th Cong. § 5 (2011); *see About Our Office*, U.S. DEP'T OF THE INTERIOR, OFF. OF NATIVE HAWAIIAN REL., https://www.doi.gov/hawaiian/aboutus (last visited Sept. 19, 2023).

[29] *See, e.g.*, *Federal Programs and Services*, U.S. DEP'T OF THE INTERIOR, OFF. OF NATIVE HAWAIIAN REL., https://www.doi.gov/hawaiian/programs (last visited Nov. 25, 2023).

[30] *See, e.g.,* Sally Apgar, *Sign-up Drives Parallel Akaka Bill,* HONOLULU STAR-BULLETIN (July 19, 2005), https://archives.starbulletin.com/2005/07/19/news/story4.html; *Native Hawaiian Roll Commission Named*, DEP'T OF HAWAIIAN HOME LANDS (Sept. 8, 2011), https://dhhl.hawaii.gov/2011/09/08/native-hawaiian-roll-commission-named/; Susan Essoyan, *Certified Native Hawaiian Roll Posted Online with 95,690 Names*, STAR ADVERTISER (July 28, 2015), https://www.staradvertiser.com/2015/07/28/breaking-news/certified-native-hawaiian-roll-posted-online-with-95690-names/.

[31] "Lāhui" means "nation," "race," "tribe," "people," or "nationality." HAWAIIAN DICTIONARY, *supra* note 7, at 190. This article specifically uses "lāhui" to refer to the unified nation of Kānaka Maoli whose sovereignty has been significantly limited in functional capacity but not entirely extinguished by the United States government.

[32] OHA, exists for this purpose. The Hawai'i Constitution asserts that OHA "shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust" for Kānaka Maoli. HAW. CONST. art. XII, § 5.

determination.[33] Yet, each attempt to create a Hawaiian registry has faced legal challenges built upon *Rice*.[34]

In 2004, Hawai'i Maoli, a nonprofit arm of the Association of Hawaiian Civic Clubs, encouraged Hawaiians to step forward and "Kau Inoa"[35] in the process of self-determination.[36] Hawai'i Maoli required verification of maoli ancestry but had no minimum blood-quantum or age requirement.[37] Buoyed by the flawed precedent of *Rice,* non-Native Hawaiian individuals like H. William Burgess infamously challenged Kau Inoa and the existence of other Native Hawaiian programs such as OHA, declaring themselves "Hawaiian" by virtue of their Hawai'i residence.[38] According to these plaintiffs, their self-proclaimed "Hawaiian identity" entitled them to participate in any process that would establish a Native Hawaiian government despite not having

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[33] *See* DEP'T OF HAWAIIAN HOME LANDS, *supra* note 30 ("The roll is to be used as the basis for participation in the organization of a Native Hawaiian governing entity."); Essoyan, *supra* note 30 ("[A] certified list of 95,690 people of Hawaiian ancestry . . . will be used to elect delegates later this year to a governance 'aha, or constitutional convention, which is expected to consider different options for Hawaiian self-determination."); Apgar, *supra* note 30 (describing Kau Inoa's 2005 registration efforts to "get [Native Hawaiians] together under one model (of government) instead of all different kinds").

[34] *See infra* notes 38 and 50–52 and accompanying text.

[35] "Kau" means "to place" or "to put." HAWAIIAN DICTIONARY, *supra* note 7, at 133. "Inoa" means "name." HAWAIIAN DICTIONARY, *supra* note 7, at 101. "Kau Inoa" means "to place your name." Apgar, *supra* note 30.

[36] Apgar, *supra* note 30.

[37] *See* KAU INOA, *Native Hawaiian Registration Form*, https://www.signnow.com/jsfiller-desk14/?mode=cors&requestHash=45c940ec515817c336007ff8dfda08009c4df5f36f05cf6d9e08165c797103e4&lang=en&projectId=1357132859&loader=tips&MEDIUM_PDFJS=true&PAGE_REARRANGE_V2_MVP=true&isPageRearrangeV2MVP=true&jsf-page-rearrange-v2=true&jsf-new-header=false&routeId=c32e021d64b48ad41087bcf718249b87#32bc26ab99d645aebba457f0b6d1b624.

[38] Anosh Yaqoob, *Legal Update: Summary of New Lawsuit* Kuroiwa v. Lingle, KA HE'E, http://www2.hawaii.edu/~nhlawctr/article5-5.htm (last visited Oct. 17, 2023). The plaintiffs, a group of non-Hawaiians, demanded registration with Kau Inoa and argued the program discriminated on the basis of race. KA WAI OLA STAFF, *Kau Inoa Presses Ahead Despite Possible Threat of Legal Attack*, KA WAI OLA (Sept. 2007), https://kawaiola.news/wp-content/uploads/2017/10/KA_WAI_OLA_200709.pdf. Many of the plaintiffs, as well as their attorney, H. William Burgess, were previously involved in legal challenges against Native Hawaiian programs and funding. *See* Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007) (many of the same plaintiffs unsuccessfully sought to dismantle the funding base for OHA and the Department of Hawaiian Home Lands ("DHHL")).

ancestral connections to the people inhabiting the Hawaiian Islands prior to 1778.[39]

In 2011, the Hawai'i State Legislature enacted Act 195 and established the Native Hawaiian Roll Commission, mandating the facilitation of the Kana'iolowalu initiative in collaboration with the state government.[40] Kana'iolowalu differed from Kau Inoa in that the state recognized the new initiative through legislation.[41] Like Kau Inoa, the Roll Commission and Kana'iolowalu called upon a network of Native Hawaiians interested in nation-building, this time as a joint effort between OHA and the legislature.[42] Former Governor John Waihe'e, the only Native Hawaiian thus far to sit in

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[39] Ka Wai Ola Staff, *Kau Inoa Presses Ahead Despite Possible Threat of Legal Attack*, KAI WAI OLA (Sept., 2007), https://kawaiola.news/wp-content/uploads/2017/10/ KA_WAI_OLA_200709.pdf (explaining that all five opposers of Kau Inoa "wish to vote in all elections which important public issues are being considered or public officials are being elected.") The year 1778 refers to the year British Captain James Cook arrived in Hawai'i and ushered in the beginning of colonization, when Haole settlers began claiming the islands as their own. *See Cook Landing Site, HI*, NAT'L PARK SERV., https://www.nps.gov/places/cook-landing-site.htm (last visited Jan. 26, 2024) (describing Captain Cook's first arrival in 1778 on the island of Kaua'i).

[40] HAW. REV. STAT. § 10H-3 (2011); *see Native Hawaiian Roll Commission Named*, *supra* note 30 ("The roll is to be used as the basis for participation in the organization of a Native Hawaiian governing entity."); Essoyan, *supra* note 30 ("The Native Hawaiian Roll Commission launched its Kanaiolowalu registry initiative in July 2012 and signed up more than 40,000 registrants.").

[41] 'Ōiwi TV, *FAQ 02: How does Kana'iolowalu differ from Kau Inoa*, VIMEO (Nov. 28, 2012, 3:54 PM), https://vimeo.com/54478186; *see* HAW. REV. STAT. § 10H-3 (2011) (codifying the Native Hawaiian Roll Commission in state law).

[42] *See* Linda Zhang, *Re-Building a Native Hawaiian Nation: Base Rolls, Membership, and Land in an Effective Self-Determination Movement*, 21 UCLA ASIAN PAC. AM. L.J. 69, 76–77 (2017) (noting that OHA funded the state legislature-created Native Hawaiian Roll Commission).

the State of Hawai'i's highest executive seat,[43] later served as the Chair of the Native Hawaiian Roll Commission.[44]

The primary nation-building task for members registered with Kana'iolowalu was to "independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves."[45] To preserve its neutrality, OHA transferred the organizational task to Na'i Aupuni to independently administer an election, convention, and final ratification vote among Kānaka delegates.[46] Additionally, Act 195 earmarked nearly $2.6 million for Kana'iolowalu, which Na'i Aupuni inherited and used to fund an 'aha[47] of delegates chosen by more than 95,000 certified voters on the Native Hawaiian Roll.[48]

Attorney William Meheula defended Na'i Aupuni against claims by individuals who sought to participate in an election they believed to be

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[43] *Gov. John Waihee*, NAT'L GOV. ASS'N, https://www.nga.org/governor/john-waihee/ (last visited Feb. 7, 2024) ("In 1986 [John Waihe'e] became Hawaii's fourth elected governor and the first elected governor of Hawaiian ancestry."). His liutenant governor and later successor, Benjamin Cayetano became the first elected governor of Filipino ancestry. Nancy Yoshihara, *Los Angeles Times Interview: Benjamin Cayetano: On the Success of Asian American Politicians–or Lack Thereof*, L.A. TIMES (Sept. 17, 1995, 12:00 AM), https://www.latimes.com/archives/la-xpm-1995-09-17-op-47085-story.html. Governors Linda Lingle and Neil Abercrombie settled in Hawai'i from St. Louis, Missouri and Williamsville, New York, respectively. *Gov. Linda Lingle*, NAT'L GOV. ASS'N, https://www.nga.org/governor/linda-lingle/ (last visited Feb. 7, 2024); Gov. Neil Abercrombie, NAT'L GOV. ASS'N, https://www.nga.org/governor/neil-abercrombie/ (Feb. 7, 2024). In 2014, Governor David Ige became the first elected governor of Okinawan descent. *Gov. David Ige*, NAT'L GOV. ASS'N, https://www.nga.org/governor/david-ige/ (last visited Feb. 7, 2024). Hawai'i's current governor, Josh Green, is from Pittsburgh, Pennsylvania. *Gov. Josh Green*, NAT'L GOV. ASS'N, https://www.nga.org/governors/hawaii/ (last visited Feb. 7, 2024).

[44] *See Native Hawaiian Roll Commission Named*, *supra* note 30.

[45] HAW. REV. STAT. §10H-5 (2011).

[46] Timothy Hurley, *OHA Transfers Nation-Building Task*, STAR ADVERTISER (May 29, 2015), https://www.staradvertiser.com/2015/05/29/hawaii-news/oha-transfers-nation-building-task/. The five members of Na'i Aupuni were unpaid directors with ties to Hawaiian royalty and formed after OHA reached out to all the ali'i trusts, royal societies, and other Native Hawaiian organizations to discuss self-determination and nation-building. *Id.*

[47] 'Aha refers to a convention, gathering, or assembly. HAWAIIAN DICTIONARY, *supra* note 7, at 5.

[48] *Election Notice to be Sent to More Than 95,000 Certified Voters on the Native Hawaiian Roll*, NA'I AUPUNI (July 31, 2015), https://web.archive.org/web/20230313091212/http://naiaupuni.org/docs/NA-NR-ElectionNotice-073115.pdf.

illegitimate.[49] In one such case, *Akina v. Hawai'i*, the named plaintiff alleged in federal court that Na'i Aupuni wrongfully prevented him from running for a delegate seat to the convention and from voting in Na'i Aupuni's election after he failed to affirm "the unrelinquished sovereignty of the Native Hawaiian people."[50] Although U.S. District Court Judge Michael Seabright denied the plaintiff's motion for a preliminary injunction,[51] thus allowing Na'i Aupuni to conduct their election, the organization decided against its final goal of advancing a constitutional ratification vote.[52] Despite its dissolution, Na'i Aupuni and the 'aha nonetheless created a maoli-led forum that "generated a long overdue and significant dialogue among the participants and within the larger community."[53] If meaningfully executed,

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[49] Akina v. Hawai'i, 835 F.3d 1003, 1006–08 (9th Cir. 2016) (affirming denial of a preliminary injunction to halt the election of Native Hawaiian delegates seeking to discuss the formation of a Native Hawaiian governing entity); *see* Jennifer Sinco Keller, *Lawsuit: Native Hawaiian Election Would Be Unconstitutional*, ASSOC. PRESS (Aug. 13, 2015, 2:24 PM), https://apnews.com/article/ee825aa2af1942c786307e89c2cfc438 (describing how the plaintiffs in *Akina v. Hawai'i* objected to their exclusion from the delegate vote).

[50] Akina v. Hawaii, 141 F. Supp. 3d 1106, 1121 (D. Haw. 2015). The named plaintiff, Keli'i Akina has since been elected to OHA's Board of Trustees following several campaigns that capitalized on the *Rice* decision in his slogan, "Everyone can vote OHA." Anita Hofschneider, *Akina Spends More than $150K to Keep Souza from OHA Seat*, HONOLULU CIV. BEAT (Oct. 13, 2020), https://www.civilbeat.org/2020/10/akina-spends-more-than-150k-to-keep-souza-from-oha-seat/.

[51] *See Akina*, 141 F.Supp. at 1136.

[52] Williamson Chang, *Nai Aupuni Decision to Sidestep Legal Challenge Raises New Legal Issues*, HONOLULU CIV. BEAT (Dec. 17, 2015), https://www.civilbeat.org/2015/12/nai-aupuni-decision-to-sidestep-legal-challenge-raises-new-legal-issues/ (describing why Na'i Aupuni decided to invite all 196 delegate candidates to participate in the convention as delegates); Chad Blair, *Native Hawaiian Constitution Adopted*, HONOLULU CIV. BEAT (Feb. 27, 2016), https://www.civilbeat.org/2016/02/native-hawaiian-constitution-adopted/ (describing how a constitution was adopted by a vote of eighty eight to thirty from the participating delegates); *Na'i Aupuni Decides Not to Pursue Ratification Vote*, NA'I AUPUNI (Mar. 16, 2016), https://web.archive.org/web/20220616133336/http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniDecidesNoRatificationVote-031616.pdf (explaining the belief that, after sharing the proposed constitution with the community, Na'i Aupuni should defer to the 'aha participants to arrange for a ratification process.)

[53] *Na'i Aupuni Seeks Broader Group to Ratify Native Hawaiian Constitution*, MAUI NOW (Mar. 17, 2016), *https://mauinow.com/2016/03/17/na%CA%BBi-aupuni-seeks-broader-group-to-ratify-native-hawaiian-constitution/.* The forum allowed for Kānaka Maoli to organize meetings with other Kānaka Maoli in order to discuss varying views of the future. *See id.* While Native Hawaiians may not all agree on whether independence, federal recognition, or continuation of the status quo results in the preferred alternative future, "it is crucial that this conversation continues." *Id.*

the DOI Policy on Consultation has the potential to continue this type of dialogue and enable political self-determination by the lāhui.[54]

The Native Hawaiian population in Hawai'i is declining.[55] As of 2020, more than fifty-five percent of Native Hawaiians live outside Hawai'i.[56] Even more alarming: although Native Hawaiians make up only about twenty percent of Hawai'i's general population, Native Hawaiians are overrepresented in Hawai'i prisons and make up forty percent of incarcerated individuals in the state.[57] With relatively low representation among the general population, the Native Hawaiian vote runs the risk of being deafened by a majority of competing interests.[58]

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[54] *See infra* notes 397–99 and accompanying text.

[55] *U.S. Census Bureau Releases Key Stats in Honor of Asian American, Native Hawaiian, and Pacific Islander Heritage Month*, U.S. DEP'T OF COM. (May 3, 2022) [hereinafter *U.S. Census Bureau Releases Key Stats*], https://www.commerce.gov/news/blog/2022/05/us-census-bureau-releases-key-stats-honor-asian-american-native-hawaiian-and. In 2020, the U.S. Census Bureau reported 619,855 Native Hawaiians across the United States. *Id.* In 2021, there were fewer Native Hawaiians living inside of Hawai'i (309,800) than living in other states (370,000). Jennifer Sinco Kelleher & Associated Press, *Hawaiians Cannot Afford to Live in Hawaii*, FORTUNE (Jan. 23, 2023, 2:10 AM), https://fortune.com/2023/01/23/hawaiians-cannot-afford-to-live-in-hawaii-las-vegas-drawing-natives/.

[56] Ku'uwehi Hiraishi, *Majority of Native Hawaiians Don't Live in Hawai'i, According to US Census Report*, HAW. PUB. RADIO (Sept. 22, 2023, 1:05 PM), https://www.hawaiipublicradio.org/local-news/2023-09-22/majority-of-native-hawaiians-dont-live-in-hawaii-us-census-report.

[57] Charlotte West, *Native Hawaiians are Overrepresented in Prisons. Cultural Education Could Help*, HONOLULU CIV. BEAT (May 21, 2023), https://www.civilbeat.org/2023/05/native-hawaiians-are-overrepresented-in-prisons-cultural-education-could-help/#:~:text=Native%20Hawaiians%20like%20Kaluhiokalani%20are,40%25%20of%20people%20in%20prison. Disparate treatment before the courts, discretionary paroling practices, and culturaly inappropriate or unavailabe reentry services are several contibuting factors to the high incarceration rate of Native Hawaiians. OFF. OF HAWAIIAN AFF., *The Impact of the Criminal Justice System on Native Hawaiians*, https://www.oha.org/wp-content/uploads/2014/11/factsheets_final_web_0.pdf (last visited Nov. 14, 2023). Because people convicted of certain offenses may be denied civil and political participation such as voting or sitting on a jury, "Native Hawaiians are disproportionatly more likely to receive criminal conviction, they are more likely to have their voting rights taken away, leaving a large section of some communities disenfranchised and unable to make decisions to change and better their own communities." *Id.*; *see* HAW. REV. STAT. § 831-2 (2006) (providing that from the time of a person's sentence until the person's final discharge, convicted felons may not vote in an election or hold public office).

[58] *See* OFF. OF HAWAIIAN AFF., *The Impact of the Criminal Justice System on Native Hawaiians*, https://www.oha.org/wp-content/uploads/2014/11/factsheets_final_web_0.pdf (last visited Nov. 14, 2023).

The United States adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2010, affirming its "commitment to address the consequences of history."[59] President Obama recognized the United States' direct and existential harm to Indigenous peoples through colonization, emphasizing that "few have been more marginalized and ignored by Washington for as long as Native Americans–our First Americans."[60] Notably, UNDRIP recognizes the "urgent need to respect and promote the inherent rights of [I]ndigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories and resources[.]"[61] Further, UNDRIP affirms the "fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development[.]"[62]

Professor James Anaya, Former UN Special Rapporteur on the Rights of Indigenous Peoples, explained that the right of self-determination is "to be

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[59] U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm; G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP] (protecting the collective and individual rights of Indigenous peoples in relation to self-government, land, education, employment, health, and other areas and also requiring countries to consult with Indigenous peoples to obtain consent on matters which concern them). Following twenty-five years of hard negotiations, one hundred forty-four countries voted for the UNDRIP, eleven abstained, and only four (Canada, Australia, New Zealand, and the United States, collectively referred to as "CANZUS") voted against the declaration. Kristy Gover, *Settler–State Political Theory, "CANZUS" and the UN Declaration on the Rights of Indigenous Peoples*, 26 EUR. J. INT'L L. 345, 345, 346 n.1 (2015). Since 2007, CANZUS have reversed their positions and now endorse the UNDRIP. *Id*. at 346. "The CANZUS states are all affluent liberal democracies settled during the period of intensive British imperial expansion in the 19th century," and Indigenous people "are vastly outnumbered by a predominantly English-speaking settler majority[.]" *Id*. at 356.

[60] *Remarks by the President During the Opening of the Tribal Nations Conference & Interactive Discussion with Tribal Leaders*, OFF. OF THE PRESS SEC'Y (Nov. 5, 2009, 9:37 AM), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-during-opening-Tribal-nations-conference-interactive-discussionw#:~:text=And%20few%20have%20been%20more,Treaties%20were%20violated.

[61] UNDRIP, *supra* note 59, at 2.

[62] UNDRIP, *supra* note 59, at 3. Federal programs such as the Advisory Council on Historic Preservation have incorporated the UNDRIP and applied it to Native Hawaiians. *Integrating the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free Prior and Informed Consent (FPIC) into Hawai'i's Aha Moku System*, DEP'T OF LAND & NAT. RES. AHA MOKU ADVISORY COMM. (2021), http://www.ahamoku.org/wp-content/uploads/2021/02/UNDRIP.brochure.pdf.

full and equal participants in the creation of the institutions of government under which [Indigenous peoples] live and, further, to live within a governing institutional order in which [Indigenous peoples] are perpetually in control of their own destinies."[63] However, the current legal landscape does not sufficiently allow Native Hawaiians to control their political destiny within the confines of American jurisprudence.[64] Specifically, *Rice* has wrongfully quashed Native Hawaiian efforts to seek self-governance by distinguishing Native Hawaiians as merely a racial category, compared to the political status of Native Americans across the continental United States.[65] If Hawai'i's political landscape continues to shift away from Indigenous interests and towards commercial development interests under the guise of racial equality as asserted by individuals like H. William Burgess, Kānaka Maoli must ask ourselves: *what will it mean to be a Hawaiian in a haole*[66] *Hawai'i?*

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[63] S. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 340 (1994); *The U.N. Declaration on the Rights of Indigenous Peoples Turns 14*, CULTURAL SURVIVAL (Sept. 3, 2021), https://www.culturalsurvival.org/news/un-declaration-rights-indigenous-peoples-turns-14.

[64] *See infra* Section IV.B (discussing how and why the current legal landscape, particularly under *Rice* limits Native Hawaiian political organization); Michael Carroll, *Every Man Has a Right to Defend His Own Destiny: The Development of Native Hawaiian Self-Determination Compared to Self-Determination of Native Alaskans and the People of Puerto Rico*, 33 J. MARSHALL L. REV. 639, 661 (2000) ("Although maintaining the status quo will satisfy the self-determination rights of those native Hawaiians who agree with United States domination over Hawai'i, it will not satisfy the rights of native Hawaiians who want to establish their own government."). While Native Hawaiians currently raise awareness of human rights violations against Native Hawaiians by the United States at the international level, any action regarding these claims cannot be expected, "given the limitation of their respective institutional mandates." S. JAMES ANAYA & ROBERT A. WILLIAMS, JR., STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION WITH THE NATIVE HAWAIIAN PEOPLE 25–26 (2015).

[65] Kathryn N. S. Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of* Rice v. Cayetano, 15 ASIAN AM. L. J. 9, 35 (2008); Gavin Clarkson, *Not Because They are Brown, But Because of Ea: Why the Good Guys Lost in* Rice v. Cayetano, *and Why They Didn't Have to Lose*, 7 MICH. J. RACE & L. 317, 318 (2002); *see* Rice v. Cayetano, 528 U.S. 495, 514–17 (2000).

[66] While "haole" may mean "white person" or "any foreigner," it also refers to a distinct behavior. HAWAIIAN DICTIONARY, *supra* note 7, at 58. This Article uses "haole" in reference to the foreign attitude which "assumes airs of superiority" in Hawai'i regardless of the vessel's race. *See id.* To be haole is to reject the underlying values of Aloha 'Āina. *See id.* This Article does *not* use the term interchangeabley with "white person," or "any foreigner" because a haole attitude may be possessed by bodies of any race and regardless of origin. *See id.* ("ho'ohaole 'ia" means Americanized or Europeanized). Despite the complex historical use

B. "Future Studies" Framework

This Article deploys a futures studies framework to analyze how the Department's consultation policy may affect maoli self-determination.[67] Specifically, the following futures studies analysis identifies emerging political obstacles Native Hawaiians face in the aftermath of *Rice*.[68] It further articulates how consultation efforts might move beyond the limits imposed by *Rice* on Native Hawaiian self-determination.[69]

Analyzing emerging issues through a futures studies framework focuses on "furthering both narrowly professional as well as broadly participative inquiry into the future."[70] Experts in the field do not attempt to delineate precisely what will happen to a government before it actually happens.[71] Instead, futurists *forecast* a wide variety of alternative futures rather than *predict* a distinct one.[72]

Debates persist within futures studies over whether ethical or moral absolutism is preferable to that of relativism when evaluating governmental behavior.[73] Ethical or moral absolutism asserts a universally binding set of values while ethical or moral relativism implies the opposite.[74] For example, Yale University Professor Wendell Bell, one of the founders of futures studies, holds the view that "there is a set of core values underlying all human action across all cultures that must be the basis of all good futures studies and futures consulting."[75] On the other hand, futurists like retired University of Hawai'i Professor James Dator[76] believe that no such common set of values

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of "haole," a federal district court convicted two Native Hawaiian men of Hawai'i's first racially motivated hate crime because it strictly interpreted "haole" to mean "white person," ignoring the expert witness' opinion that the victim's behavior, not his complexion, motivated one defendant's reference to the victim as Haole. United States v. Alo-Kaonohi, 635 F. Supp. 3d 1074 (D. Haw. 2022).

[67] *See infra* Section IV.C.

[68] *See infra* Section IV.C.

[69] *See infra* Part V. *See generally* Lisset M. Pino, *Colonizing History:* Rice v. Cayetano *and the Fight for Native Hawaiian Self-Determination*, 129 YALE L.J. 2574 (2020).

[70] James A. Dator, *The Future Lies Behind! Thirty Years of Teaching Futures Studies*, 42(3) AM. BEHAV. SCIENTIST 298, 302 (1998) [hereinafter *The Future Lies Behind!*].

[71] *Id.* at 301.

[72] *Id.* at 303.

[73] *Id*. at 302.

[74] *See id.*

[75] *Id.* at 302, 308.

[76] The 1971 Hawai'i legislature created a Hawai'i Research Center for Futures Studies within the University of Hawai'i, first directed by Dator. HAW. RSCH. CENTER FOR FUTURES STUD., https://manoa.hawaii.edu/futures-center/ (last visited Sept. 20, 2023). "The Center is

exists "beyond vague generalities . . . that can be used to require or outlaw specific actions."[77]

This Article utilizes Dator's position over that of Bell because the Department's policy may be ethical by one set of standards (e.g., UNDRIP which endorses Indigenous self-determination) while impermissible by another (e.g., American jurisprudence that precludes self-determination from Indigenous peoples that the judiciary has yet to recognize).[78] Acknowledging that these differences may stem from conflicting values allows for the skepticism of dominant views that Bell himself employed to question dominant governments.[79] Because Indigenous peoples share some common historical experiences, including non-dominance in comparison with foreign states,[80] the current political situation of Kānaka Maoli within the United States warrants Dator's conception of futures studies.

Dator categorizes the innumerable alternative futures into four major (generic) images for any human system, including a Native Hawaiian government:

> *Continuation* – usually of "economic growth" [e.g., the status quo's conflict between economic development and traditional practices];

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best known for its work in judicial foresight, which began with the Hawai'i State Judiciary in 1971 (under the encouragement of Chief Justice William S. Richardson and Chief Court Administrator Lester Cingcade)." *The Future Lies Behind!*, *supra* note 70, at 300.

[77] *The Future Lies Behind!*, *supra* note 70, at 302.

[78] *See id*.

[79] *See, e.g.*, Wendell Bell, *The American Invasion of Grenada: A Note on False Prophecy*, 10 FORESIGHT 27, 28 (2008) (criticizing the role of non-credible future predictions by the United States government as justification for the 1983 invasion of Grenada).

[80] While the United Nations has never adopted a formal definition of "Indigenous Peoples," a working definition generated by Indigenous peoples includes four elements:

> Indigenous communities, peoples, and nations are those which, [1] having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, [2] consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They [3] form at present non-dominant sectors of society and [4] are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultrual patters, social institutions, and legal system.

Cobo, *supra* note 22, at 29.

> *Collapse* – from, usually, one of a variety of different reasons such as environmental overload and/or resource exhaustion, economic instability, moral degradation, external or internal military attack, meteor impact, and so on;
>
> *Disciplined society* – in which society in the future is seen as organized around some set of overarching values usually considered to be ancient, traditional, natural, ideologically correct, or God-given; and
>
> *Transformational society* – usually either of a high-tech or a high-spirit variety, which sees the end of current forms and the emergence of new (rather than the return to older, traditional) forms of beliefs, behavior, organization, and perhaps, intelligent life-forms.[81]

Dator's framework utilizes two common approaches to analyses: "deductive forecasting" and "emerging-issue analysis."[82] Following the first approach, futurists paint a picture of each of these four alternative futures by deducing characteristics from each of the four generic societal images.[83] Emerging-issue analysis, on the other hand, seeks to identify "future problem[s and opportunities] at their earliest possible emergence rather than waiting until they are fully formed and [manifested as] powerful trends."[84] While deductive forecasting identifies important trends, emerging-issue analysis provides more utility as "[t]here are specific techniques involved in learning how to spot emerging issues and then to present them to decision makers."[85]

Emerging-issue analysis within Dator's futures studies framework is deployed in this Article, not only to anticipate obstacles in Native Hawaiian consultation, but also to propose meaningful solutions.[86] This framework is

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[81] *The Future Lies Behind!*, *supra* note 70, at 305.

[82] *Id*. Dator's "deductive forecasting" is a technique used to forecast "general characteristics" of alternative futures "by deducing it from each of the societal images" (continuation, collapse, disciplined society, and transformational society). *Id*. Emerging-issue analysis, built upon the work of Graham Molitar, consists of studying a problem or opportunity through its S-curve life cycle, which consists of four stages: emergence unnoticed by the general population, slow growth, rapid and noticed growth, and "full blown" status "whereupon a great deal of time and attention is spent . . . until it eventually fades away . . . [or] reemerges." *Id*.

[83] *Id.*

[84] *Id.* at 306.

[85] *Id.*

[86] *See infra* Part V.

applied to Kānaka Maoli who face a novel consultation policy with the potential to either amplify their collective voice or further drown them in a sea of feigned advocacy. The legal obstacle created by *Rice* is an emerging issue to be analyzed in order to deduce how to avoid the "continuation" of status quo (in the form of self-determination efforts stymied by *Rice*) and move towards a "transformational" future (utilizing tools within a haole forum to advance maoli interests).

The critical presumption among futurists that "'[t]here are no future facts, [and] there are no past possibilities'" urges scholars, advocates, decisionmakers, and communities to refer to the past in forecasting their future.[87] An ʻōlelo noʻeau[88] heeds the same refrain: "i ka wā ma mua, i ka wā ma hope," or "the future is in the past; the past is prologue."[89] Forecasting alternative futures for Kānaka Maoli identifies the most crucial issues that have and can conceivably continue to hinder self-determination for Kānaka Maoli.[90]

Part II of this Article tells the story of governance in Hawaiʻi by chronicling its evolution from a constitutional monarchy to statehood.[91] Part III examines the legal rules forming the present foundation for federal consultation with Native Hawaiians, including the federal trust relationship with the NHC, the United States' acknowledgement of its role in illegally overthrowing the Hawaiian Kingdom, and the Executive Order underlying tribal consultation.[92] Part IV analyzes *Rice* before forecasting how the Court's flawed holding may affect federal consultation with the NHC.[93] Part V then proposes a starting point for future research, analysis, and discussion on how to further Native Hawaiian self-determination and political self-governance, including proposed amendments to the DOI consultation policy, suggestions regarding the Department's organization, and a call to action for

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[87] *Id*. at 302 (quoting Wendell Bell & James A. Mau, *Images of the Future: Theory and Research Strategies*, *in* THE SOCIOLOGY OF THE FUTURE: THEORY, CASES, AND ANNOTATED BIBLIOGRAPHY 6, 9 (Wendell Bell & James A. Mau eds.,1971)).

[88] "'Ōlelo noʻeau" means "proverb," "wise saying," or "traditional saying." HAWAIIAN DICTIONARY, *supra* note 7, at 284.

[89] *See* Natalia Kurashima, Jason Jeremiah & Tamara Ticktin, *I Ka Wā Ma Mua: The Value of a Historical Ecology Approach to Ecological Restoration in Hawai'i*, 71(4) PAC. SCI. 437, 440 (2017).

[90] *See infra* Section IV.C.

[91] *See infra* Part II.

[92] *See infra* Part III.

[93] *See infra* Part IV.

members of the lāhui to learn more about political sovereignty and self-determination and to speak knowledgeably with other Kānaka Maoli and residents of Hawai'i about these topics.

II. BACKGROUND

Hawai'i's induction into the United States differed significantly from the creation of states through westward expansion.[94] This section dissects specific inflection points in the history of Hawaiian governance that exhibit incremental steps of assimilation, ultimately allowing a western nation to absorb, through statehood, an internationally recognized and constitutionally organized sovereign nation. This section also sets the stage for the legal issues presented in *Rice* by elaborating upon the 1978 Constitutional Convention and OHA's creation, both of which were meant to address insufficiencies in the state government's service to Hawai'i's Native Hawaiian population.

Soon after Kamehameha III (Kauikeaouli) signed Hawai'i's first constitution and reluctantly appointed foreign individuals to seats of political power, historian Samuel Mānaiakalani Kamakau described some Kānaka Maoli as living "like wanderers on the earth . . . not seen again in this Hawai'i."[95] Some of those Native Hawaiians sailed to Oregon, Tahiti, and Peru, while others traveled to Nantucket, New Bedford, Sag Harbor, and other American ports because they felt Hawai'i's laws had begun to favor foreigners who stayed in the islands to satiate a colonizing hunger for new lands.[96] Because of these converging interests in Hawai'i's land, the monarchial government fluctuated between eras of centralization and decentralization to avoid complete takeover by the western colonizing forces.[97] The legacy of these colonizing forces continues to drive Kānaka away from their ancestral lands today.[98] The constitutions that emerged

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[94] *See A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Hawaii*, OFF. OF THE HISTORIAN, https://history.state.gov/countries/hawaii (last visited Jan. 26, 2024); *Westward Expansion (1801-1861),* SMITHSONIAN AMERICAN ART MUSEUM, https://americanexperience.si.edu/historical-eras/expansion/#:~:text=Westward%20expansion%20began%20in%20earnest,size%20of%20the%20young%20nation (last visited Jan. 26, 2024).

[95] SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAI'I 403–04 (Kamehameha Publishing rev. ed. 1992).

[96] *Id*. at 404.

[97] *See infra* Section II.A.

[98] *See New Census Data Confirms More Native Hawaiians Reside on the Continent Than in Hawai'i*, OHA (Sept. 25, 2023), https://www.oha.org/news/new-census-data-more-native-hawaiians-reside-continent/.

between 1840 and 1887, during times of political change within the Kingdom of Hawai'i, served as both a sword and shield for ali'i in power.[99] Scholars of Federal Indian Law often study how policies affect tribal sovereignty based on the tribe's situation in thematic eras such as "Removal," "Assimilation," and "Self-Determination."[100] Understanding ea,[101] or Native Hawaiian sovereignty, however, begins with understanding how the haole interests have intentionally diminished that sovereignty.

A. *Constitutional Monarchy of Hawai'i (1840–1893)*

The constitutional monarchy of Hawai'i and its early challengers demonstrate the enduring push and pull between Native Hawaiian and colonial interests. Kamehameha I bore the name Ka'iwakīloumoku, or "the 'iwa bird that hooks the islands together," for the prophecy he would fulfill by consolidating the formerly independent islands of Hawai'i.[102] Upon the death of Kamehameha I, his first son, Kamehameha II (Liholiho) abolished the traditional system of law, the kapu.[103] A mere few months later, Calvinists and other Protestants from the American Board of Commissioners for Foreign Missions sailed into the heart of the spiritual vacuum left by the end of the kapu.[104] After abolishing the kapu, ali'i amenable to Christian

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[99] For example, through the Constitution of 1840, Kauikeaouli "refin[ed] ancient structures" and adopted Anglo-American law by "reaffirming in the relatively new governmental system that which was held traditionally in practice," demonstrating "ali'i agency in using law for their own purposes." *See* KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 129 (2014).

[100] *See* DAVID E. WILKINS & HEIDI K. STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 121, 123–24 (4th ed. 2017).

[101] "Ea" means "sovereignty" and "life." HAWAIIAN DICTIONARY, *supra* note 5, at 36.

[102] KA'IWAKĪLOUMOKU PACIFIC INDIGENOUS INSTITUTE, https://kaiwakiloumoku.ksbe.edu/article/kaiwakiloumoku-about-our-name#:~:text=The%20epithet(1)%20Ka'iwakīloumoku%20was,moku%20–%20into%20a%20single%20nation (last visited Sept. 21, 2023).

[103] The kapu system "was the principle by which all activity was organised" in old Hawai'i. Stephenie S. Levin, *The Overthrow of the Kapu System in Hawaii*, 77 J. POLYNESIAN SOC'Y 402, 411–12 (1968) (describing the kapu system as a system of classification and the "hierarchical order of society"). The abolishment of the kapu system in 1819 marked a radical change and the repudiation of kinship ties deeply entrenched in Hawai'i's stratified society. *Id.* at 425.

[104] JOHN VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 22 (2008) [hereinafter WHO OWNS THE CROWN LANDS?]. Following his death, Ka'ahumanu and Keōpūolani, Pai'ea's favorite wife and most sacred wife, respectively, detested the kapu system and joined Liholiho in an "extraordinaty event" by eating from the same food vessel. KAMAKAU, *supra* note 95, at 224. The same day, Liholiho decreed the destruction of every temple and idol in the kingdom. KING DAVID KALĀKAUA, THE LEGENDS AND MYTHS OF HAWAI'I 27 (1990).

influences (namely Queen Ka'ahumanu, Liholiho, and the Council of Chiefs) consolidated the monarchy as a centralized secular government.[105] Protestant missionaries secured their influence in Hawai'i by opening schools almost immediately after their arrival and teaching the English language through reading and writing.[106] When Kauikeaouli ascended the throne as his brother's heir at eleven years old, his motto reflected a vision to equip the lāhui with the skills necessary to contend and communicate with foreign nations: He aupuni palapala ko'u ("Mine is a kingdom of literacy").[107] He also promulgated Hawai'i's first constitution to protect rights and assert the lāhui's sovereignty.[108]

Similar in function to the U.S. Bill of Rights,[109] Hawai'i's 1839 Declaration of Rights[110] proclaimed the inalienable rights of the people of Hawai'i and ensured equal protection for chiefs and common people alike.[111] While the 1840 Constitution, enacted shortly after the Declaration of Rights, proved significant by establishing a constitutional monarchy,[112] its greater importance lies in the fact that Kauikeaouli demonstrated the level of political sophistication necessary to convince western maritime powers to acknowledge Hawai'i's sovereignty despite political imposition by western

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[105] DAVIANNA P. MCGREGOR, *The Cultural and Political History of Hawaiian Native People*, in OUR HISTORY, OUR WAY: AN ETHNIC STUDIES ANTHOLOGY 333, 343 (1996).

[106] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 23.

[107] Nanea Armstrong-Wassel, *Nūpepa Preserve Information from Hawaiian Worldview*, KA WAI OLA (Jan. 1, 2018), https://kawaiola.news/moolelo/nupepa-preserve-information-hawaiian-worldview/. Following the first newspaper printing in 1822, experts estimate that over 125,000 newspaper pages were written – equivalent to roughly one million standard pages of typed text today. *Id.* Not only did this repository preserve information about practically every aspect of Hawaiian life, culture and history, it safeguarded 'ike Hawai'i ("Hawaiian knowledge") for future generations. *Id.* It captured how Hawaiians of the time were engaging and interacting with the world around them on a global scale. And, most importantly, it served as a space in which this information could be recorded from a Maoli perspective. *Id.*

[108] *See* WHO OWNS THE CROWN LANDS?, *supra* note 104, at 26.

[109] The United States Bill of Rights comprises the first ten amendments of the U.S. Constitution and spells out the rights of American citizens in relation to their government by guaranteeing civil rights and liberties to the individual and setting rules for due process of law. U.S. CONST. amend. I–X.

[110] KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1839 (1839), *reprinted in* KA HO'OILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 30–32 (Mar. 2002).

[111] *See* KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1840 (1840), *reprinted in* KA HO'OILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 34–59 (Mar. 2002) (providing the original text, a second version with diacritical marks added, and an English translation).

[112] "A system of government in which a monarch shares power with a constitutionally organized government." *Constitutional Monarchy*, BRITANNICA.COM, https://www.britannica.com/topic/constitutional-monarchy (last visited Sept. 25, 2023).

nations.[113] Just one month after the publication of the 1839 Declaration of Rights, Kauikeaouli responded to a threat of western incursion known as the LaPlace Affair.[114] Kauikeaouli charged diplomats William Richards, Timoteo Haʻalilio, and Sir George Simpson with securing from Britain, France,[115] and later the United States, "full recognition . . . of the independence of the Hawaiian Government."[116]

Kauikeaouli, working closely with Kekāuluohi,[117] crafted the 1840 Constitution to establish the House of Representatives as part of a legislative body, granting the people a voice in government.[118] Along with establishing Hawaiʻi's bicameral legislature, the 1840 Constitution contained provisions for an independent judiciary and some of the checks and balances found in western constitutions.[119] Yet, the Constitution did not simply mimic western

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[113] J. CORLEY, LEVERAGING SOVEREIGNTY: KAUIKEAOULI'S GLOBAL STRATEGY FOR THE HAWAIIAN NATION, 1825–1854, at 45 (2022); *see* KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1840 (1840), *reprinted in* KA HOʻOILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 34–59 (Mar. 2002).

[114] CORLEY, *supra* note 113, at 45. Captain Cyrille P.T. LaPlace of France extorted political concessions from Kauikeaouli by threat of attack. *Id*. at 38.

[115] Britain and France later recognized the sovereignty of the Hawaiian Kingdom in the Anglo-Franco Proclamation signed on November 28, 1843. *Celebrating Lā Kūʻokoʻa, Independence Day*, KAMEHAMEHA SCHS. (Nov. 22, 2021), https://www.ksbe.edu/article/celebrating-la-kuokoa-independence-day. The nations also acknowledged the efforts of Richards, Haʻalilio, and Simpson to secure such recognition of sovereignty for the Kingdom. *Id.* Lā Kūʻokoʻa or "Independence Day" is a Kingdom holiday that recently celebrated its 180th anniversary on November 28, 2023 and today represents "an affirmation of identity and joyful pride in being a part of the lāhui[.]" *Id.*; *see also Novemaba 28: Lā Kūʻokoʻa*, UNIV. OF HAW. AT MANOA (Nov. 26, 2018), https://manoa.hawaii.edu/punawaiola/ 2018/11/26/novemaba-28-la-ku%ca%bboko%ca%bba/.

[116] *J. C. Calhoun to Haalilio and William Richards, July 06, 1844*, POLYNESIAN, March 29, 1845, at 184, https://chroniclingamerica.loc.gov/lccn/sn82015408/1845-03-29/ed-1/.

[117] CORLEY, *supra* note 113, at 45–46. Kekāuluohi was the third Kuhina Nui for the Kingdom of Hawaiʻi. *Id*. "Kuhina Nui" refers to a powerful officer who shared executive power with the king in the days of the monarchy and loosely means "prime minister," or "premier." HAWAIIAN DICTIONARY, *supra* note 7, at 173.

[118] *See* KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1840 (1840), *reprinted in* KA HOʻOILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 49–50 (Mar. 2002) ("[P]ersons to sit in council with the nobles and establish laws for the nation . . . shall be chosen by the people, according to their wish, from Hawaiʻi, Maui, Oʻahu, and Kauaʻi. The law shall decide the form of choosing them, and also the number to be chosen. This representative body shall have a voice in the business of the kingdom. No law shall be passed without the approbation of a majority of them.").

[119] CORLEY, *supra* note 113, at 44.

constitutions.[120] Rather, the Constitution's western elements protected the continuation of traditional Hawaiian institutions and customs in the face of western settlement.[121]

As another measure to secure western recognition of Hawai'i's sovereignty and legitimacy, the 1840 Constitution also established the Chiefs' Children's School with funding from the Kingdom, which was designed to internationalize the royal children who would become future Kingdom leaders.[122] While Kauikeaouli sought to teach the protocols, knowledge systems, and languages of other countries to prepare the royal children to rule in a new Hawai'i,[123] the royal children did not mature quickly enough to fill seats of political power occupied by foreigners.[124]

The 1852 Constitution reduced the mō'ī's[125] influence by distributing power among the three branches of government with the ability to "perform the King's duties and assume all powers vested in the King by the Constitution" where such authority, when exercised, was subject to the mō'ī's approval.[126] Bestowed with a say in how the mō'ī ruled, the legislature, judiciary, and executive cabinet began to isolate Kauikeaouli's power and that of his successors in a manner similar to the home government of its main author, Chief Justice Lee.[127]

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[120] *Id.*

[121] *See id.*

[122] *Id*. at 78.

[123] *Id*. "[Kauikeaouli] was giving his own people, chiefs and commoners, the offices which they could fill; and only those which they could not fill were being given to foreigners, and that when the young chiefs were sufficiently instructed in the English language the offices were to be given back to them. . . . [T]he new ways of civilized governments were to be added to the old ways of the Hawaiian government." KAMAKAU, *supra* note 95, at 402. Kauikeaouli appointed foreigners Robert C. Wylie as Minister of Foreign Affairs, G.P. Judd as Minister of the Treasury, William Richards as Minister of Education, and John Ricord as Attorney General to administer both foreign and internal affairs of the government. *Id.*

[124] *See* Linda K. Menton, *A Christian and "Civilized" Education: The Hawaiian Chiefs' Children's School, 1839–50*, 32 HIST. OF EDUC. Q. 213, 242 (1992); Julie Kaomea, *Education for Elimination in Nineteenth-Century Hawai'i: Settler Colonialism and the Native Hawaiian Chiefs' Children's Boarding School*, 54 HIST. OF EDUC. Q. 123, 124 (2014).

[125] Mō'ī means "sovereign," "monarch," or "ruler," and is used to refer to the ruling monarch of Hawai'i. HAWAIIAN DICTIONARY, *supra* note 7, at 251.

[126] *Id.* (quoting KINGDOM OF HAW. CONST. OF 1852 art. XLVII).

[127] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 65. Notably, Chief Justice William Little Lee, originally from the American South, influenced the decentralization of the ali'i's political authority. *How Jon Van Dyke Analyzed the Hawaiian Constitutions of 1840–1893*, ARCHIVAL COLLECTIONS AT THE UNIV. OF HAW. SCH. OF L. LIBR., http://archives.law.hawaii.edu/exhibits/show/jvd-scholarship/hawaiian-constitutional-histor (last visited Sept. 26, 2023).

Kamehameha IV (Alexander Liholiho) and his advisors sought to amend the Constitution by restoring the mōʻīʻs position of power to no avail.[128] The next king, Kamehameha V (Lota Kapuāiwa) impaneled a Constitutional Convention in 1864 to draft a new constitution instead of swearing to support the previous one.[129] When the drafting body dissolved, members of the executive cabinet drafted a new constitution to reflect Kapuāiwa's desire that "the prerogatives of the Crown . . . be more carefully protected . . . and that the influence of the Crown . . . be seen pervading every function of the government."[130]

As a result, the 1864 Constitution increased the economic power of the King but disenfranchised citizens through the imposition of specific literacy, property, and income qualifications to vote, all of which Kapuāiwa opposed.[131] Additionally, the executive and legislative branches became positions for wealthy individuals literate in English, Hawaiian, and European languages.[132] The Bayonet Constitution[133] significantly tempered Kalākaua's political power as a sovereign over the entire kingdom.[134] First, the 1887 Constitution removed words such as "the Kingdom is His" from the 1864 Constitution and required the King to gain approval of the Legislature to remove any Cabinet Minister.[135] In addition to a higher bar for removal, Cabinet members enjoyed increased control over the government: acts of the King had no effect unless approved by a member of the Cabinet,[136] and every action taken by the King had to be "with the advice and consent of the

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[128] Jon Van Dyke, *The 1864 Constitution*, ARCHIVAL COLLECTIONS AT THE UNIV. OF HAW. SCH. OF L. LIBR. [hereinafter *1864 Constitution*], http://archives.law.hawaii.edu/items/show/5582 (last visited Sept. 26, 2023).

[129] MacKenzie, *supra* note 24, at 20.

[130] *1864 Constitution*, *supra* note 128 (quoting 2 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM: TWENTY CRITICAL YEARS, 1854-1874 127 n.44 (1953)).

[131] *Id*.

[132] *See id.* "The egalitarian phrase in Article I of the 1852 Constitution proclaiming that 'God hath created all men free and equal'" was removed from the 1864 Constitution, and the Kuhina Nui office was entirely abolished by the 1864 Constitution. *Id.*

[133] The 1887 Constitution earned the name "Bayonet Constitution" for the weapons with which haole descendants of missionaries and sugar planters led by Lorrin A. Thurston forced the hand of King David Kalākaua. "The 1887 Constitution," Jon Van Dyke, *The 1887 Constitution*, ARCHIVAL COLLECTIONS AT THE UNIV. OF HAW. SCH. OF L. LIBR. [hereinafter *1887 Constitution*], http://archives.law.hawaii.edu/items/show/5583 (last visited Sept. 26, 2023).

[134] *See 1887 Constitution*, *supra* note 133.

[135] *Compare* KINGDOM OF HAW. CONST. OF 1864 *with* KINGDOM OF HAW. CONST. OF 1887.

[136] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

Cabinet."[137] Other traditional powers of the constitutional monarch were equally stripped: the King's veto for legislation could be overridden by a two-thirds vote of the Legislature,[138] and the King's status as "commander-in-chief" was eliminated with control of the military transferring to the Legislature as well.[139] The Bayonet Constitution also limited voting for political representatives to those who spoke Hawaiian, English, Portuguese, other European languages, and Puerto Rican, strategically disadvantaging certain votes.[140] Following the Bayonet Constitution's ratification in 1887, the King's power decreased along with representation of Indigenous and Asian immigrant peoples of Hawai'i, while haole usurpers benefited from self-imposed power.[141]

B. *Overthrow and Republic of Hawai'i (1893–1898)*

Political assimilation reared its ugly head in the annexation of Hawai'i to the United States.[142] In the late nineteenth and early twentieth centuries, the U.S. executive and legislative branches implemented a slew of assimilative policies across the continent, attempting to "kill the Indian to save the man."[143] Such policies eerily resembled measures in Hawai'i that sought to

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[137] KINGDOM OF HAW. CONST. OF 1887 art. LXXVIII; WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

[138] KINGDOM OF HAW. CONST. OF 1887 art. XLVIII; WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

[139] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

[140] KINGDOM OF HAW. CONST. OF 1887 art. LXII; WHO OWNS THE CROWN LANDS?, *supra* note 104, at 145.

[141] *See, e.g.,* MacKenzie, *supra* note 24, at 20; JONATHAN K. OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 240 (2002) ("The king's signature ended the twenty-three-year-old constitution established by Lota Kapuāiwa and inaugurated one that would divide the nation because of its content and its origins. For the king, [the Bayonet] constitution meant the abrupt and nearly total termination of any executive power or royal authority. For haole, it meant not only an enhanced representation in the legislature and control of the executive, it also retrieved their ability to define the nation and membership in it.").

[142] *See generally* Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1 (1997); Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013); Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U. L. REV. 765 (2009).

[143] Captain Richard Henry Pratt, a firm believer in the forced assimilation of Indigenous peoples to American culture, uttered this infamous phrase in 1892 during his speech at the National Conference of Charities and Correction held in Denver, Colorado. Captain Richard H. Pratt, The Advantages of Mingling Indians with Whites, Address before the Nineteenth Annual National Conference of Charities and Corrections (June 23-29, 1892), *in* PROC. NAT. CONF. CHARITIES CORR. 45, 46 (Isabel C. Barrows ed., 1892).

oppress the Islander to take his land.[144] The U.S. Supreme Court similarly decided consequential legal issues by mischaracterizing peoples within newly acquired territories as "barbarians" through a series of judicial decisions known as the *Insular Cases*.[145] Such categorization served as a retroactive justification for the ultimate assimilative act of illegally overthrowing the independent Kingdom of Hawai'i.[146]

Hawai'i's Queen, Lili'uokalani, proposed the 1893 Constitution to address the restraints on Native Hawaiian political power in governing the Kingdom.[147] As King Kalākaua's sister and successor, Queen Lili'uokalani detested the Bayonet Constitution because she felt its proponents facilitated its passage under the guise of democracy and had not given the people a choice in the decision.[148] Members of her Cabinet, however, refused to sign

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[144] Common assimilation policies included replacing the traditional and communal economy with a system of private property; intensified education through boarding schools; regulating every aspect of Indian social life, including marriage, dispute settlement, and religious practice; granting U.S. citizenship; and allowing tribes to become self-governing only by adopting constitutions ultimately subject to Congress' approval. *See, e.g.*, Indian General Allotment Act, 25 U.S.C. §331-334 1887 (repealed 2007); *see also* Addie Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUMBIA J. RACE & L. 811, 826 (2021) ("The goal of [assimilation policies like allotment] included detribalization through the division of communally held tribal land and indoctrination into a Western, capitalist way of life through individualized property ownership.").

[145] *E.g.,* Downes v. Bidwell, 182 U.S. 244, 287 (1901) (holding that the territory of Puerto Rico was not part of the U.S. constitutionally with respect to tariffs because new territories were "inhabited by alien races" that could not be governed by Anglo-Saxon principles); *see also* Christiana D. Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2460 (2022); Dolace McLean, *Cultural Identity and Territorial Autonomy: U.S. Virgin Islands Jurisprudence and the* Insular Cases, 91 FORDHAM L. REV. 1763, 1765 (2023).

[146] *See* LORRIN A. THURSTON, A HANDBOOK ON THE ANNEXATION OF HAWAI'I 31 (1897) ("The Native Hawaiians, only 33,000 in number, are a conservative, peaceful and generous people. They have had during the last twenty years, to struggle against the retrogressive tendencies of the reigning family; but in spite of that, a very large proportion of them have stood out against such tendencies, and are supporters of the Republic and of annexation.").

[147] MacKenzie, *supra* note 24, at 20.

[148] HELENA G. ALLEN, THE BETRAYAL OF LILIUOKALANI: LAST QUEEN OF HAWAI'I 1838–1917, at 215 (1982). Lili'uokalani also opposed the Bayonet Constitution afer she had visited the daughter of Walter Murray Gibson (a foreign-born leader in the Church of Latter Day Saints whose political campaign embraced the Native Hawaiian interest) and heard first-hand a story of several men forcibly entering her home to attack her father and her husband "without regard for the gray hairs of the old gentleman." *Id.* This incident played a role in racial

the Queen's proposed constitution, as it would have reduced the Cabinet's unbound authority by limited voting power to subjects of the Kingdom who owed no allegiance to the imperialistic United States.[149] In fact, the Queen's proposed constitution was viewed as "arrogantly autocratic and intentionally provocative," a justification later deployed by the Hawaiian League to overthrow the long-standing monarchy of Hawai'i and to push for annexation by the United States.[150] The Hawaiian League included two factions: minority radicals led by Thurston who sought to overthrow the monarchy and annex Hawai'i to the United States, and majority conservatives led by Sanford B. Dole who wanted Hawai'i to remain an independent monarchy but with curtailed monarchial powers.[151] By the third week of 1893, Queen Lili'uokalani reached exactly the same conclusion the counter-revolutionists had: there was no longer a neutral zone of cooperation or appeasement between the monarchy (dedicated to Hawaiian heritage) and the haole businessmen (dedicated to commercial gain).[152] Due to the influence of American businessmen organizing as the Hawaiian League, the Hawaiian Kingdom was depicted as ripe for their revolution.[153]

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consciousness among Kānaka Maoli. After the attack on his family led by Thurston and Dole's reformists, Gibson fled the islands for fear of his life, dying penniless in San Francisco. *Id.* at 216. When his son-in-law returned his body to Hawai'i for a funeral and burial, defective embalming caused Gibson's skin to turn black. *Id.* Upon viewing Gibson's open casket, Thurston wrote in his memoirs that now even God had seen Gibson for the "black devil" he was. *Id.* Having become more color conscious, Kānaka whispered; for whispers were all they dared that "now he is one of us" – signaling color and racism as an emerging issue. *Id.*

[149] *See id*. at 284–88; NEIL THOMAS PROTO, THE RIGHTS OF MY PEOPLE: LILIUOKALANI'S ENDURING BATTLE WITH THE UNITED STATES 1893–1917, at 15–16 (2009).

[150] PROTO, *supra* note 149, at 13 (quoting a friend of coup d'état leader William O. Smith); *see also* ALLEN, *supra* note 148, at 286–88; THOMAS COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAI'I 148–51 (rev. ed. 2016).

[151] ALLEN, *supra* note 148, at 214.

[152] *Id.* at 283. "In 1889, Robert W. Wilcox led an insurrection against the so-called 'Reform Government,' composed of a small cadre of sugar planters, missionary descendants, and their allies, who two years earlier had imposed the 'Bayonet Constitution' upon King Kalākaua, Wilcox intended to return rights to the monarchy and to Native Hawaiians." Helen G. Chapin, *Robert Wilcox and the 1889 Rebellion*, KA'IWAKĪLOUMOKU PAC. INDIGENOUS INST., https://kaiwakiloumoku.ksbe.edu/article/historical-snapshots-robert-wilcox-and-the-1889-rebellion (last visited Sept. 23, 2023). "The government brought Wilcox to trial for high treason. Hawaiians, however, accused those in power of being usurpers and having blood-stained hands. A jury of his peers refused to convict Wilcox. He would lead another rebellion in 1895." *Id.*

[153] According to author Helena G. Allen,

Following the overthrow of the Hawaiian Kingdom, a so-called "Provisional Government" established its own 1894 Constitution that temporarily governed Hawai'i while the Queen and her supporters were imprisoned.[154] The 1894 Constitution became the supreme law of the Republic and established an Executive Council that would swear allegiance to the Provisional Government, nullifying all previous constitutions.[155] Written primarily by Dole (the Republic's only "President" and the Territory's first Governor), the 1894 Constitution allowed the Territory, on behalf of the United States, to claim the Crown Lands, which by 1894 consisted of about 971,463 acres, free and clear of any trust (constructively, a seizure of expropriation without just compensation).[156] The 1893 overthrow

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> The revolutionists had a door badly weakened, if not completely rotten, one which Lili'uokalani had inherited from her brother Kalākaua, one which . . . continued to splinter further during the past two years of her reign. The revolutionists had at least determined leaders in such men as L.A. Thurston, labelled by more than one unbiased historian as a 'rabid radical.' The three percent followers were primarily among the Americans born in Hawai'i, second generation missionary sons, *American businessmen who were not even naturalized citizens*, and a few naturalized foreigners.

ALLEN, *supra* note 148, at 283–84 (emphasis added). Historians generally agree that a country is ripe for to revolution if there is (1) a 'rotten door' to break down, (2) strong opposition leadership, and (3) as little as three percent of the population willing to follow. *Id.* at 283. All three circumstances for a revolution were in play when the Haole Hawaiian League overthrew the Kingdom on January 17, 1893.

[154] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 172–73; *see also* A.F. Judd, *Constitution of the Republic of Hawaii*, 4 YALE L.J. 53, 53 (1894). Most Kānaka Maoli would not declare an oath to the Provisional Government, "and at a meeting attended by 2,000 Native Hawaiians on April 9, 1894, those continuing to support the monarchy agreed to boycott the election for delegates to the 1894 Constitutional Convention." Jon Van Dyke, *1894 Constitution of the Republic of Hawaii*, ARCHIVAL COLLECTIONS AT THE UNI. OF HAW. SCH. OF L. LIBR., http://archives.law.hawaii.edu/items/show/5585 (last visited Nov. 28, 2023). The members of the Republic's Constitutional Convention are pictured in THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? 216–17 (1998).

[155] ALLEN, *supra* note 148, at 317–18 (declaring the 1894 Constitution "to be the Constitution and the supreme law of the Republic of Hawaii" during Sanford B. Dole's oath of office).

[156] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 174. The Māhele of 1848 represented the most consequential "land division" in Hawai'i that sought to reconceptualize traditional stewardship of 'āina in a manner more compatible with concepts of western land title. *See* MacKenzie, *supra* note 24, at 13. The Crown Lands included 'āina retained by the sovereign leader of Hawai'i. WHO OWNS THE CROWN LANDS?, *supra* note 104, at 6.

represented the most explicit loss of Indigenous political control in Hawai'i, making way for haole men in power to promote assimilation to western society.[157]

The Newlands Resolution of 1898, a joint resolution that provided for the annexation of the Republic of Hawai'i, committed Hawai'i to a future of American governance consented to by the haole usurpers of the Hawaiian government.[158] Acquiring a foreign nation through a joint resolution is in and of itself unconstitutional by American legal standards because it undermines the U.S. Constitution's careful allocation of powers which deliberately prohibits the House of Representatives from having any power over foreign affairs.[159] Enacting a joint resolution requires a majority vote in the Senate and the House, but doing so to create a treaty with a foreign nation undermines the explicit delegation of the treaty-making power to the President and the Senate.[160] In 1988, Douglas Kmiec from the U.S. Department of Justice examined the annexation of Hawai'i and found no constitutional power permitting the United States to annex Hawai'i.[161] Professor Williamson Chang, who argues against efforts to legitimize the annexation, explains that "[s]uch an admission of failure, given that the [United States] has the burden of proving how it acquired Hawai'i, is a virtual confession of the lack of U.S. sovereignty over Hawai'i."[162]

C. *Conflicting Images of Statehood for Hawai'i (1919–1978)*

Although Hawai'i became a state in 1959,[163] efforts to admit Hawai'i to the Union began decades earlier.[164] Statehood was first propositioned by a Hawaiian – more specifically, an ali'i on a mission to secure a future for Native Hawaiians in Hawai'i amidst widespread declining health and population.[165] Statehood efforts in the early 1920s stands in stark contrast with the efforts of American businessmen in the 1950s who pursued

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[157] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 162–63, 169–71.

[158] *See* Newlands Resolution, Res. 55, 55th Cong. (1898) (consented to by the Republic of Hawai'i, with Sanford B. Dole as its president).

[159] Williamson Chang, *Darkness over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70, 81–82 (2015).

[160] *Id.* at 82.

[161] *Id.* at 83.

[162] *Id.* at 83–84.

[163] An Act to Provide for the Admission of the State of Hawaii into the Union (Pub. L. 86-3, 73 Stat. 4, enacted March 18, 1959) [hereinafter Hawai'i Admissions Act].

[164] *See infra* note 174 and accompanying text.

[165] *See infra* note 178 and accompanying text.

statehood for the business opportunities it would enable.[166] The earlier effort resulted in the security of reserved lands to build homes for Native Hawaiians through federal legislation.[167] The later effort secured Hawai'i's status as America's fiftieth state, introducing issues of citizenship, land rights, and voting rights which continue to shape the story of governance in Hawai'i.[168]

The 1900 Organic Act codifying Hawai'i's territorial status subjugated citizens to provisions of the U.S. Constitution without representation in the United States government.[169] U.S. citizenship and the application of U.S. constitutional principles to Hawai'i still affects U.S. territories today.[170] In particular, the U.S. Supreme Court held in *Hawaii v. Mankichi* that U.S. citizenship not only extended to Kānaka but also that the "granting of citizenship . . . [is] the determinative factor in deciding whether a territory had been incorporated into the United States."[171] *Mankichi* relied on other *Insular Cases* decided between 1901 and 1905, in which the Court constitutionally justified imperialist policies toward its assumed territories: Hawai'i, Puerto Rico, and the Philippines.[172]

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[166] *See infra* note 189 and accompanying text.

[167] *See infra* notes 178–85 and accompanying text.

[168] *See* ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS 328 (1984); MacKenzie, *supra* note 24, at 32–33; Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 616-25 (2022) (discussing the broader civil rights issues asssociated with Hawai'i's statehood).

[169] Organic Act of 1900, ch. 339 § 4, 141 ("[A]ll persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared citizens of the United States and citizens of the Territory of Hawaii.").

[170] *See* Gustavo A. Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rice, Hawai'i, and the Philippines*, THE FEDERAL LAWYER, Mar.–Apr. 2011, at 22, 25.

[171] Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PENN. J. INT'L L. 283, 314 (2007); *see, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); Hawai'i v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).

[172] *Downes*, 182 U.S. at 286. The Court devised the doctrine of "territorial incorporation," from which two types of territories emerged: *incorporated* territories like Hawai'i, in which the U.S. Constitution fully applied and which the United States had destined for statehood, and *unincorporated* territories, including American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, in which only "fundamental" constitutional guarantees applied and which the United States had deemed premature for statehood. *See* Gelpi, *supra* note 170, at 22, 25. American Samoa is uniquely situated as the only unincorporated territory of the United States where the inhabitants are not American citizens at birth. Without U.S. citizenship, American Samoans may not vote in U.S. elections, run for office outside American Samoa, or apply for certain jobs. *See* Fitisemanu v. United States, 1

In considering the rights (or lack thereof) attributed to United States territories, statehood may be viewed as the lesser of two evils for Hawai'i.[173] Yet the two different attempts to obtain statehood, first in the 1920s and later in the 1950s, reflect differing motives and were met with different levels of public support.[174] Contrary to the "romantic images of Hawai'i peddled globally by the billion-dollar tourism industry," groups of differing ethnic backgrounds and economic interests engaged in heated political battles stemming from opposing histories.[175] The 1887 Bayonet Constitution strategically disenfranchised the Native Hawaiian vote while also denying the vast majority of immigrant laborers of Chinese and Japanese ancestry the right to vote.[176] Thus, some support for statehood later derived from a need to advocate for Hawai'i's broader public interest through political

F.4th 862 (10th Cir. 2021) (holding on appeal that citizens of American Samoa were not birthright citizens of the United States by virtue of the Fourteenth Amendment's Citizenship Clause); Susak K. Serrano & Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories: Reckoning with America's Colonial Climate Crisis*, 110 CAL. L. REV. 1281, 1283 (2022).

[173] *See* Gelpi, *supra* note 170 (discussing the limited rights of citizens in U.S. territories). *See also* Micah Hicks, *Has Statehood Actually Worked Out for Hawaii?*, HONOLULU CIV. BEAT (Aug. 16, 2019), https://www.civilbeat.org/2019/08/has-statehood-actually-worked-out-for-hawaii/; Campbell, *supra* note 168, at 594 (describing how *Balzac v. Porto Rico*, 258 U.S. 298 (1922), presented a "significant limitation to the constitutional rights of territorial citizens" and how the U.S. Supreme Court "reaffirmed [Territorial Incorporation Doctrine] in a way that had repercussions not just for the residents of Puerto Rico, but for all inhabitants of the various United States territories").

[174] BELL, *supra* note 168, at 45 (describing how the statehood bills of 1919 and 1920 "were, at most, token gestures designed to placate those in the islands and in Congress who rightly viewed territorial rule as a transitory step toward full-fledged democracy and who had supported annexation on this basis"). The first pursuit of statehood was not widely supported. *See id.*

[175] Dean I. Saranillio, *Colliding Histories: Hawai'i Statehood at the Intersection of Asians "Ineligible to Citizenship" and Hawaiians "Unfit for Self-Government,"* 13 J. ASIAN AM. STUD. 283, 283–84 (2010) [hereinafter Saranillio, *Colliding Histories*]. Congress has found that "in 1853, [I]ndigenous Hawaiians made up 97% of the islands' population," but "by 1923, their numbers had dwindled to 16%, and the largest percentage of Hawaii's population was Japanese." *Hawaii: Life in a Plantation Society*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/immigration/japanese/hawaii-life-in-a-plantation-society/ (last visited Sept. 26, 2023).

[176] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 150 (explaining that drafters of the Bayonet Constitution "gave Portuguese laborers advantages over other immigrant workers because they thought the Portuguese voters would benefit their political agenda"); *see supra* Section II.A.

representation and the tourism industry that began replacing the sugar industry.[177]

Prince Jonah Kūhiō Kalaniana'ole (Kūhiō) first proposed the idea of statehood to the U.S. Congress in 1919 to improve the living conditions of Kānaka Maoli who experienced immense losses in land and life following the illegal overthrow.[178] Known affectionately as Ke Ali'i Maka'āinana or "The People's Prince," Kūhiō forcefully advocated for Native Hawaiians, who suffered terribly at the hands of plantation owners.[179] Kūhiō believed that one way to ensure civil rights for his people was the admission of Hawai'i to the Union.[180] He could not, however, garner enough support in Congress to obtain statehood.[181] Instead, he secured Congressional approval for the Hawaiian Homes Commission Act of 1921 ("HHCA"), which set aside 200,000 acres of Crown Lands across Hawai'i for Native Hawaiian homesteading.[182] As a delegate, Kūhiō explained the situation of Kānaka Maoli on the U.S. congressional stage:

> Many causes have been assigned . . . but the *principal cause was the coming of the new civilization*. The Hawaiians for generations have been an agricultural and seafaring people. With the coming of the foreigner conditions gradually changed, the lands were used in large tracts, and cheap labor had to be used to cultivate them successfully. With the cheap labor came competition in the trades until the *Hawaiians were crowded out and forced into the tenements of the cities and towns, becoming susceptible to all of the modern diseases which accompany civilization*.[183]

Met with significant opposition from ranchers and sugar plantation owners who lobbied to limit the HHCA beneficiary class of Hawaiians to a smaller

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[177] Jessica Terrel, *Will Hawaii Finally be Able to Break its Dependence on Tourism?*, HONOLULU CIV. BEAT (Oct. 12, 2020), https://www.civilbeat.org/2020/10/will-hawaii-finally-be-able-to-break-its-dependence-on-tourism/.

[178] H.R. 12210, 64th Cong. (1919); LORI KAMAE, THE EMPTY THRONE: A BIOGRAPHY OF HAWAII'S PRINCE CUPID 178 (1980).

[179] KAMAE, *supra* note 178, at 122, 178–80.

[180] *Id*. at 178.

[181] *Id*.

[182] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 251.

[183] *Hawaiian Homes Commission Act of 1920: Hearing on H.R. 13500 Before the S. Comm. on the Territories*, 66th Cong. 67 (1921) (statement of Kūhiō as Hawai'i's delegate to Congress) (emphases added).

class of full-blooded Hawaiians, Kūhio insisted on a blood quantum of one thirty-second.[184] In order to secure the passage of the HHCA, however, Kūhiō made the reluctant compromise to limit the beneficiary class to "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[185] Wesleyan University Professor of Anthropology and American Studies J. Kēhaulani Kauanui described attitudes fixated on blood quantum as distinctly colonial: "the enfranchisement of [I]ndigenous peoples in the United States entailed the domestication of previously recognized sovereign entities, the project of erasing their distinctiveness through discourses of deracination was essential to and remains a key feature of contemporary neocolonial entrenchment."[186]

By contrast, the circumstances leading to the successful bid for statehood began in the mid-1930s and was "clearly seen as an attempt to reconsolidate haole racial power and privilege."[187] A group of landowner plantation families in Hawai'i known as the "Big Five" had close ties with the federal government as well as local news distribution that allowed them to manipulate support from the general public. [188] Their motivation to join the Union arose from acts of Congress following the Great Depression that

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[184] Ku'uwehi Hiraishi, *Blood Quantum Policy an 'Act of Compromise' for Hawaiian Homes,* HAW. PUB. RADIO (July 14, 2021, 2:50 PM), https://www.hawaiipublicradio.org/local-news/2021-07-14/blood-quantum-policy-an-act-of-compromise-for-hawaiian-homes.

[185] *Id*.; Hawaiian Homes Commission Act, 42 Stat. at 124; *see* Troy Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. L. REV. 1, 27 (2022) ("The push for a high blood quantum requirement was no doubt an effort to ensure that, with the continued decline in the full blood Hawaiian population, the HHCA would cease to exist and lands would be returned to the United States.").

[186] J. Kēhaulani Kauanui, *The Politics of Hawaiian Blood and Sovereignty in* Rice v. Cayetano, *in* SOVEREIGNTY MATTERS 87, 98 (Joanne Barker ed., 2005).

[187] DEAN ITSUJI SARANILLIO, UNSUSTAINABLE EMPIRE: ALTERNATIVE HISTORIES OF HAWAI'I STATEHOOD 97 (2018) [hereinafter SARANILLIO, UNSUSTAINABLE EMPIRE].

[188] *See id*; Saranillio, *Colliding Histories*, *supra* note 175, at 294 ("Japanese Americans represented a new political force that gave birth to a new arrangement of power in Hawai'i. The emergence of various labor movements of plantation and dockworkers, changing demographics and their impact on voting, and the disenfranchisement of rights through martial law during World War II would alter Hawai'i's political landscape."). Lorrin P. Thurston, the son of Lorrin A. Thurston, served as Chairman of Hawai'i Statehood Commission between 1955 and 1959 and as a member of the group since its conception. *Oral History: Lorrin Potter Thurston*, OUTRIGGER CANOE CLUB SPORTS, https://www.outriggercanoeclubsports.com/occ-archives/oral-histories/lorrin-potter-thurston/ (last visited Sept. 28, 2023). Thurston also served as President, General Manager, and Publisher of a newspaper, the Honolulu Advertiser, between 1931 and 1961. *Id.*

"extinguished the profitable tariffs and empowered dockworkers to unionize in ways that would extinguish mutual interests of the Big Five."[189]

The Hawai'i State Commission successfully paved a path to Hawai'i Statehood by appealing, in part, to disenfranchised Japanese citizens following World War II, who "became objects of propaganda that were globally circulated to prove Japanese American loyalty to the United States and reconcile postwar relations between the two countries."[190] Although the multiethnic population of Hawai'i hindered Congressional support of statehood in the 1920s, that same characteristic played a much different role in the 1950s efforts.[191]

Finally, in 1959, four decades after Kūhiō's attempt to secure statehood, the Hawai'i Admission Act conveyed HHCA administrative responsibilities to the state government, but reserved federal control over blood quantum requirements.[192] Yet, the state's continued failure to address Native Hawaiian issues would lead to crucial constitutional amendments.[193]

D. The 1978 Constitutional Convention and Creation of the Office of Hawaiian Affairs

The 1978 Constitutional Convention and its creation of OHA represented an important reshaping of the State Constitution to reconcile maoli interests in the haole forum of an American state. To fill gaps left by the 1959 Constitution, the 1978 Constitutional Convention ("Con Con") importantly incorporated Native Hawaiian rights and other provisions benefiting the

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[189] *See* SARANILLIO, UNSUSTAINABLE EMPIRE, *supra* note 187.

[190] *Id.*

[191] *See* Saranillio, *Colliding Histories*, *supra* note 175, at 289–90. In the 1950s, deliberate western positioning of Hawai'i and its Native Hawaiian and Pacific islander population as the "frontiers of America's new strategic position in the world" furthered narratives of U.S. imperialism as "spreading democracy," rather than traditional European colonization. *Id.*

[192] *See* Mgmt. and Disposition of Geothermal Res. on DHHL Lands, Op. Att'y Gen. 14-1 (2014) ("It is clear from the Admission Act . . . that the State has an obligation to manage such resources . . . pursuant to the HHCA"). U.S. Representative Kai Kahele proposed a compromise to lower the blood quantum requirement for successors of leases from one-quarter to one thirty-second. H.R. 9614, 117th Cong. (2022). Although the measure died and Kahele opted against reelection in order to run unsuccessfully for the Hawai'i gubernatorial seat, his Congressional successor Jill Tokuda has promised to reintroduce the measure during her term. Blaze Lovell, *Kahele Introduces Bill Lowering Blood Quantum for Home Lands*, HONOLULU CIV. BEAT (Dec. 21, 2022), https://www.civilbeat.org/beat/kahele-introduces-bill-lowering-blood-quantum-for-home-lands/.

[193] *See infra* Section II.D (describing the impetus behind the amendments enacted during the 1978 Constitutional Convention).

public interest.[194] The 1978 Con Con specifically established the Office of Hawaiian Affairs to serve the needs of Native Hawaiians independent of the State's resources or interests:

> The committee intends that *[OHA] will be independent from the executive branch and all other branches of government* although it will assume the status of a state agency . . . . The status of [OHA] is to be *unique and special.* . . . The committee developed this office based on . . . the University of Hawaii [i]n particular, . . . so that the office could have *maximum control over its budget, assets, and personnel*. The committee felt that it was important to arrange a method whereby the *assets of Hawaiians could be kept separate* from the rest of the state treasury.[195]

As OHA is the only public office charged with assessing the policies and practices of state agencies impacting Kānaka resources,[196] establishing OHA's Board of Trustees through an election limited to Kānaka Maoli was a strong consensus among Con Con representatives:

> [P]eople to whom assets belong should have control over them. . . . [A] board of trustees chosen from among those who are interested parties would be the best way to *insure proper management and adherence to the needed fiduciary principles. . . . The election of the board will enhance representative governance and decision-making accountability* and, as a result, *strengthen the fiduciary relationship*.[197]

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[194] For example, Amendment 31 proposed the adoption of 'ōlelo Hawai'i as an official state language, the adoption of Kauikeaouli's refrain "Ua mau ke ea o ka 'āina i ka pono" (the sovereignty of the land is perpetuated through righteousness) as the state motto, and the amendment of the Constitution's preamble to better reflect Hawaiian custom. Res. 31, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 546–47 (1980) [hereinafter CONCON PROCEEDINGS]. Additional changes included the establishment of the State Water Commission, the promotion of Hawaiian culture in schools, a grant of legislative funding for the Department of Hawaiian Home Lands, and protections for the customary rights of Kānaka Maoli. *Id*. at 543, 545.

[195] Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 645 (1980) (emphasis added).

[196] *See* HAW. REV. STAT. § 10-3(4) (2011).

[197] Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644 (emphasis added).

Although OHA provided a vehicle for Hawaiians to control funds set aside exclusively for their benefit, litigants like William Burgess deployed U.S. constitutional principles to attack Native Hawaiians' ability to exercise that sovereignty.[198] Several challenges have been successful, leading to the status quo under which all Hawai'i residents may vote or run for OHA's board of trustees.[199] Other challenges have been less successful but have nonetheless attempted to chip away at impactful Native Hawaiian programs.[200]

Based on the U.S. constitutional principles utilized in attacking beneficiary programs at the state level, new federal initiatives could face similar criticism for empowering Native Hawaiian autonomy in policymaking.[201] The proposed DOI consultation policy represents another means to protect Indigenous interests.[202] Yet, its potential to protect and advance Native Hawaiian interests through consultation may be limited so long as the lāhui and its Native Hawaiian constituents remain in a state of legal ambiguity.[203] Such "legal limbo" is a result of the federal government's inconsistent treatment of Native Hawaiians as a political class in some instances (e.g., the DOI Policy on Consultation discussed herein) and as a strictly racial class in other instances, namely by the Court in *Rice* for purposes of the voting criteria under the Fifteenth Amendment.[204]

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[198] *See, e.g.*, Arakaki v. Hawaii, 314 F.3d 1091 (9th Cir. 2002); MacKenzie, *supra* note 24, at 35.

[199] *See, e.g.*, Arakaki, 314 F.3d at 1095 (9th Cir. 2002) (citing Rice v. Cayetano, 528 U.S. 495 (2000), the court ruled in favor of plaintiffs who claimed that OHA's candidate restriction violated the Fifteenth Amendment and the Voting Rights Act, so that now, non-Hawaiians may vote *and* run for OHA).

[200] *See, e.g.*, Corboy v. Louie, 128 Hawai'i 89, 91, 283 P.3d 695, 697 (2011) (holding that taxpayer plaintiffs, who are not Native Hawaiian and several of whom also participated in *Arakaki*, lacked standing to seek exemption from real property taxes equal to the exemption granted to Hawaiian homestead lessees under the HHCA).

[201] *See id.*

[202] *Interior Department Announces Development of First-Ever Consultation Policy with Native Hawaiian Community,* U.S. DEP'T OF THE INTERIOR (Oct. 18, 2022), https://www.doi.gov/pressreleases/interior-department-announces-development-first-ever-consultation-policy-native (quoting Secretary Deb Haaland, who stated that the "new and unprecedented consultation policy will help support Native Hawaiian sovereignty and self-determination as we continue to uphold the right of the Native Hawaiian Community to self-government").

[203] *See infra* notes 258–61 and accompanying text.

[204] DOI Policy on Consultation, *supra* note 1; Rice. v. Cayetano, 528 U.S. 495 (2000).

III. LEGAL RULES

The Department intended its Native Hawaiian Community consultation policy to "affirm[] and honor[] the special political and trust relationship between the United States and the Native Hawaiian Community" and to confirm the Department's intent to apply the principles underlying Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships[205] as well as Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments").[206] However, legal ambiguity persists because the Department has extended tribal consultation principles usually reserved for federally recognized tribes to the non-federally recognized NHC, which does not exercise the same political sovereignty as the federally recognized tribes served by the Bureau of Indian Affairs ("BIA").[207] Further, despite the Department's authority to enact its own rules and regulations, policies will not survive judicial review if they are challenged in court and found to be arbitrary, capricious, an abuse of discretion, or contrary to existing laws.[208] To demonstrate the legal tools that limit and enable consultation with the Native Hawaiian Community, the following section examines the legal rules that form the foundation of the DOI's federal consultation policy with Native Hawaiians, including a discussion on the federal trust relationship with Native Hawaiians, the Apology Resolution, and Executive Order 13175.

A. *Federal Trust Relationship with Native Hawaiians*

The United States' responsibility to certain Indigenous peoples stems from those Indigenous peoples' respective trust relationships with the federal

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[205] *Interior Department Announces Development of First-Ever Consultation Policy with Native Hawaiian Community,* U.S. DEP'T OF THE INTERIOR (Oct. 18, 2022), https://www.doi.gov/pressreleases/interior-department-announces-development-first-ever-consultation-policy-native.

[206] DOI Policy on Consultation, *supra* note 1, at 1.1.

[207] Native Hawaiians are not included in the 574 Native tribes listed on the Federal Registry's "Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs." *See* 88 Fed. Reg. 54654 (Aug. 11, 2023). Further, no "Native Hawaiian Community" or any other entity is viewable when searching for Federally Recognized Tribes in Hawai'i on the BIA website. *Search Federally Recognized Tribes*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFF., https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes (select "Hawaii" from dropdown; then click "apply") (last visited Sept. 28, 2023).

[208] Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 336 (2002); *see* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

government.[209] In *Seminole Nation v. United States*, the Court recognized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[210] As the Court developed concepts of the government's trust responsibility to Indigenous peoples, it recognized that tribes' inherent sovereignty to exercise control over their lands and natural resources derived from the tribe's treaty with the federal government.[211] Yet, by recognizing such inherent sovereignty, the Court also absolved the federal government of a heightened fiduciary responsibility to care for those resources.[212] As a result, tribes may enforce their trust rights under federal treaties and laws, but they are more

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[209] *See* Morton v. Mancari, 417 U.S. 535, 552 (1974) ("'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to peform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic[.]'") (quoting Bd. of Cnty Comm'rs v. Seber, 318 U.S. 705, 715 (1943)).

[210] Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

[211] *See e.g.*, Montana v. United States, 450 U.S. 544 (1981) (recognizing tribes' inherent sovereignty to regulate lands on which tribes exercise absolute and undisturbed use and occupation). While the Supreme Court held that General Allotment Act of 1887 created only a *limited* trust relationship, imposing no duty upon the federal government to manage timber in tribal lands, United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 546 (1980), it later held that other statutes and regulations could nonetheless established a fiduciary relationship between the United States and tribes. *See, e.g.*, United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983). In *Mitchell II*, the Court held that "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). *Id.* at 206 ((holding that "the United States was subject to suit for money damages because timber management statutes and other legal rules imposed fiduciary duties upon the United States," despite the holding of *Mitchell I*). Thus, "where the Federal Government takes on or has control or supervision over tribal monies or properties, a fiduciary relationship normally exists with respect to such monies or properties. *Id.* at 225.

[212] *See Mitchell I*, 445 U.S. at 540–41; Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L.REV. 1137, 1151 (1990) ("Justice Marshall's majority opinion held that Congress had not intended to impose fiduciary responsibilities upon the federal government for allotment management, much less to make damages available for the breach of such duties."); *see also* Arizona v. Navajo Nation, 599 U.S. 555, 569–70 (2023) (concluding the federal government's treaty with the Navajo Nation does not require the United States to take "affirmative steps to secure water" for the Nation and thus the federal government did not breach its trust duty in failing to provide access to clean potable water to thousands of Navajos).

likely to win lawsuits involving those rights "when the government's duty to act is clear and express, or when Congress has delegated to a federal agency elaborate control over the tribal resource in question."[213]

Similarly, the Hawaiian Homes Commission Act established all essential elements of a common law trust, warranting the extension of the United States' fiduciary duties to beneficiaries of the Act.[214] The HHCA designated 200,000 acres of federally controlled "ceded" lands as available for Hawaiian homesteads, thereby creating a fiduciary trust relationship between the United States as the settlor-trustee and a subpopulation of the Native Hawaiian Community as a beneficiary class to receive designated lands that represent the trust corpus.[215] Until 1993, the "ceded" lands under federal control included Kaho'olawe, the smallest of the eight main Hawaiian Islands which the U.S. military used as a target and training area during World War II.[216] The United States then created another trust relationship with Native Hawaiians through a 1953 Executive Order that placed control of Kaho'olawe under the Secretary of the Navy who ensured restoration of its "habitable condition" when it no longer needed the island for navy purposes.[217]

Despite the lack of a recognized government, Native Hawaiians like George Helm and James Kimo Mitchell politically activated the NHC in the 1970s through their group Protect Kaho'olawe 'Ohana.[218] In 1976, Helm, Mitchell, and other Hawaiians, engaged in peaceful civil disobedience by establishing their presence on Kaho'olawe despite government opposition:

> This persistence, combined with the loss at sea of two leaders of [Protect Kaho'olawe] 'Ohana, George Helm and James Kimo Mitchell, galvanized the Hawaiian community

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[213] Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope*, CALIF. WATER LIBR. 4–5 (2009), https://cawaterlibrary.net/wp-content/ uploads/2017/ 05/The-Federal-Tribal-Trust-Relationship.pdf.

[214] *See* MacKenzie, *supra* note 24, at 30–31.

[215] *See* Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007) (affirming that each member of the HHCA beneficiary class–Native Hawaiians with a blood quantum of one-half–had standing to sue under 42 U.S.C. § 1983);

Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, §201(a)(7), 42 Stat. 108, 108 (1921) (defining "native Hawaiian" as "any descendent of not less than one-half part of the blood of races inhabiting the Hawaiian Islands previous to 1778").

[216] MacKenzie, *supra* note 24, at 39.

[217] *Id.*

[218] PROTECT KAHO'OLAWE 'OHANA, http://www.protectkahoolaweohana.org/ (last visited Sept. 28, 2023).

> and called statewide and national attention to the destruction of the island.
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> . . . .
>
> In 1993, after years of sustained efforts by [Protect Kahoʻolawe] ʻOhana, Congress recognized the cultural significance of [Kahoʻolawe], required the navy to return the island to the state, and directed the navy to conduct an unexploded ordinance cleanup and environmental restoration in consultation with the state.[219]

Through Protect Kahoʻolawe ʻOhana's activism, state law now guarantees that Kahoʻolawe will be transferred to the "sovereign" Native Hawaiian entity "upon its recognition."[220] Thus, federal recognition means that the lāhui would regain management and control over federal trust resources – namely Crown Lands.[221] In addition to establishment of a trust relationship through the HHCA and the future turnover of Kahoʻolawe, the federal government's duty to reconcile with the Native Hawaiian Community was further developed through the Executive Branch's apology for past harms a century after the illegal overthrow.[222]

B. *The Apology Resolution*

The federal legislative and executive branches jointly recognized Native Hawaiians as the Indigenous people of Hawaiʻi through Public Law 103-150, known as the Apology Resolution.[223] President William B. Clinton signed

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[219] MacKenzie *supra* note 24, at 39–40. "The same year, the Hawaiʻi state legislature established the Kahoʻolawe Island Reserve, consisting of the island and its surrounding ocean waters, to be used for Native Hawaiian cultural, spiritual, and subsistence purposes; fishing; environmental restoration; historic preservation; and education." *Id*. at 40; *see also* HAW. REV. STAT. § 6–3 (1993).

[220] HAW. REV. STAT. § 6K-9 ("Upon its return to the State, the resources and waters of Kahoʻolawe shall be held in trust as a part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.").

[221] MacKenzie, *supra* note 24, at 40–41 ("Hawaiʻi law also guarantees that when a sovereign Native Hawaiian entity is established and recognized by the United States, the state will transfer management and control of Kahoʻolawe to that entity.").

[222] *See infra* Section III.B.

[223] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaiʻi, S.J. Res. 19, 103rd Cong., Pub. L. No. 103-150, 107 Stat. 1510 (1993).

the resolution in 1993, acknowledging that the "United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation."[224] The resolution formally apologized to the NHC for the United States' role in the illegal overthrow of the Hawaiian Kingdom and found that Native Hawaiians "never directly relinquished their claims to their inherent sovereignty as a people" despite the "deprivation of the[ir] rights [] to self-determination."[225] The Apology Resolution established a strong foundation for U.S. reconciliation with the NHC.[226] Yet, subsequent U.S. Supreme Court decisions have cast a shadow of doubt over the significance of that resolution.

In *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*, for example, the Court held that the Apology Resolution held no "operative effect," deeming its substantive provisions merely conciliatory or precatory.[227] In 2008, individual Native Hawaiians and OHA filed suit in state court to prevent the State of Hawai'i from selling "ceded" lands, arguing that the Apology Resolution "changed the legal landscape and restructured the rights and obligations of the State."[228] The Hawai'i Supreme Court relied on a plain reading of the Apology Resolution in favor of OHA and Native Hawaiians.[229] The U.S. Supreme Court, however, reasoned that "[s]uch terms are not the kind that Congress uses to create substantive rights – especially those that are enforceable against the co-sovereign States."[230] Although the Court limited the reach of the Apology Resolution in supporting Native Hawaiian political sovereignty, the Executive Branch has utilized its executive order authority to mandate consultation as one method of reconciliation with Indigenous peoples.[231]

C. *Executive Order 13175*

In 2000, President Clinton issued Executive Order 13175, which mandated agencies to formally consult with Indian tribes regarding the development of

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[224] *See id.*

[225] *Id.* at ¶ 29, §1(3).

[226] *See id.* at § 1(4) (committing to "acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people"); Eric K. Yamamoto & Sarah D. Ayabe, *Courts in the Age of Reconciliation:* Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 518 (2011).

[227] Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163, 173–75 (2009).

[228] Off. of Hawaiian Affs. v. State Hous. & Cmty. Dev. Corp., 117 Hawai'i 174, 190, 177 P.3d 884, 900 (2008).

[229] *Id.* at 191, 195, 177 P.3d at 901, 905.

[230] *Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. at 173 (referencing, for example, Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17–18 (1981)).

[231] *See infra* Section III.C.

regulations and legislation affecting those tribes.[232] Executive Order 13175 focused on regulations implicating tribal self-government, tribal trust resources, Indian tribal treaties, and other rights.[233] The order charged all executive departments and agencies to engage in consistent, meaningful, and robust consultation with tribal officials.[234] As a result, federally recognized Indian tribes may actively participate in the drafting of federal regulations, legislative comments, and proposed legislation that may affect their rights.[235]

Reinforcing the initial Executive Order, a 2009 Presidential Memorandum required "each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175."[236] A subsequent 2022 Presidential Memorandum charged the head of each agency to "designate a primary point of contact for Tribal consultation matters who is responsible for advising agency staff on all matters pertaining to Tribal consultation [who would] serv[e] as the primary point of contact for Tribal officials seeking to consult with the agency."[237] Although Native Hawaiians are not listed in the Federally Recognized Indian Tribe List[238] and thus, are not directly implicated by Executive Order 13175, at least one federal department, the DOI, has chosen to extend its underlying principles to the NHC.[239]

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[232] Exec. Order No. 13175, 3 C.F.R § 1(b) (2000), *reprinted in* 25 U.S.C. § 5130 (formerly cited as 25 U.S.C. § 479a(2)). "Indian tribes" are defined as any "Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994."

[233] Diana C. David, *Green Energy in Indian Country as a Double-Edged Sword for Native Americans: Drawing on the Inter-American and Colombian Legal Systems to Redefine the Right to Consultation*, 38 ENVIRONS ENV'T. L. & POL'Y J. 223, 234 (2015).

[234] 3 C.F.R. § 5 (2000).

[235] *Id.* at § 1(b) (referencing the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 5130 (formerly cited as 25 U.S.C. § 479)).

[236] *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, 2021 DAILY COMP. PRES. DOC. 91 (Jan. 26, 2021) (explaining Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009)).

[237] *Memorandum on Uniform Standards for Tribal Consultation*, 2022 DAILY COMP. PRES. DOC. 1083 (Nov. 30, 2022).

[238] 25 U.S.C. § 5130.

[239] *See* DOI Policy on Consultation, *supra* note 1; DOI Procedures on Consultation, *supra* note 5.

IV. ANALYSIS

This Article's analysis focuses on the current political status of Native Hawaiians and the potential for initiatives such as DOI consultation to help or hinder the advancement of the Native Hawaiian Community. Relying upon the background information and the governing legal rules explored in Parts II and III, the following analysis discusses the effectiveness of the Department's consultation policy with Native Hawaiians by investigating how *Rice* and its legacy affects Native Hawaiian self-determination. Part IV.A explores the errors in the *Rice* decision and the obstacle it presents to meaningful Native Hawaiian self-determination.[240] Part IV.B. analyzes limits to the Department's consultation policy stemming from *Rice* as precedent.[241] Finally, Part IV.C. deploys a futures studies analysis to forecast two possible futures for Kānaka Maoli governance if *Rice* continues to guide federal court adjudication of maoli issues.[242]

The formalist decision in *Rice v. Cayetano* represents a key loss of self-determination for Native Hawaiians.[243] In *Rice v. Cayetano*, haole Hawai'i resident Harold Rice sued Ben Cayetano in his official capacity as Governor and contested OHA's voting scheme restricting its elections to voters of Native Hawaiian ancestry.[244] The Governor and OHA asserted that "the voting limitation was not racial, but rather a limitation that flowed from a recognition by the United States of its political relationship with aboriginal peoples and its long history of granting special rights and protections to such people based upon the fact that they once owned land now part of the United States."[245] Nevertheless, the Court held that the Office of Hawaiian Affairs' election policy violated the Fifteenth Amendment' prohibition of discrimination on the basis of race.[246]

The Department's reliance on individual Native Hawaiian Organizations ("NHOs") for consultation demonstrates a crucial legal problem created by *Rice*: the federal government is unable to meaningfully consult with the

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[240] *See infra* Section IV.A.

[241] *See infra* Section IV.B.

[242] *See infra* Section IV.C.

[243] *See* Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-first Century Endorsement of Nineteenth-Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91, 108 (2000); Pino, *supra* note 69, at 2601 ("The Court's decision in *Rice* has repeatedly stymied OHA's efforts to support the fight for Kānaka Maoli sovereignty.").

[244] *See* Iijima, *supra* note 243, at 96.

[245] *Id.* (citing Brief of Amici Curiae Office of Hawaiian Affairs, et al. as Amici Curiae supporting respondent at 3; Rice v. Cayetano, 528 U.S. 495, 495 (2000)).

[246] Rice v. Cayetano, 528 U.S. 495, 517 (2000); *see* Iijima, *supra* note 243, at 96.

unified voice of an Indigenous people that its highest court erroneously decided to politically ignore.[247] Because *Rice* mischaracterizes the inquiry of Native Hawaiian ancestry as unconstitutional racial exclusivity,[248] the NHC is unable to elect anyone resembling a "tribal official" referred to in Executive Order 13175 and subsequent memoranda.[249] The Department's policy to consult with NHOs accordingly illuminates unique problems facing Kānaka Maoli. Most notably, *Rice* provides a legal basis for opponents to undermine the embers of inherent sovereignty that politically distinguish Kānaka Maoli from other "races" in Hawai'i.

A. Rice-*ists are Wrong*

The Court made two crucial errors in *Rice* that perpetuate the colonizing forces that Con Con representatives sought to reconcile through the creation of OHA.[250] First, the Court mistakenly declared OHA's use of ancestry as a proxy for race: "The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time. . . . We reject this line of argument. *Ancestry can be a proxy for race. It is that proxy here*."[251] By inappropriately labeling Native Hawaiians as a mere racial category, the Court consequently applied the

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[247] *See supra* Section I.A.

[248] *Rice*, 528 U.S. at 517 ("The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. . . . The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."); *see also* Hong, *supra* note 65, at 29 (discussing how the Court's holding reflected a failure to recognize a distinction between "political" and "racial" classifications and, thus, failed to acknowledge that Indigenous rights are necessarily tied to race).

[249] "Tribal officials" refers to elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations. 3 C.F.R § 1(d) (2000), *reprinted in* 25 U.S.C. § 5130 (formerly cited as 25 U.S.C. § 479a). As acknowledged in the DOI's consultation policy, "the Native Hawaiian Community has been without a formal government for over a century," so no government apparatus has been able to elect or appoint what could be considered a tribal official. *See* DOI Policy on Consultation, *supra* note 1, at n.1.

[250] *See* Mililani B. Trask, Rice v. Cayetano*: Reaffirming the Racism of Hawaii's Colonial Past*, 3 ASIAN-PAC. L. & POL'Y. J. 352, 355 (2002) ("The exclusion of [] Hawaiians from the federal policy which allows Native American Indians and Alaskan Natives to exercise internal self-determination through autonomous, federally recognized sovereign entities . . . means that Hawaiians continue to be denied the right to self-determination to this very day.").

[251] *Rice*, 528 U.S. at 514 (emphasis added).

wrong, and more stringent, standard of review in evaluating OHA's election in light of the Fifteenth Amendment.[252]

The second crucial error of *Rice* lies in the Court's failure to refer to Native Hawaiians as an Indigenous people which definitionally recognizes the painful history of American settler colonialism in Hawai'i.[253] The Court reasoned that if it concluded OHA's voting scheme was constitutional, it would necessarily have to conclude that Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes, and . . . has delegated to the State a broad authority to preserve that status."[254] Although the Court acknowledged that OHA's election policy reflected the state's effort to preserve a commonality of Native Hawaiians,[255] the Court characterized such provisions as unlawful "racial discrimination" for singling out "identifiable classes of persons . . . *solely* because of their ancestry or ethnic backgrounds."[256] Native Hawaiians do not merely share a common ancestry: Kānaka Maoli share a right to self-determination of their future as

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[252] *See* Ellen D. Katz, *Race and the Right to Vote after* Rice v. Cayetano, 99 MICH. L. REV. 491, 504–10 (2000). Justice Kennedy's categorization of Native Hawaiians as a race led to the imposition of strict scrutiny as the standard of review, whereby a law must be narrowly tailored to serve a compelling government interest. *See id.* (discussing how under *Rice*, a special-purpose district that classifies voters by race implicates the fundamental right to vote, thus triggering strict scrutiny). The Supreme Court has held that all government programs with racial classifications are subject to strict scrutiny. *See, e.g.,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (adopting strict scrutiny review for racial preferences in government contracting); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that strict scrutiny review applies to government programs designed to benefit racial minority business owners). Indian preferences, however, are reviewed under the rational basis review, a lower threshold, because tribal classifications are political, not racial. *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, 430 U.S. 641 (1977).

[253] *See* Cobo, *supra* note 22. *See* Pino, *supra* note 69, at 2574 ("Justice Kennedy's majority opinion in Rice provides an account of Hawaiian history that reduces American intervention in Hawai'i to the actions of specific individuals, minimizing the role of the U.S. government."). The Court looked to relevant legislative enactments that exhibited Congress' concern for the condition of Hawaiians soon after the territorial government's establishment. *See Rice*, 528 U.S. at 507 (referencing H.R. REP. NO. 839, 66th Cong., at 2–6 (1920)). However, the Court stated that even if the Court were to "take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians [] as tribes, Congress may not authorize a State to create a voting scheme of this sort." *Rice*, 528 U.S. at 519.

[254] *Rice*, 528 U.S. at 518.

[255] *Id.* at 515.

[256] *Id.* (emphasis added).

an Indigenous people and of the management of Hawai'i's lands and natural resources.[257]

1. *Native Hawaiians are a Racial* and *Political Class*

Justice Anthony Kennedy, who authored the majority opinion in *Rice*, incorrectly categorized the white plaintiff as "Hawaiian" by virtue of his residence in the State of Hawai'i, creating ambiguity around what it means to be "Hawaiian" from the outset of the decision.[258] By creating uncertainty around the definition of "Hawaiian," Justice Kennedy opened the door to a more consequential inquiry into the definition of "Native Hawaiians," the more inclusive of OHA's two categories of beneficiaries.[259] Justice Kennedy's opinion ignored the HHCA, which set aside lands specifically for Native Hawaiians comparable to land reservation for federally recognized tribes, and ignored the Apology Resolution, which recognized the federal government's culpability in the illegal overthrow of the Hawaiian Kingdom.[260] Thus, when *Rice* equated ancestry with race, it weakened maoli control by inappropriately tethering political sovereignty to blood quantum.[261]

Furthermore, in describing Native Hawaiians merely as a racial class,[262] the Court failed to acknowledge Kānaka Maoli as members of a living culture determined to transmit traditions to future generations despite its

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[257] *See generally* Jonathan K. Osorio, *"What Kine Hawaiian Are You?" A Mo'olelo About Nationhood, Race, History, and the Contemporary Sovereignty Movement in Hawai'i*, 13 CONTEMP. PAC. 359 (2001) (discussing Native Hawaiian conceptions of race and nationality and the contemporary sovereignty movement); Anaya, *supra* note 63 (assessing Native Hawaiians' right to self-determination under international law precepts).

[258] *Rice*, 528 U.S at 499. Rather than "Hawaiian" identity being derived from ancestral connection to the aboriginal people inhabiting Hawai'i prior to 1778, the holding from *Rice* implies that being "Hawaiian" equates broadly to citizenship in the State of Hawai'i. *See id.*; Lisa Cami Oshiro, *Recognizing* Nā Kānaka Maoli*'s Right to Self-Determination*, 25 N.M. L. REV. 65, 89–90 (1995) (describing common misuse of the term "Hawaiian," which conflates residency in Hawai'i with Native Hawaiian ancestry).

[259] OHA's beneficiaries include all Native Hawaiians, regardless of blood quantum. *See* MacKenzie, *supra* note 24, at 33–34. The Hawai'i Constitution and Hawai'i Revised Statutes, however, refer to OHA's beneficiaries as "native Hawaiians and Hawaiians." *See id.*

[260] *See supra* Section III.A.

[261] Kauanui, *supra* note 186, at 98.

[262] *Rice*, 528 U.S. at 516.

independence having been limited by colonization's lasting barriers.[263] In Justice Kennedy's skewed view, Native Hawaiians are only unified in their racial and ethnic makeup.[264] However, Congress had already acknowledged that the United States extends services to Native Hawaiians not "because of their race, but because of their unique status as the [I]ndigenous people of a once sovereign nation."[265] In describing ancestry as a proxy for race, the *Rice* Court relied on its ruling upholding the constitutionality of curfews against individuals of Japanese descent during World War II, which emphasized that "[d]istinctions between citizens *solely* because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[266] Yet, ancestry is not the *sole* distinction between Native Hawaiians and other residents of Hawai'i, and political classification of Kānaka Maoli as the Indigenous people of Hawai'i would allow the state and federal governments to fulfill their respective trust duties.[267]

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[263] *See* Cobo, *supra* note 22, at 29 (defining Indigenous peoples as "those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them."). The distinction of "Indigeneity" is paramount because it accounts for the fact that Indigenous communities do not exist as snapshots in history taken when colonial forces began imposing their political dominance shortly after arrival. *See* J. Kēhaulani Kauanui, *"A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity*, 5 CULTURAL STUD. ASS'N 1, 4–5 (2016).

[264] *See Rice*, 528 U.S. at 516–17, 523 ("The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."); *see also* Hong, *supra* note 65, at 35 (explaining that the Court erred "in that it forced the unique situation of Native Hawaiians into ill-fitting legal categories . . . . As a result, the Court produced an opinion that imposed civil rights concerns onto a case about indigenous peoples").

[265] *See, e.g.*, 20 U.S.C. § 7512(12)(B).

[266] *Rice*, 528 U.S. at 517 (emphasis added) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); *see* Kathryn A. Bannai, *Gordon Hirabayashi v. United States: "This is an American case,"* SEATTLE J. SOC. JUST. 41, 42 (2012). Ironically, the Court in *Hirabayashi* affirmed the conviction of appellant Hirabayashi who violated the Act of Congress of March 21, 1942 (56 Stat. 173) by disregarding a curfew order on persons of Japanese ancestry. *See Hirabayashi*, 320 U.S. at 100–02. Although the law was based solely upon one's ancestry, the Court did not find the curfew unconstitutional because "in [the] time of war[,] residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. *Id.* at 101.

[267] *See e.g.*, Ian Falefuafua Tapu, *How to Say Sorry: Fulfilling the United States' Trust Obligation to Native Hawaiians by Using the Canons of Construction to Interpret the Apology Resolution*, 44 N.Y.U. REV. L. & SOC. CHANGE 445, 468–84 (discussing the sources of the federal government's trust obligations towards Native Hawaiians as the Indigenous people of Hawai'i).

The *Rice* Court specifically refused to rely on its 1978 holding in *Morton v. Mancari* affirming the political sovereignty of Indians.[268] In *Mancari*, the Court held that due to Indians' political status, employment and promotion preferences for Indian applicants and employees at the BIA did not violate civil rights legislation forbidding discrimination based on race.[269] The Indian employment preferences represented the legacy of the Indian Reorganization Act of 1934, which intended to provide tribes with a greater degree of self-government.[270] Similarly, OHA is designed to eventually transfer its assets to a future Native Hawaiian government and "hold[s] title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians."[271]

As a result of *Rice*, all voting citizens of Hawai'i, regardless of their association with the NHC, have voting control over the administration of revenues and proceeds from public lands held in trust for Native Hawaiians.[272] Native Hawaiians comprise only about twenty percent of the general population in Hawai'i.[273] Opening candidacy and voter eligibility for OHA trustees to the general public runs the significant risk of non-Hawaiian residents having plenary control over the lives and destinies of Hawaiians in Hawai'i.[274] This is not self-determination.

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[268] *Rice*, 528 U.S. at 522 ("To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs. The Fifteenth Amendment forbids this result.").

[269] 417 U.S. 535, 542, 549–51 (1974).

[270] *Id*. at 541–42.

[271] HAW. CONST. art. XII, § 5.

[272] *See Rice*, 528 U.S. at 521. *Rice* has "repeatedly stymied OHA's efforts to support the fight for Kānaka Maoli sovereignty" and has "frustrated attempts to exercise indigenous sovereignty in other U.S. territories" by restricting those territories' Indigenous inhabitants. Pino, *supra* note 69 at 2601. For example, "Chamorro activists have pushed for a Guam political-status plebiscite [since the 1980s] in which the vote is limited to Chamorros as the native inhabitants of Guam." *Id.* at 2602. Relying on *Rice*, however, the Ninth Circuit affirmed the district court's 2019 order enjoining the purportedly "racial classification-based" plebiscite. *See id.* at 2603.

[273] *New Census Data Confirms More Native Hawaiians Reside on the Continent Than in Hawai'i*, OHA (Sept. 25, 2023), https://www.oha.org/news/new-census-data-more-native-hawaiians-reside-continent/ ("The proportion of Native Hawaiians in Hawai'i remained stable from 2010 to 2020, currently constituting 21.8% of the state's population"); *see supra* notes 55–57 and accompanying text.

[274] *See supra* Section II.B*;* Pino, *supra* note 69, at 2605 (citing Noelani Goodyear-Ka'ōpua, *Introduction*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND

Rice also ignores the 1993 Apology Resolution, enacted by Congress and signed into public law by President Clinton.[275] In doing so, Justice Kennedy failed to analyze OHA's election procedures as an act of self-determination by an Indigenous people.[276] When the Court decided *Rice*, as the dissenting Justices pointed out, more than one-hundred fifty federal laws expressly include Native Hawaiians as part of the class of Native Americans who benefit from policies relating to the United States' duty to Indigenous peoples.[277] Through the passages of numerous laws, Congress had made clear that Native Hawaiians enjoy "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities."[278] Further, congressional authority to legislate in matters affecting the aboriginal or Indigenous peoples of the United States "includes the authority to legislate in matters affecting the native peoples of Alaska and Hawai'i."[279] Because Congress intended to extend the same privileges to Native Hawaiians and the Apology Resolution acknowledged Native Hawaiians' inherent sovereignty and rights to self-determination, Native Hawaiians are a political class within the United States.[280] Thus, the Court should have acknowledged OHA's voter restriction as a legal act of self-determination.[281]

SOVEREIGNTY 1, 29 (Noelani Goodyear-Ka'ōpua et al. eds., 2014)) ("[B]y invalidating Hawaiian-only voting for OHA trustees, *Rice* eliminated 'the small measure of electoral control over resources Kānaka Maoli could collectively exercise within the settler state system.'").

[275] Kara M. L. Young, *Kamehameha's Hawaiians-Only Admissions Policy*, 26 UNIV. HAW. L. REV. 309, 324–26 (2003); *see* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, S.J. Res. 19, 103rd Cong., Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[276] *See* Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644–45 (1980) (recognizing the inherent sovereignty of Native Hawaiians and noting the Native Hawaiian-only OHA election provision is necessary because the "people to whom assets belong should have control over them").

[277] *Rice*, 528 U.S. at 533–34 (Stevens, J., dissenting).

[278] 42 U.S.C. § 11701(19).

[279] *Id.* at § 11701(17).

[280] Van Dyke, *supra* note 16, at 108. A number of federal statutes extend "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities" to Kānaka Maoli. Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701(19) (1992); *see, e.g.*, Native American Programs Act, 42 U.S.C. § 2991 (1975); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978); National Museum of the American Indian Act, 20 U.S.C. § 80q (1989); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1990).

[281] *See* 42 U.S.C. § 11701(19) (recognizing "[t]he historical and unique legal relationships which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities").

Mililani B. Trask, a lawyer and well-known Native Hawaiian rights activist who now serves as an OHA trustee, has asserted that "[t]he exclusion of Native [] Hawaiians from the federal policy which allows Native American Indians and Alaska Natives to exercise internal self-determination through autonomous, federally recognized sovereign entities" is, itself, "a clear violation of the Equal Protection Clause," which the Court did not address in *Rice*.[282]

Further, as an exercise of self-determination, each federally recognized tribe evaluates tribal eligibility according to their own membership ordinances.[283] Some tribes like the Cherokee Nation, have tribal members who do not descend from the same ancestors.[284] Other policies, like that of the Santa Clara Pueblo, have excluded some biological children of tribal members from tribal membership.[285] Therefore, even if a broad definition of "Native Hawaiian" tied to ancestry allows for a person of one sixty-fourth Hawaiian blood to vote for OHA trustees, decisions regarding eligibility should also be viewed as an act of self-determination. However, in arguing that the OHA voting scheme is essentially a race-based voting qualification,

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[282] Trask, *supra* note 250.

[283] *See* 25 C.F.R. § 23.108(a) ("The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.")

[284] *See* Cherokee Nation v. Nash, 267 F.3d 86, 140 (D.C. Cir. 2017) (holding that descendants of people once enslaved by the Cherokee Nation also qualify as Cherokee).

[285] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51–52 (1978). The Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1304 applies individual liberties under the U.S. Constitution to individual members within a tribe, limiting tribal government decisionmaking. *See* Seth E. Montgomery, *ICRA's Exclusionary Rule*, 102 B.U. L. REV. 2101, 2104–06 (2022). In Santa Clara Pueblo v. Martinez, a Pueblo woman, Martinez, sued her tribe over its member ordinance which provided that if she married and had children with a non-member of the tribe, her children would not have member eligibility. Lucy A. Curry, *A Closer Look at* Santa Clara Pueblo v. Martinez*: Membership by Sex, by Race, and by Tribal Tradition,* 16 WIS. WOMEN'S L.J. 161, 161– 62 (2001) ("The membership Ordinance afforded membership rights to children of Santa Claran men and nonmembers, while denying membership to children of marriages between Santa Claran women and nonmembers."). Martinez sued under ICRA on the basis of sex discrimination because the same policy did not hold true for men who had children with non-Pueblo women. *Santa Clara Pueblo*, 436 U.S. at 51. The Court held that Title I of ICRA may not be interpreted to impliedly authorize claims for declaratory or injunctive relief of exclusive membership ordinances because abrogating tribal decisions is another means of destroying cultural identity "under the guise of saving it." *Id*. at 54 (quoting Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18–19 (D. N.M. 1975)).

the Court disguises an abrogation of Indigenous self-determination rights as the preservation of U.S. constitutional rights.[286]

In *Rice*, the Court paid attention to the purpose and command of the Fifteenth Amendment but failed to adequately understand the historical context surrounding its ratification.[287] As Justice John Paul Stevens explained in his dissenting opinion, OHA's voting scheme violated "neither the letter nor the spirit" of the Fifteenth Amendment, which prohibits voting restrictions "on account of race, color, or previous condition of servitude."[288] Without explicitly referring to race, color, or servitude, the majority opinion relied on the flawed assumption that because ancestry *can be* a proxy for race, "ancestry *is always* a proxy for race."[289] Unlike many of the voting schemes in southern states that excluded any potential voter with a "taint" of "Black blood," OHA's voting scheme excluded no descendant of a 1778 aboriginal resident just because he or she was also part European, Asian, or African, as a matter of race.[290] Majority author Justice Kennedy noted OHA's scheme "demean[ed] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[291] The dissent, however, drew an important distinction: ancestry as the basis for *restricting* one's right to vote differs from the relevance of ancestry to claims of "an *interest in trust property*, or to a shared interest in a proud heritage."[292]

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[286] *See* Katz, *supra* note 252, at 512 (describing the intrinsic value of voting as political participation and the dissonance between these values and the reasoning stated in *Rice*).

[287] *See* Rice v. Cayetano, 528 U.S. 495, 538 (2000) (Stevens, J., dissenting).

[288] *Id*. at 538–39 (quoting U.S. CONST. amend. XI, § 1).

[289] *Id.* at 539–40.

[290] *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1179 (1997):

> Individual rights of those who has any significant amount of Black ancestry were restricted severely by law. . . . [A]ll rights were rooted in the past, in remote African ancestry. Ancestry alone determined status, which was fixed. A [Black person] could not buy out of her assigned race . . . nor were her children released from its taint. As historian Gilbert Stephenson bluntly stated, "miscegenation has never been a bridge upon which one might cross from the [Black] race to the Caucasian, though it has been a thoroughfare from the Caucasian to the [Black]."

Id. (quoting GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 19 (1910)).

[291] *Rice*, 528 U.S. at 517.

[292] *Id.* at 544–45 (Stevens, J., dissenting) (emphases added).

2. *OHA's Election Permissibly Excluded Non-Hawaiians*

The *Rice* majority failed to apply *Mancari* to OHA's voting scheme.[293] In *Mancari*, the Court held that an employment preference for Indians (federally recognized Native Americans and Alaska Natives) within the Bureau of Indian Affairs did not violate the Equal Employment Opportunity Act of 1972 because it "reasonably and directly related to a legitimate, nonracially based goal."[294] The limited exception to the Equal Employment Opportunity Act provided in *Mancari* should extend to *Rice* because "one of the very purposes of OHA – and the challenged voting provision – is to afford Hawaiians a measure of self-governance," representing a both legitimate and nonracially based goal.[295] The Court refused to apply *Mancari,* reasoning that Congress may not authorize a state to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, and thereby excluding all non-Indian citizens.[296] However, the Court's error becomes clear when analyzing *Mancari* together with the purpose of OHA's election.

Opponents of Indian preference, including the class of non-Indian employees who initiated the *Mancari* litigation, claimed that the 1972 Equal Employment Opportunity Act implicitly repealed the BIA's preference policies, which allegedly deprived non-Indians of rights (in this case, rights to a public job) without due process of law.[297] The *Mancari* Court, however, recognized that if there were no Indian employment preference within the BIA, "primarily non-Indian-staffed BIA [would have] plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes."[298] The Court ruled in favor of the BIA, holding that Indians have a distinct political status for four reasons: (1) Congress had long

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[293] *Id.* at 522; Jeanette Wolfley, Rice v. Cayetano*: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights*, 3 ASIAN-PAC. L. & POL'Y J. 359, 364 (2002) ("Declining to confront the rather simple logic of the trust relationship and the application to Native Hawaiians, the majority of the Court simply stated, 'If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law.'") (quoting *Rice*, 528 U.S. at 518).

[294] Morton v. Mancari, 417 U.S. 535, 554 (1974).

[295] *Rice*, 528 U.S. at 520 (quoting Brief for Respondent at 34); *see also* Clarkson, *supra* note 65, at 317 (describing Native Hawaiians, in the wake of the *Rice* case, as "victims of a constitutionally faulty remedial infrastructure that was based on race rather than their inherent sovereignty as [I]ndigenous people").

[296] *Rice,* 528 U.S. at 520.

[297] *Mancari*, 417 U.S. at 539.

[298] *Id.* at 542.

recognized a "federal policy of providing a unique legal status to Indians in matters concerning tribal . . . reservation employment[;]" (2) Congress had recently enacted two laws giving Indians "preference in Government programs for training teachers of Indian children[;]" (3) Indian preferences "have been treated as exceptions to . . . [o]rders forbidding employment discrimination[;]" and (4) courts do not favor repeals by implication.[299] Accordingly, the Court concluded that the Indian preference did not constitute racial discrimination because it was reasonably and rationally designed to further Indian self-government and to make the BIA more responsive to the needs of its constituents.[300] The same concept should apply to OHA trustee elections for greater accountability to its constituents – Native Hawaiians.

The Court's refusal to apply *Mancari* in *Rice* directly contradicts the decisions of both the district court and the Ninth Circuit.[301] District court Judge David A. Ezra held that *Mancari* "is equally applicable to Native Hawaiians as to formally recognized Native Americans."[302] Judge Ezra based his conclusion on extensive evidence that "the guardian-ward relationship [upon which *Mancari* depends] existed, and currently exists, between the federal Government and Native Hawaiians and between the State of Hawaii and Native Hawaiians."[303] Likewise, the Ninth Circuit indicated that *Mancari* does not "[compel the Court] to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it."[304] Both lower courts discussed, at length, the unique status of Native Hawaiians that justified OHA's limited voting scheme, which the Supreme Court later dismissed.[305]

Disenfranchising Native Hawaiians in matters of Hawaiian governance could eventually mean that Kānaka "have no voice in determining their future."[306] Justice Kennedy referred to the Proceedings of the 1978 Con Con

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[299] *Id.* at 548–49.

[300] *Id.* at 554.

[301] *See* Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998); Rice v. Cayetano, 963 F. Supp. 1547, 1554 (D. Haw. 1997); *see* Pino, *supra* note 69, at 2582–83

[302] *Rice*, 963 F. Supp. at 1554.

[303] *Id.*

[304] *Rice*, 146 F.3d at 1081.

[305] *See* Rice v. Cayetano, 146 F.3d 1075, 1080–81 (9th Cir. 1998); Rice v. Cayetano, 963 F. Supp. 1547, 1554 (D. Haw. 1997).

[306] Queen Lili'uokalani once noted that constitutionally limiting the vote as a matter of allegiance to no other country would neither be unwise nor a departure from other civilized nations. Queen Lili'uokalani, *My Own Nation (1899)*, *in* SAY WE ARE NATIONS: DOCUMENTS

in discussing OHA's administrative positioning in the executive branch, but failed to acknowledge important details in the same standing committee report only a few pages earlier:

> The special *election for [OHA] trustees is not equivalent to a general election*, and the vote is *not for officials who will perform general governmental functions* in either a representative or executive capacity. . . . [I]t reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and "a board of trustees chosen from among those who are interested parties would be the *best way to insure proper management and adherence to the needed fiduciary principles*."[307]

Rather than a racially discriminatory scheme demeaning individuals on account of their race, OHA's election sought a political consensus to recognize the special claim to self-determination possessed by the Indigenous people of Hawai'i.[308] Further, even if the classification of Kānaka Maoli as a strictly racial group were true, the fiduciary relationship established between OHA trustees and Native Hawaiians should justify

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OF POLITICS AND PROTEST IN INDIGENOUS AMERICA SINCE 1887, at 13, 14 (Daniel M. Cobb ed., 2015). Referring to Hawaiians as the "children of the soil – the native inhabitants of the Hawaiian Islands and their descendants," Lili'uokalani warned that "quasi-Americans" who called themselves Hawaiian, then American when it suited them were the very ones demanding to "be allowed to vote, seek office, to hold the most responsible of positions, without becoming naturalized, and reserving to himself the privilege of protection under the guns of a foreign man-of-war" against the government under which he lives." *Id.* at 14–16. Those Americans who illegally overthrew the Kingdom of Hawai'i claimed to be "Hawaiian" when the label came with power but were distinctly American when asserting their individual liberties and extinguishing Indigenous sovereignty. *Id.* at 15. When the Provisional Government established the Republic of Hawai'i, it made the national day of Independence of the United States as its own. *Id.* at 17. Representatives made speeches claiming to be American citizens despite representing themselves as Hawaiians in Washington. *Id.*

[307] *Rice*, 146 F.3d 1075, 1081 (9th Cir. 1998) (citing Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644) (emphasis added).

[308] *See* Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644; Troy J.H. Andrade, (*Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631, 641 (2017) ("The goal of the entity, which Hawai'i's people ratified, was truly reconciliatory: to 'unite Hawaiians as a people[,]' to ensure that 'Hawaiians have more impact on their future[,]' and to provide it 'maximum independence.' But, that goal would be put to the test.").

restricting voting eligibility to fit the parameters of the beneficiary class.[309] Until the law permits organization of a formal Native Hawaiian government, Kānaka Maoli must figure out how best to utilize the Department's consultation policy when possible.

B. Rice *Will Prevent Meaningful NHC Consultation*

While this Article criticizes some of the consultation policy's proposed language, the policy nevertheless possesses great potential to enhance Kānaka Maoli sovereignty because the act of engaging in working relationships with other governments is a critical function of all self-determination.[310] All federal agencies now have formal consultation policies prescribing how they will consult with tribal governments on policy making.[311] Yet, the manual for consultation with the NHC may not guarantee deference to NHC comments comparable to the deference offered to tribal governments represented by tribal officials.[312] The NHC consultation manual's language is problematic for two reasons. First, its definition of NHOs does not require members to be Native Hawaiian.[313] Second, consultation relies on political self-determination, which *Rice* has significantly limited for the Native Hawaiian Community.[314] By preventing the election of representatives that could serve in the same capacity as tribal officials by the NHC, *Rice* prevents meaningful consultation with the NHC.

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[309] *See Rice*, 146 F.3d at 1081. It is unclear why OHA's election needed to be tied to the state election in the first place. Perhaps doing so would save on financial costs, as the Con Con standing committee report suggests: "the cost [of] electing the board of trustees would be nominal, provided it is held at the same time as the state general elections." Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644. If no other reason prevents OHA from severing its election from that of the State, restructuring the election outside of the State's administrative funding might avoid conflicts with the *Rice* holding. *See Rice*, 146 F.3d at 1076, 1081.

[310] REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 256 (Miriam Jorgensen ed., 2007) [hereinafter REBUILDING NATIVE NATIONS].

[311] *Id*. at 249. For example, the Rhode Island Department of Transportation and the Narragansett Tribe signed a ten-year agreement in 1998 specifying that the state would hire tribal members to monitor federally funded highway construction projects, thereby helping to ensure proper identification and respectful treatment of human remains and cultural artifacts. *Id.* at 247. Similarly, tax agreements are among the most prevalent examples of new tribal-state relationships, and Arizona, Nevada, Oklahoma, Utah, Washington, Wisconsin, and Wyoming have agreements with native nations that address motor fuel or tobacco taxes. *Id.* at 248.

[312] DOI Policy on Consultation, *supra* note 1, at 1.1.

[313] *Id*. at 1.4.

[314] *Id*. at 1.5.

1. *So-Called "Native Hawaiian Organizations"*

The UN Declaration on the Rights of Indigenous Peoples specifically states that Indigenous peoples have the right to participate in decision-making matters affecting their rights "through representatives chosen by themselves in accordance with their own procedures."[315] Further, UNDRIP confirms the right to consultation between federal and tribal governments, and mandates cooperation with concerned Indigenous peoples "through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them."[316] Government-to-government relationships should thus reflect and enforce Indigenous sovereignty, but the DOI policy arbitrarily places NHOs in the same consultative capacity as a tribal government official.[317] For purposes of DOI consultation with Native Hawaiians, NHOs are defined as:

> (1) Any organization that:
>
> a) serves and represents the interests of Native Hawaiians;
>
> b) has as a primary and stated purpose the provision of services to Native Hawaiians; and
>
> c) has expertise in Native Hawaiian affairs;
>
> (2) Includes but not limited to:
>
> a) Native Hawaiian organizations registered with the Department of the Interior's [ONHR]; and
>
> b) Homestead Association and HHCA Beneficiary Associations (collectively "HBA") as defined under 43 C.F.R. §§ 47.10 and 48.6.[318]

NHOs "stated purpose" or asserted "expertise" in Native Hawaiian affairs generally opens the door for many organizations to be NHOs under the

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[315] UNDRIP, *supra* note 59, at art. 18.

[316] *Id*. at art. 19.

[317] DOI Policy on Consultation, *supra* note 1, at 1.6 ("NHOs are the informal representatives of the [NHC]. The requirement to work with NHOs is necessary because the NHC currently lacks a unified formal government. . . . Federal Officials identitfy the most appropriate NHC leaders to work with on a particular project.").

[318] *Id.* at 1.4(H).

policy.[319] By relying on such ambiguous definition or by merely registering as a NHO with the ONHR under subsection (2)(a), the DOI consultation manual's current language risks being counterproductive to nation-building.[320] While the Department should not be responsible for the political organization of Native Hawaiians, it should ensure that the Department and the NHC interact as equals in a relationship akin to a government-to-government interaction.[321] "In a hierarchical contracting relationship, a government contracts with a nonprofit or community-based organization to carry out a policy or deliver a service," and the government maintains the upper hand and the ability to "dictate the terms of the relationship."[322] Conversely, government-to-government relationships are "negotiated by both governments and the terms of the relationship are mutually developed and agreed upon."[323] That the DOI consultation manual contains unilaterally drafted terms – including the definition of NHOs – demonstrates the

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[319] The current list of Native Hawaiian organizations registered with the Deparmtent's ONHR currently contains 163 NHOs under the DOI Consultation Policy's definition. *Id.* at 1.4(H)(2)(a); *see* U.S. DEP'T INTERIOR, OFF. NATIVE HAWAIIAN REL., NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST (2023) [hereinafter NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST], https://www.doi.gov/sites/doi.gov/files/nhol-complete-list.pdf. While some organizations listed such as Kamehameha Schools (a Native Hawaiian educational institution, landowner, and trust), and Nā 'Aikāne o Maui (an educational organization uplifting all aspects of Hawaiian culture), clearly represent Native Hawaiian interests and provide specific details as to how they do so, others listed organizations do not. *See id.* at 35, 61. For example, Meje, Inc., offers no discription in the organization's association with the Native Hawaiian Community but merely states a vague interest in "preserving the cultural understandings of the traditional work values and ethics of the Hawaiian Culture." *See id.* at 59.

[320] Although subsection (2)(b) of the definition of "Native Hawaiian Organization" refers to a program that verifies that its beneficiaries are Native Hawaiian, the HHCA infamously limits its beneficiary class by a blood quantum requirement of 50%. *See* DOI Consultation Policy, *supra* note 1 at 1.6; Hawaiian Homes Commission Act, *supra* note 178 at 124. In an ethnically diverse land base like Hawai'i, such a requirement is not sustainable and affects private matters of individual choice including marriage and procreation. *See* Hokulani McKeague, *Hokulani McKeague v. Department of Hawaiian Homelands: A Case for the Unconstitutionality of Blood Quantum*, 42 HAWAII L. REV. 204, 209 (2019).

[321] *See* REBUILDING NATIVE NATIONS, *supra* note 310, at 256. The Manual notes that a special political and trust relationship may continue to exist even without a formal government-to-government relationship. DOI Policy on Consultation, *supra* note 1, at 1.1 n.1; *see, e.g.*, Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est., 470 F.3d 827, 847–48 (9th Cir. 2006) ("Congress has reaffirmed the unique relationship that the United States has with Hawai'i as a result of the American involvement in the overthrow of the Hawaiian monarchy.").

[322] REBUILDING NATIVE NATIONS, *supra* note 310, at 257.

[323] *Id.*

Department's upper hand in what should be a "government-to-sovereign" relationship but more closely resembles a unilateral contracting relationship.[324] Further, by omitting any requirement that NHOs must be run by or comprised of Native Hawaiians, the DOI manual's proposed language poses the same threat to sovereignty that *Rice* enabled: non-Hawaiians having a dominant voice in the management of resources specifically for Kānaka Maoli.[325]

Successful government-to-government relationships with Indigenous peoples should expand Indigenous influence in decisions over policy areas, people, and lands that affect Native peoples.[326] Such relationships should amplify the impact of a Native nation's actions by offering means to capitalize on Indigenous resources and expertise, productively address native concerns, and promote comprehensive community development.[327] These features rely on choices made by each participating government in a way that can assist Indigenous communities to formulate comprehensive and long-

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[324] *See* Charles Wilkinson, *Indian Law into the Twenty-First Century: The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1063, 1087 (1997). Wilkinson described bilateralism as a successful model for government-to-government relationships between the United States and Indian tribes from unilateral to bilateral federal policymaking. *See id.* at 1063, 1087. He described how "bilateralism was carried through the negotiating process where the two teams, as equals, developed protocols, set meeting dates, negotiated, developed working drafts, and eventually agreed upon a final Secretarial Order." *Id.* at 1087. Yet Wilkinson also warned that "dilution" of the process has the potential to generate anger or reduce efficacy, *Id.* at 1086. While the DOI solicited comments and suggestions related to its consultation policy and procedure with the NHC, they only did so *after* drafting the policy themselves, and it is unclear to what extent the comments that *were* received actually affected the proposed policy. *See* U.S. Dep't Interior, Off. Native Hawaiian Rels., *DOI Consults on its Native Hawaiian Community Consultation Policy and Procedures* (Dec. 5, 2022), https://www.doi.gov/hawaiian/doi-consults-on-its-native-hawaiian-community-consultation-policy-and-procedures.

[325] *See* Trask, *supra* note 250, at 354–55.

[326] In its 2022-2027 Strategic Plan, the U.S. Government Accountability Office recognized evaluation of "federal policies and programs that serve Indian tribes, their members, and other indigenous groups," assessment of "federal efforts to protect Native American cultural, environmental, and natural resources," and examination of "federal efforts to foster tribal self-determination, self-governance, and economic development" as specific performance goals for the federal government to achieve in maintenance of its government-to-government relationships with tribes. U.S. GOV. ACCOUNTABILITY OFF., STRATEGIC PLAN 2022-2027, at 21 (2022).

[327] REBUILDING NATIVE NATIONS, *supra* note 310, at 256–58

term policies.[328] The Department's policy with the NHC, however, did not rely on any choices made by a representative body designated by the NHC.[329] The consultation policy, therefore, lacks input from one participating sovereign party.[330]

2. *Non-Binding Consultation*

The 2009 publication, *Government to Government: Models of Cooperation Between States and Tribes*, proposes several guiding principles for developing and nurturing intergovernmental relationships: mutual understanding and respect; communication; a process for addressing disagreements and concerns, institutionalization; and most importantly, a commitment to cooperation in anticipating whether the policy may effectively nurture nation-building and how much accountability it places on the United States.[331] At the heart of each principle is the critical understanding that intergovernmental relationships with states, counties, boroughs, and cities are not a substitute for a tribe's direct relationship with the federal government, but rather a complement to it.[332]

The consultation process itself is a step in the right direction toward empowering Native Hawaiians to manage their own affairs. However, the current decision-making language in the proposed policy allows the Department to act before the consultation process concludes.[333] A pre-emptive decision-making "loophole" left by the Department contradicts its broader mission to build trust with the NHC by granting the Department deference in making decisions regardless of consultation:

> *In some situations, the [Department] makes decisions throughout the consultation process.* . . . Whether the final decision aligns with or differs from the positions of the Native Hawaiian Community, documenting and sharing this information is an important tool in *building trust* with the [NHC] and securing their future participation and

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[328] *See id.*

[329] *See supra* note 6 and accompanying text (explaining the DOI's purposeful use of "government-to-sovereign" rather than "government-to-government" relationship with the Native Hawaiian Community).

[330] *See* DOI Policy on Consultation, *supra* note 1.

[331] SUSAN JOHNSON ET AL., NAT'L CONF. OF STATE LEGISLATURES, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 6–11 (Sia Davis ed., 2009).

[332] *See id.* at 11.

[333] *See* DOI Procedures on Consultation, *supra* note 5, at 2.7.

assistance.[334]

A commitment to cooperation requires that partnering governments consent to a level of accountability for adherence to the terms of the relationship,[335] and "negotiation of and participation in intergovernmental relationships can be resource intensive."[336] Parties must therefore commit to cultivating and maintaining the relationship and sufficient financial support to ensure a sustainable and effective relationship.[337] For example, as a measure to maintain and respect the relationship, states typically appropriate funds to staff Indian Affairs commissions and state legislative committees.[338] Here, the Department may devote time and resources to seek opinions from NHOs or individual Native Hawaiians,[339] demonstrating a significant commitment to developing and maintaining the relationship by holding in-person consultation sessions with representatives traveling to Hawai'i for face-to-face conversations.

Despite its potential to support the NHC, the DOI consultation policy lacks key aspects of self-determination. The Department failed to allow Kānaka to generate their own list of NHOs available for consultation.[340] Instead, the Department generated its own reference list of NHOs to serve in a representative capacity for all Kānaka Maoli.[341] Further, upon conclusion of a consultation, the consultation manual requires the Department to complete a Consultation Report summarizing consultation activities, which are combined to develop an Annual Report.[342] These reports, however, make no commitment to cooperation with the NHC – it merely attempts to establish a

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[334] *Id.* (emphasis added).

[335] *See* REBUILDING NATIVE NATIONS, *supra* note 310, at 259, 268.

[336] REBUILDING NATIVE NATIONS, *supra* note 310, at 261. Kieran O'Neil, Comment, *In the Room Where It Happens: How Federal Appropriations Law Can Enforce Tribal Consultation Policies and Protect Native Subsistence Rights in Alaska,* 98 Wash. L. Rev. 659, 663–64 (2023) (describing how while administrations continue to laud consultation as the best method for American Indian and Alaska Native perspectives in federal decision-making, "communities continue to be left out of federal management decisions that directly affect them")

[337] REBUILDING NATIVE NATIONS, *supra* note 310, at 261.

[338] *Id.* at 261–62.

[339] *See, e.g.*, DOI Procedures on Consultation, *supra* note 5, at 2.4.

[340] *See* NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST, *supra* note 319.

[341] *See id*.

[342] DOI Procedures on Consultation, *supra* note 5, at 2.8; DOI Consultation Policy, *supra* note 1, at 1.4(d), 1.11.

record.[343] Records of consultation activities are instead used to develop the Native Hawaiian Community Consultation Annual Report "to promote consultation" as a "comprehensive list of all consultation efforts undertaken that year and may include, but is not limited to, the scope, cost, and activities of the consultation efforts. . . . The report should also include proposed plans and recommendations."[344] Neither the policy nor its procedure contemplate whether the NHC is required to review the accuracy of the report, again raising the question as to the DOI's commitment to meaningful consultation.[345]

While the proposed consultation policy demonstrates the Department's desire to acknowledge the importance of including the NHC in federal decision-making, history has demonstrated how such policies amplify Indigenous voices depending on the administration's political objectives.[346] As the ever-increasing cost of living continues to price Kānaka out of their ancestral lands, political self-determination and the development of intergovernmental relationships is crucial to avoid the disenfranchisement of Hawaiians and to ensure their voice in the future of Hawai'i.[347] Evaluating the DOI's consultation policy in tandem with the judicial limitations imposed by *Rice* will be crucial to determining what effect, if any, consultation efforts will support Native Hawaiian self-determination in the future.

C. *Alternative Futures for NHC Consultation*

As introduced in Section I.B, this Article deploys Dator's emerging-issue analysis to forecast possible futures related to Native Hawaiian consultation, namely, the impacts of *Rice* in different hypothetical futures scenarios.[348] By examining *Rice*'s potential impacts on consultation as opposed to how consultation could progress in the absence of *Rice*'s limitations, this Article

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[343] *See* DOI Procedures on Consultation, *supra* note 5, at 2.7, 2.8

[344] DOI Policy on Consultation, *supra* note 1, at 1.11 ("The report should also highlight significant consultation efforts conducted one-on-one with the [NHC]").

[345] *See id.*

[346] *See* WILKINS & STARK, *supra* note 100, at 121–24 (discussing how the federal government's engagement with Indigenous communities is dynamic and outlining the historical development of federal-tribal relationship through policy eras).

[347] *See* Sproat, *supra* note 21, at 183–85 ("Cultural and political sovereignty is essential for Indigenous Peoples' self-determination."); JOHNSON, *supra* note 331, at 11 (describing pathways for government-to-government relationships). The Manual is unclear as to how the Department will weigh input from NHOs outside Hawai'i. *See* DOI Procedures on Consultation, *supra* note 5 at 27. The current list of approximately 130 NHOs registered for notification of consultation sessions includes chapters of Hawaiian Civic Clubs situation on the U.S. continent. *See* NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST, *supra* note 319.

[348] *See supra* notes 82–85 and accompanying text.

suggests a pathway forward.[349] In other words, how can we look to the past to shape the future for Native Hawaiian self-determination?

So far, this Article has discussed, at length, *Rice*'s disservice to Native Hawaiian self-determination.[350] Such disservice is an objective factor in assessing the potential effectiveness of the DOI's consultation policy.[351] The legacy of settler colonialism[352] and the emigration of Native Hawaiians out of Hawai'i are enduring issues that exacerbate the dangerous precedent of *Rice*. In discussing whether DOI consultation will be a service or disservice for Native Hawaiian self-determination, this section forecasts the political climate for self-determination through the *continuation* and *transformational* images of alternative futures[353] – if *Rice* remains "good law" or if it is somehow overturned.[354]

1. *If* Rice *Remains "Good Law"*

One image of the future is characterized as *continuation* of the status quo.[355] In this situation, *continuation* would assume that *Rice* remains precedent as it has for the past few decades. Such continuation exacerbated by the trend of Native Hawaiians leaving Hawai'i in recent years could

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[349] *See infra* Section IV.C.1–2; Part V.

[350] *See, e.g.*, *supra* note 286 and accompanying text.

[351] The futures studies framework requires an identification of what Dator describes as objective factors—"a variety of *environmental forces* with which any image of the future (and struggle toward a preferred future) must contend." *See The Future Lies Behind!*, *supra* note 70, at 303.

[352] Marissa Aivazis, *Researchers Explore a Distinctly Hawaiian Approach to Understanding and Healing from Settler Colonialism*, U. S. CAL. PULLIAS CTR. FOR HIGHER EDUC. (Sept. 8, 2020), https://pullias.usc.edu/blog/researchers-explore-a-distinctly-hawaiian-approach-to-understanding-and-healing-from-settler-colonialism/ ("Settler colonialism refers to the systemic efforts to assimilate, isolate, or suppress [I]ndigenous people through the elimination of their societies, culture, language, and political systems. It represents a distinct type of colonialism driven by the replacement of the uniqueness of an Indigenous population with a hybrid native-settler society that eventually consumes the original culture.").

[353] *See supra* Section I.B (discussing the "Futures Studies" framework).

[354] The *Continuation image* in this Article contemplatesthe efficacy of DOI consultation under the current restraints of *Rice. Transformational images*, on the other hand, contemplate change to the existing social or political conditions. *See supra* Section I.B. This Article selected the emerging-issue analysis because, in the Author's view, it offers more utility in the context of Native Hawaiian political self-determination. *See supra* notes 82–85 and accompanying text. Within the emerging-issue analysis, the "collapse" and "disciplined society" futures are not contemplated because both futures extend beyond the scope of this Article.

[355] *The Future Lies Behind!*, *supra* note 70, at 305.

eventually lead to the long-term failure of Native Hawaiian self-determination initiatives.[356] Because more Native Hawaiians now live on the continent than in Hawai'i,[357] self-determination has become paramount to protect Native Hawaiian rights reflected in the UNDRIP and enshrined in Hawai'i's constitution.[358] Despite their minority status in Hawai'i,[359] Native Hawaiians experience food and housing insecurity at disproportionate rates.[360] Native Hawaiians need a governing entity to advocate on behalf of maoli interests.

In the absence of a Native Hawaiian political entity, more often than not, commercial interests take the steering wheel in shaping Hawai'i's sociopolitical landscape at the expense of maoli interests.[361] Despite Hawai'i's fertile land, small farmers who produce food for their local communities struggle to stay financially afloat due to the cost of purchasing

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[356] *See* Maia Sophia Campbell, *The Right of Indigenous Peoples to Political Participation and the Case of* Yatama v. Nicaragua, 24 ARIZONA J. OF INT. & COMP. L. 499, 521–22 (2007) ("The right to political participation is linked with the right to self-determination. . . . Thus, access to government decision-making bodies through political participation is fundamental to the advancement of the right of self-determination of any group and is separate from the achievement of independent statehood.").

[357] In 2020, the U.S. Census Bureau reported 619,855 Native Hawaiians across the United States. *U.S. Census Bureau Releases Key Stats*, *supra* note 55. In 2021, there were about 309,800 Native Hawaiians in Hawai'i and about 370,000 in other states. Jennifer Sinco & Associated Press, *Hawaiians cannot afford to live in Hawaii*, FORTUNE (Jan. 23, 2023, 2:10 AM), https://fortune.com/2023/01/23/hawaiians-cannot-afford-to-live-in-hawaii-las-vegas-drawing-natives/.

[358] *See* Anaya, *supra* note 63, at 32–36.

[359] *U.S. Census Bureau Releases Key Stats, supra* note 55.

[360]Christopher R. Long et al., *Food Security Status of Native Hawaiians and Pacific Islanders in the US: Analysis of a National Survey*, 52 J. NUTRITION EDUC. & BEHAV. 788, 790 (2020); Seanna Pieper-Jordan, *Native Hawaiian Healing from White Settler Injustices and Continued Discrimination*, HAW. APPLESEED CTR. FOR L. & ECON. JUST. (Jan. 21, 2023), https://hiappleseed.org/blog/native-hawaiian-healing-white-settler-injustice-discrimination.

[361] *See* R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223, 224 (2010) ("The practical effect of the ruling in *Rice* was that the direct link of accountability between trustee and beneficiary, created by law the Hawaiians-only voting structure, was diluted because any citizen of Hawai'i could participate in OHA elections regardless of the individual stake in decisions made by OHA trustees."); Clarkson, *supra* note 65, at 348 ("As Justice Stevens said, 'it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government – a possibility of which history and the actions of this Nation have deprived them.'").

land and the rarity of affordable leases.[362] Instead, the current economy favors the nearly one hundred large, corporate farms who produce the bulk of the produce sold to grocery stores over the seven thousand local farmers who only produce a fraction of agricultural sales.[363] Hawai'i's food economy today is a stark departure from traditional land stewardship and food production within the ahupua'a system.[364] Moreover, Hawai'i is not food sovereign because corporate, "mainland" food production has monopolized the local market.[365]

Additionally, corporate entities, who purchased lands and water diversion systems once owned by sugar plantations, dominate the control of other natural resources like water.[366] Disputes over water diversion from streams in notoriously dry Maui Komohana (West Maui) is one poignant example[367]

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[362] Jessica Terrel, *Hawai'i's Food System is Broken. Now is the Time to Fix It*, HONOLULU CIV. BEAT (Jan. 27, 2021), https://www.civilbeat.org/2021/01/hawaiis-food-system-is-broken-now-is-the-time-to-fix-it/.

[363] *Id.*

[364] *See* Leslie Hutchins & Mackenzie Feldman, *What Do Values Have to Do With It?: Resilience of Two Types of Farmers in Hawai'i to the COVID-19 Pandemic*, 5 FRONTIERS IN SUSTAINABLE FOOD SYSTEMS 1, 1 (2021) ("A history of agriculture and socio-cultural formation has led to a complex local food system in Hawai'i."); Brittany Lyte, *How Hawaii Squandered Its Food Security — And What It Will Take to Get It Back*, HONOLULU CIV. BEAT (April, 23, 2021), https://www.civilbeat.org/2021/04/how-hawaii-squandered-its-food-security-and-what-it-will-take-to-get-it-back/. An "ahupua'a" is a "land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (ahu) of stones surmounted by an image of a pig (pua'a), or because a pig or other tribute was laid on the altar as tax to the chief." HAWAIIAN DICTIONARY, *supra* note 7, at 9.

[365] *See* Lyte, *supra* note 364.

[366] *See* JONATHAN L. SCHEUER & BIANCA K. ISAKI, WATER AND POWER IN WEST MAUI 2 (2021) [hereinafter WATER AND POWER IN WEST MAUI].

[367] The State Water Code, authorizes the Commission on Water Resource Management ("CWRM") to designate water management areas for surface water use regulation after finding that serious disputes respecting the use of surface water resources are occurring. HAW. REV. STAT. § 174C-41 ("[W]hen it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by exiting or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over withdrawals and diversions of ground and surgace waters in the area to ensure reasonable and beneficial use of the water resources in the public interest."). Upon a unanimous vote, CWRM designated Maui Komohana as a ground and surface water management area in June 2022. Kehaulani Cerizo, *Under Landmark Decision, State Will Now Manage West Maui Water Resources*, MAUI NOW (June 14. 2022, 4:55 PM), https://mauinow.com/2022/06/14/under-landmark-decision-state-will-now-manage-west-maui- water-resources/. On August 8, 2023, the arid conditions of Maui

of the ongoing battle between legacy plantation interests in the tourism and agribusiness industries and constitutionally protected Native Hawaiian rights:[368]

> A mere few miles from the Westin Kā'anapali and other resorts, kalo cultivation continues in Kaua'ula and other West Maui valleys today. For over a century and a half, Kānaka Maoli and others who live in this area have wielded lawmaking, litigation, and other tools to contest this partial takeover. Their efforts have been significantly focused on trying to manage water in a way that allows for the preservation of traditional and customary practices, as well as the maintenance of a healthy environment that these

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Komohana caused by decades of water diversion culminated in wildfires that destroyed most of historic Lahaina, the first capitol of the Hawaiian Kingdom. *See* Naomi Klein & Kapua'ala Sproat, *Why Was There No Water to Fight the Fire in Maui?*, THE GUARDIAN (Aug. 17, 2023, 4:02 PM), https://www.theguardian.com/commentisfree/2023/aug/17/hawaii-fires-maui-water-rights-disaster-capitalism. Among the structures destroyed included the Nā 'Aikāne o Maui Cultural Center that sat on the grounds of Moku'ula and Mokuhinia, a lush inland fishpond that nourished the area both spiritually and physically. *See id.*; Jonaki Mehta, *Priceless Connections to Hawaii's Ancient Past Were Lost When Cultural Center Burned*, NAT'L PUB. RADIO (Aug. 18, 2023, 5:01 AM), https://www.npr.org/2023/08/18/1194500944/priceless-connections-to-hawaiis-ancient-past-were-lost-when-cultural-center-bur. Despite thousands of displaced residents and scores dead and some yet unaccounted for, the Hawai'i Tourism Authority nevertheless announced that West Maui would reopen for tourism mere months following the devastation and without consultation from the local community. Kiara Alfonseca, *'Slap in the Face': West Maui Set to Reopen for Tourism, with Outrage from Residents*, ABC NEWS (Sept. 19, 2023, 9:18AM), https://abcnews.go.com/US/west-maui-set-reopen-tourism-outrage-residents/story?id=103275631.

[368] Since the 1978 Con Con, the Hawai'i State Constitution has recognized water as a public trust resource that cannot be bought or sold as private property. HAW. CONST. art. XI, § 7 ("The State has an obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people."). Native Hawaiian law developed around the appropriation of water, as water was regarded as one of the most valued resources on the islands. *See* D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW TREATISE 522, 526–34 (Melody K. MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat, eds., 2015). Kānāwai," the term used for traditional Native Hawaiian law, literally translates to "relating to water." *Id.* Similarly, the word "waiwai" demonstrates that an abundance of natural resources like water – not money – equates to wealth from the maoli perspective, as "waiwai" refers to goods, property, assets, valuables, value, worth, wealth, importance, benefit, estate, or use. HAWAIIAN DICTIONARY, *supra* note 7, at 380. When Aloha 'Āina governed the land, subsistence principles supported communities, but now Kānaka in those exact communities must fight legal wars for access to water. *See, e.g.*, Jim Mendoza, *Maui Taro Farmers Prevail in Water Dispute with State*, HAW. NEWS NOW (Apr. 16, 2016, 9:11 PM), https://www.hawaiinewsnow.com/story/32775775/maui-taro-farmers-prevail-in-water-dispute-with-state/; WATER AND POWER IN WEST MAUI, *supra* note 366.

practices rely on and promote.[369]

This juxtaposition between corporate and Native Hawaiian interests highlights repeated mismanagement of Hawai'i's resources.[370] These extractive economies continue to threaten Native Hawaiian self-determination.[371] A recognized and representative body to advocate for Kānaka Maoli interests would better protect and advance Native Hawaiians and their lifeways.[372] In the absence of any change to *Rice*'s precedent, however, consultation with entities that are not limited to Native Hawaiians only further disserves maoli self-determination efforts.[373]

2. *If* Rice *Were Overturned: In Pursuit of a* Transformational *Future*

An elimination of the *Rice* rule would potentially restore a Native Hawaiian election for OHA in a way that could usher in a *transformational* future that more appropriately supports self-determination.[374] An alternative *disciplined* future[375] – in which Hawai'i reverts to pre-western contact ways of governance – is difficult to imagine in today's context given the significant

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[369] WATER AND POWER IN WEST MAUI, *supra* note 366.

[370] Federal mismanagement of water in Hawai'i includes the recent mismanagement of resources in the hastily built Red Hill Bulk Fuel Storage Facility that has historically leaked, contaminating O'ahu families' drinking water with petroleum. Christina Jedra, *How the Red Hill Fuel System Has Threatened Oahu's Drinking Water for Decades*, HONOLULU CIV. BEAT (Dec. 12, 2021), https://www.civilbeat.org/2021/12/how-the-red-hill-fuel-system-has-threatened-oahus-drinking-water-for-decades/; *see Aloha 'Āina: Kapūkakī (Red Hill Bulk Fuel Storage Facility)*, UNIV. OF HAW. WEST O'AHU, JAMES & ABIGAIL CAMPBELL LIB., https://guides.westoahu.hawaii.edu/c.php?g=977248&p=7079960 (last visited Sept. 30, 2023) (describing how in 2014, a fuel storage tank at Red Hill spilled 27,000 gallons of jet fuel and currently continues to leak into one of Oahu's main aquifers that supplies water to a large portion of the east side of the island); *see also*, *About Red Hill Fuel Releases*, ENV'T PROT. AGENCY (May 5, 2023), https://www.epa.gov/red-hill/about-red-hill-fuel-releases (explaining that in 2021, another fuel release occurred at the Red Hill Bulk Fuel Storage Facility, operated by the United States Navy, which contaminated the drinking water of approximately 93,000 residents for around four months).

[371] *See* Klein & Sproat, *supra* note 367 (describing Maui communities' fight to "for their right to manage their own water rather than watch as it is diverted for often frivolous uses").

[372] *See supra* notes 248–50 and accompanying text (discussing how *Rice* prohibits the NHC from electing its own government officials, hindering consultation with a unified Kanaka voice).

[373] *See supra* notes 248–50 and accompanying text.

[374] *See The Future Lies Behind!*, *supra* note 70, at 305.

[375] As described earlier in this Article, a *disciplined society* is one "in which society in the future is seen as organized around some set of overarching values usually considered to be ancient, traditional, natural, ideologically correct, or God-given[.]" *Id.*

changes to governance in Hawai'i.[376] Traditional values, however, such as Aloha 'Āina,[377] would be central in a *transformational* future in which Kānaka are considered by the law, and law-makers, as more than just a racial demographic.[378] In other words, a *transformational* future, unlike continuation of the status quo would value Native Hawaiian self-determination to the fullest extent possible, requiring a significant shift in legal, moral, and normative beliefs to catalyze this change.[379]

Rice limits the chances of a *transformational* future that would amplify the Hawaiian voice in a recognized government forum.[380] *Rice* immediately changed OHA's administrative procedures as its precedent denies Native Hawaiians any legal classification beyond a racial one.[381] Such classification even created obstacles in the state legislature when, for example, OHA sought to construct housing opportunities for its beneficiaries.[382] In 2023, in response to housing-based legislation in favor of OHA beneficiaries, State House Speaker Scott Saiki asserted that he was "not sure how OHA [would] be able to restrict or give preference to Hawaiians" because "federal law does

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[376] *See supra* Part II (chronicling Hawai'i's journey from a monarchy to statehood).

[377] *See* M. J. Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands*, 57 HARV. C.R.-C.L. L. REV. 393, 402–09 (2022).

> Th[e] reciprocal relationship [with land] is encapsulated in the foundational 'Oiwi value of aloha 'aina (profound love for the land),75 and, more recently, the concept of malama 'aina (to care for, protect, and preserve the land). Prior to western contact in 1778, Kanaka manifested their kuleana in part by managing all biocultural resources "as a public trust for present and future generations" and harnessing tidal power and natural hydrology to create regenerative communal agriculture and aquaculture systems that supported a population close to present-day size. Aloha 'aina is the foundation of-and inherent in-Hawai'i's constitutional Public Trust today and has inspired generations of Kanaka to challenge colonial subordination.

Id. at 402.

[378] *The Future Lies Behind!*, *supra* note 70, at 305. As described earlier in this Article, a *transformational society* is "usually either of a high-tech or a high-spirit variety, which sees the end of current forms and the emergence of new (rather than the return to older, traditional) forms of beliefs, behavior, organization, and perhaps, intelligent life-forms." *See id.*

[379] *See id.*

[380] *See supra* Section IV.A–B.

[381] *See* Rice v. Cayetano, 528 U.S. 495, 499 (2000).

[382] Catherine Cruz, *Speaker Saiki offers OHA a deal to restrict housing in Kaka'ako in exchange for funds*, HAW. PUB. RADIO (Apr. 5, 2023), https://www.hawaiipublicradio.org/the-conversation/2023-04-05/speaker-saiki-oha-deal-to-restrict-housing-in-kakaako.

not allow for anyone to discriminate based on *race*."[383] It is apparent how *Rice* affects subsequent federal judicial decisions as precedent, but the holding also – perhaps more implicitly – impacts the scope of state legislation designed to benefit Native Hawaiian constituents.

Speaker Saiki's comments followed his proposal for OHA to receive $190 million in exchange for a perpetual easement against OHA's planned housing project development in Kakaʻako Makai. [384] In lieu of proceeds to which OHA was entitled from public trust lands between November 1978 and June 2012, OHA received the Kakaʻako Makai parcels it sought to develop as part of a $200 million settlement with the state.[385] Since 2012, however, the state has denied OHA exemptions from a residential development prohibition impacting the Kakaʻako Makai area.[386] After the legislative measure to exempt the Kakaʻako Makai development from existing restrictions died once again in the 2023 session, Speaker Saiki proposed the $190 million deal as "just" compensation.[387] OHA's Board of Trustees unanimously rejected Speaker Saiki's proposal because the dollar amounts were not comparable to what the state actually owes OHA in public lands proceeds.[388]

Although unlikely, the removal of *Rice* as a barrier to an exclusive Native Hawaiian government could facilitate the *transformational* future for self-determination efforts by absolving OHA from the legal restrictions against the voting scheme initiated by the Con Con.[389] More importantly, rejection of *Rice* would clarify the legal ambiguity around the political status of Native Hawaiians in the United States such that the judiciary would view Kānaka in

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[383] *Id.*

[384] *See* Letter from Scott K. Saiki, Speaker of the House, to Carmen "Hulu" Lindsey, OHA Board of Trustees Chair, (Apr. 3, 2023), https://s3.documentcloud.org/documents/23742051/2023-04-03-spkr-to-oha.pdf (regarding proposed Senate Bill No. 1235, S.D. 2, H.D. 1).

[385] *Id.*

[386] *Id.*

[387] Kuʻuwehi Hiraishi, *OHA Trustees Reject Speaker Saiki's $190M Deal for Kakaʻako Makai*, HAW. PUB. RADIO (Apr. 7, 2023, 1:28 PM), https://www.hawaiipublicradio.org/local-news/2023-04-07/oha-trustees-reject-speaker-saikis-190m-deal-for-kakaako-makai#:~:text=The%20Office%20of%20Hawaiian%20Affairs,worth%20more%20than%20%24190%20million.

[388] *Id.*

[389] *See supra* Section II.D.

line with the federal legislation and executive orders that afford Native Hawaiians special recognition.[390]

V. RECOMMENDATIONS

Three ideas of future governance models available for Native Hawaiians include (1) independence, in which Hawai'i is a nation-state severed from the United States; (2) federal recognition, in which Native Hawaiians would have a status as the Indigenous people of Hawai'i like American Indians and Alaska Natives; and (3) the status quo, in which Native Hawaiians remain classified as a racial class in Hawai'i with no unique political consideration.[391] While this Article does not contemplate or suggest any particular model, the following recommendations may further Native Hawaiian self-determination through incremental steps involving amendments to DOI consultation and federal ONHR hiring practices.

A. *Consultation Should be With Maoli-led NHOs*

Any consultation policy should reserve consultation to Native Hawaiian individuals or NHOs that are led by and comprised of NHC members.[392] Although this recommendation does not immediately solve the problem of the United States having an upper hand through the Department's use of non-binding language, it would limit the Department's consideration to concerns raised specifically by Native Hawaiians and not by NHOs.[393] With the current ease of registering as a NHO,[394] organizations could claim to serve some

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[390] *See supra* Section I.A (describing the differences in federal treatment of American Indians, Alaska Natives, and Native Hawaiians).

[391] *See* Candice Fujikane, *Review: Restoring Independence and Abundance on the Kulāiwi and 'Āina Momona*, 67 AM. Q. 969, 969 (2015); J. Kēhaulani Kauanui, *Precarious Positions: Native Hawaiians and US Federal Recognition*, 17 CONTEMP. PAC. 1, 11 (2005) [hereinafter *Precarious Positions*].

[392] *See supra* notes 317–25 and accompanying text (critiquing the DOI's definition of "Native Hawaiian Organization").

[393] *See supra* notes 317–25 and accompanying text.

[394] ONHR's "Native Hawaiian Organization Notification List Registration Document Provided for the Convenience of NHOs" states at the top of the form that "use of [the] form is not required." *Sample Registration Form For Nhol Fillable Fin [pdf]*, DEP'T OF INTERIOR, https://www.doi.gov/media/document/sample-registration-form-nhol-fillable-fin-pdf (last visited Feb. 9, 2024); *see supra* note 319 (describing several specific NHOs registered with the ONHR). At least one entry on ONHR's NHO list completely lacks any summary of its interest in consultation efforts. *See* NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST, *supra* note 340, at 11.

Native Hawaiian interest while prioritizing purely commercial interests.[395] However, such restricted NHC consultation may be subject to judicial review if *Rice* still stands.[396]

The NHC should be able to voice concerns about federal actions that could affect them, but the Department's defined NHOs do not function as a representative body for the entire NHC.[397] No independent representative body means no meaningful exchange, which is key to rebuilding relationships between Indigenous and non-Indigenous peoples.[398] Without meaningful exchange, the DOI's consultation process may not accurately reflect the values of the broader NHC.[399]

Although other departments, such as the U.S. Department of Transportation, have the ability to initiate their own consultation sessions, the DOI policy will likely serve as a model for consultation between the NHC and those other agencies as it is the first to be drafted.[400] However, because

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[395] *See Sample Registration Form For Nhol Fillable Fin [pdf]*, DEP'T OF INTERIOR, https://www.doi.gov/media/document/sample-registration-form-nhol-fillable-fin-pdf (last visited Feb. 9, 2024).

[396] *See* Pino, *supra* note 69, at 2601 (describing that as a result of of *Rice*, Na'i Aupuni was unable to use the Native Hawaiian voter roll to elect constitutional convention delegates). While *Rice* was decided on Fifteenth Amendment grounds specifically related to voting criteria, the language referring to Native Hawaiians as merely a race is relevant to any constitutional analysis. *See* Katz, *supra* note 252, at 508.

[397] The last time the United States consulted with an arbitrarily recognized representative body for Native Hawaiians was when President William McKinley signed the Newlands Resolution. *See supra* Section II.B. Without dialogic exchange, finding a consultation process that can be a "cultural match" will be difficult because the consulted views may not accurately reflect the broader NHC view. *See id.*

[398] NADIA FERRARA, RECONCILING AND REHUMANIZING INDIGENOUS-SETTLER RELATIONS: AN APPLIED ANTHROPOLOGICAL PERSPECTIVE 29 (2015) ("[T]he only way to move forward and heal from the wounds of colonialism is to rebuild the relationship between indigenous and nonindigenous peoples. This entails rebuilding a sense of trust, acknowledging the wrongs of the past and learning from them, and focusing on the healing process, and supporting prosperous and sustainable indigenous communities that contribute to the overall prosperity[.]"); *see supra* Section IV.B.I (discussing measures of successful government-to-government relationships).

[399] *See* MELISSA L. TATUM ET AL., STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS 15 (2014). The idea of institutional legitimacy, often referred to as "cultural match," is a key factor in the success of constitution drafting and constitution reform. *Id.*

[400] *See* DEP'T OF TRANSP., DEPARTMENT OF TRANSPORTATION PLAN OF ACTIONS 2 (2021) ("The Department will separately proceed with an additional standalone consultation policy regarding Native Hawaiian Organizations that will be developed in consultation with Native Hawaiian Organizations.").

other federal agencies may define their consulting partners differently than the DOI, resulting inconsistencies within the federal government have the potential to undermine agency legitimacy.[401] When a "government['s] institutions allocate power and decision-making in a way that feels [legally or] culturally illegitimate to the community," the polity as a whole tends "to ignore [the] government, criticize it, disrupt its functioning, or use it for self-interested purposes."[402] Further, political reconciliation is an ongoing process: "the political damage that has been inflicted upon tribal governments for so many decades in the past could not be undone overnight."[403] This process is, therefore, better served when Native Hawaiians are equal partners in this political reconciliation and healing.

B. *The DOI Should Consider Employment Preferences for Native Hawaiians in the Office of Native Hawaiian Relations*

So long as *Rice* remains "good law" and its precedent continues to distinguish the political classification of Native Hawaiians from that of other Indigenous peoples, the NHC faces continued barriers to assert political sovereignty.[404] The consultation policy is imperfect, but it could be improved to allow for institutional self-determination within the Department's Office of Native Hawaiian Relations.[405]

The Ninth Circuit Court of Appeals, whose decision *Rice* reversed, concluded that Kānaka, "being a group to whom obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."[406] This reasoning mirrors that of *Mancari* where the Court noted a "primarily non-Indian-staffed BIA [would have] plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes."[407] While *Mancari* was rejected by the Court in the context of *Rice*, the ONHR should still consider an employment or hiring preference similar to the BIA's policy because it may not be in direct

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[401] *See id.* at 16.
[402] *Id.*
[403] *Id.*
[404] *See supra* Section IV.C.1.
[405] "The Office of Native Hawaiian Relations was authorized by Congress in Public Law 108–199 on January 23, 2004, and in Public Law 104–42 on November 2, 1995. The Office discharges the Secretary [of the Interior's] responsibilities for matters related to Native Hawaiians and serves as a conduit for the Department's field activities in Hawai'i." U.S. DEP'T INTERIOR, OFF. NATIVE HAWAIIAN REL., *About Our Office*, https://www.doi.gov/hawaiian/aboutus (last visited Oct. 3, 2023).
[406] Rice v. Cayetano, 146 F.3d 1075, 1079 (9th Cir. 1998).
[407] Morton v. Mancari, 417 U.S. 535, 542 (1974).

violation of the *Rice* rule.[408] The *Rice* Court only held OHA's state election scheme was unconstitutional under the Fifteenth Amendment and did not decide upon matters of employment preferences for federal Native Hawaiian programs.[409] Employment or hiring preferences would potentially bolster self-determination efforts by prioritizing Native Hawaiian leadership programs that directly serve the NHC.[410] Further advocacy following this narrow, potentially challenging path has the potential to propel this conversation regarding Native Hawaiian participation in decisionmaking.

VI. CONCLUSION

The Department took a step in the right direction by initiating a consultation policy with the NHC. Its language, however, has revealed areas in the law that the federal government must address before any government-to-government relationship can be forged or adequately substituted by a meaningful "government-to-sovereign" relationship. Without such changes, the DOI policy inappropriately assumes an essential element of Native Hawaiian self-determination by unilaterally drafting consultation language that distances Kānaka Maoli from the decision-making process. The history of governance in Hawai'i clearly depicts the establishment of a federal trust relationship between the United States and Native Hawaiians. Indeed, two of the three branches of the U.S. federal government have acknowledged the inherent sovereignty that underlies that trust relationship. But the *Rice* Court rejected the distinction of Kānaka Maoli as anything but a racial class. While this Article does not attempt to suggest a model for Hawaiian governance, the ability to politically organize as a lāhui – to follow whatever governance model it chooses – is an urgent and critically significant element of self-determination that *Rice* has, for over two decades now, prevented. Unless distinguished or overturned, *Rice* may similarly nullify "government-to-sovereign" consultation between the United States and the NHC.

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[408] *Rice*, 528 U.S. at 522 ("the question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment").

[409] *See id.*

[410] James P. Mills, *The Use of Hiring Preferences by Alaska Native Corporations After* Malabed v. North Slope Borough*,* 28 SEATTLE U. L. REV 403, 409 (2005) ("The ability of Native corporations to offer hiring preferences to Alaska Natives is critical to federal Indian policy toward Alaska Natives because (1) the unique position of Native corporations; (2) the diminished role that tribes play in economic lives of Alaska Natives; and (3) the underlying purposes of ANCSA.").

Hawaiian Education in Hawai‘i’s Public Schools: A Path to Reasonable Access

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I. INTRODUCTION

Forty-five years ago, in 1978, citizens of the State of Hawaiʻi gathered for a Constitutional Convention ("ConCon").[1] The 1978 ConCon came about during a time known as the "Hawaiian Renaissance."[2] Resistance and cultural renaissance movements around the United States, particularly among Native Americans, helped to spur a "reawakening of Hawaiian culture"[3] among Native Hawaiians seeking a path "for economic, social, and cultural justice."[4] The ConCon offered a path for those motivated by the Hawaiian Renaissance towards "enrich[ing] children's education as well as preserv[ing] the [Hawaiian] culture."[5] ConCon delegates sought amendments to the state constitution, promoting the study of "Hawaiian language, history and culture

[1] *1978 Constitutional Convention,* THE HAW. STATE CONST. CONVENTION CLEARINGHOUSE, https://hawaii.concon.info/?page_id=214 (last visited Nov. 7, 2023). The 1978 Constitutional Convention provided an opportunity for citizens to come together and amend the state constitution. The Hawaiian Affairs Committee used the opportunity to advocate for changes benefiting Native Hawaiians. *Id.*

[2] Troy J.H. Andrade, *Hawaiʻi '78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PA. J.L. & SOC. CHANGE 85, 102–03 (2021) (citing GEORGE S. KANAHELE, HAWAIIAN RENAISSANCE 13 (1982)) (describing how shifting views and cultural terrain in Hawaiʻi helped create the conditions for a ConCon in 1978).

[3] *See id.* at 102–06 (describing the critical establishment of a Hawaiian Studies Program at the University of Hawaiʻi and its impact in helping to expose Native Hawaiians to negative impacts of colonization, including suppression of Hawaiian language, traditional dance (hula), music, and the successful voyage across the pacific of the traditional double hulled canoe, Hōkūleʻa).

[4] *See id.* at 102–17 (describing the efforts of Native Hawaiian activists to politically organize in the 1970s, especially around the use of land and the need to protect important cultural locations such as the island of Kahoʻolawe).

[5] *See* Comm. Whole Rep. No. 12, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 274 (1980) [hereinafter CONCON PROCEEDINGS] (quoting a statement made by Delegate Alice Takehara, speaking in favor of the amendment to support the study of Hawaiian culture, history, and language).

in all phases of state activities."[6] The delegates further recognized the revival of the Hawaiian language through proper training of teachers and use of community expertise in public schools as being "essential to the preservation and perpetuation of Hawaiian culture."[7]

Numerous figures within the Hawaiian Renaissance movement emerged as delegates to the ConCon, helping to support the effort for a grassroots convention where few politicians ran as delegates.[8] Among the thirty female delegates was Adelaide "Frenchy" DeSoto, a member of Protect Kahoʻolawe ʻOhana ("PKO"),[9] who quickly formed alliances with other representatives advocating for improvements to environmental laws and Hawaiian rights via the ConCon.[10] She was selected to chair the Hawaiian Affairs Committee, which the ConCon intended to use as a way to support Native Hawaiian rights.[11] The Hawaiian Affairs Committee's work included the successful passage, and ratification by the electorate, of an amendment to the Hawai‘i State Constitution requiring a Hawaiian Education[12] program in the public schools to promote "the study of Hawaiian culture, history, and language."[13] ConCon delegate Masako Ledward saw this requirement as an opportunity for "[a]ll the people of Hawai‘i, not just the children . . . [to] have the opportunity of knowing about the Hawaiian culture."[14]

Article X, section 4, was added to the Hawai‘i State Constitution, enacting a constitutional mandate for Hawaiian Education:

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[6] *See id.*

[7] *See* Standing Comm. Rep. No. 57, *in* CONCON PROCEEDINGS, *supra* note 5, at 637.

[8] *See* Preface, *in* CONCON PROCEEDINGS, *supra* note 5, at vii.

[9] *See* Andrade, *supra* note 2, at 117. Many of the Hawaiian Renaissance activists were members of PKO, a grassroots group that, starting in 1976, fought to stop the use of the island of Kahoʻolawe for U.S. military bombing target practice. *Id.* at 112. PKO utilized the physical occupation of Kahoʻolawe as a means to emphasize the sacred significance of the island to Native Hawaiians. *Id.* at 116.

[10] *See id.* at 120–21; *see also* Preface, *in* CONCON PROCEEDINGS, *supra* note 58, at vii–x.

[11] *See* Andrade, *supra* note 2, at 120–22 (describing the work of the Hawaiian Affairs Committee to include the protection of Native Hawaiian rights, traditions, archaeological sites, culture, language, agriculture, and addressing issues related to the Hawaiian Homes Commission Act).

[12] *See* Comm. of the Whole Rep. No. 12, *in* CONCON PROCEEDINGS, *supra* note 5, at 1016 (outlining the term Hawaiian Education). For the purposes of this Comment, "Hawaiian Education" is broadly used to refer to educational programming and encompasses Hawaiian culture, history, and language in Hawai‘i's public schools.

[13] HAW. CONST. art. X, § 4; *see* Comm. of the Whole Rep. No. 12, *in* CONCON PROCEEDINGS, *supra* note 5, at 1016; *see also* Clarabal v. Dep't of Educ., 145 Hawai‘i 69, 74, 446 P.3d 986, 991 (2019) (providing extensive background on the constitutional changes from the 1978 ConCon, and delegates' intentions regarding the Hawaiian language, its recognition as an official language, and the importance of not losing the knowledge and wisdom of the kūpuna in the community).

[14] *See* Whole Rep. No. 12, *in* CONCON PROCEEDINGS, *supra* note 5, at 273.

> The State shall promote the study of Hawaiian culture, history and language. The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.[15]

The ConCon delegates adopted the mandate for Hawaiian Education curricula alongside a constitutional amendment that added Hawaiian as one of two official languages in the State of Hawaiʻi, which was also ratified by the electorate.[16] In recognizing Hawaiian as an official language, the delegates desired to "give full recognition and honor" to the "rich cultural inheritance"[17] and "overcome certain insults of the past where the speaking of Hawaiian was forbidden in the public school system," expressly recognizing ʻŌlelo Hawaiʻi[18] as equal to the English language.[19]

While modern educational practices recognize the value of culture-based educational programs, at the time of the 1978 ConCon, these methods were not yet well researched nor accepted as effective means of meeting learners' academic and socio-emotional needs, especially for Indigenous haumāna.[20] Regardless, the ConCon delegates recognized the urgent need to overcome the "200 years of deliberate and inadvertent obliteration" of Hawaiian language, culture, and history.[21] Delegates clearly understood that the arrival of the first Europeans in Hawaiʻi directly led to the steady demise of any opportunity for haumāna to experience ʻŌlelo Hawaiʻi, Hawaiian culture, or history in local public schools.[22]

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[15] HAW. CONST. art. X, § 4.

[16] *See* Standing Comm. Rep. No. 57, *in* CONCON PROCEEDINGS, *supra* note 5, at 638.

[17] *Id.*

[18] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 471 (1986) (indicating that ʻŌlelo Hawaiʻi refers to language, speech, word, quotation, statement, utterance, term, or tidings in the Hawaiian Language).

[19] *See* Comm. of the Whole Rep. No. 12, *in* CONCON PROCEEDINGS, *supra* note 5, at 1016 (recognizing the inappropriateness of the University of Hawaiʻi's practice of treating ʻŌlelo Hawaiʻi as a foreign language, as the State of Hawaiʻi is the "only place where Hawaiian studies is likely to occur" since there is no other "'aina for Hawaiians").

[20] PUKUI & ELBERT, *supra* note 18, at 536 (indicating that haumāna is the Hawaiian word for students, while haumana is the term used for a singular student); *see* Shawn Malia Kanaʻiaupuni, Brandon Ledward & Nolan Malone, *Mohala i ka wai: Cultural Advantage as a Framework for Indigenous Culture-Based Education and Student Outcomes*, 54 AM. EDUC. RSCH. J. 319S (2017) (discussing the value of culture based educational approaches to strengthen student success and engagement in learning).

[21] *See* Whole Rep. No. 12, *in* CONCON PROCEEDINGS, *supra* note 5, at 274.

[22] *See* Kamanaonāpalikūhonua Souza & K. Kaʻanoʻi Walk, *ʻŌlelo Hawaiʻi and Native Hawaiian Education, in* NATIVE HAWAIIAN LAW: A TREATISE 1256, 1262–63 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapuaʻala Sproat eds., 2015).

In the 1820s, Christian missionaries pushed for Native Hawaiians to attend sectarian schools and become literate in ʻŌlelo Hawaiʻi.[23] Unfortunately, much of the missionaries' work educating the Indigenous population was centered on the idea of "[w]estern superiority" and "instilling a sense of inferiority" within and "concerning everything Hawaiian."[24] The importance of education was further solidified in 1840 when King Kamehameha III established the first public education system in the Kingdom.[25] His action set forth the oldest continuously operating public school system west of the Mississippi.[26]

By the 1850s, thanks to both sectarian and public schools, Hawaiʻi's ʻŌlelo Hawaiʻi literacy rate was high, rivaling literacy rates in western countries.[27] However, westerners in Hawaiʻi began a strong push for English-medium schools shortly after, diminishing the importance of instruction in ʻŌlelo Hawaiʻi.[28] Similarly, the ruling aliʻi,[29] alongside the newly formed Department of Public Instruction, pushed for Native Hawaiians to learn English.[30] The aliʻi viewed fluency in English as the best way to ensure equity and success for their people in a changing economic and political climate.[31] On the other hand, the push for English-medium instruction by the western elite was driven by a desire to increase their power and influence, to the detriment of the Hawaiian people and the ruling monarchy.[32]

By the time of the illegal overthrow of the Hawaiian Kingdom in 1893[33] and the establishment of the Republic of Hawaiʻi in 1894, ʻŌlelo Hawaiʻi

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[23] *See id.* at 1263-64. Early missionaries sought to educate Native Hawaiians to facilitate saving their souls via conversion to Christianity. *Id.* Having a literate populace provided an effective means to promote western values and norms. *Id.*

[24] *See id.* at 1263 (quoting Ralph K. Stueber, *An Informal History of Schooling in Hawai'i*, *in* TO TEACH THE CHILDREN: HISTORICAL ASPECTS OF EDUCATION IN HAWAIʻI 16 (Alexander P. Kali ed., 1991)).

[25] *See History of Hawaiian Education,* STATE OF HAW. DEP'T. OF EDUC. [hereinafter *History of Hawaiian Education*], https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/History-of-the-Hawaiian-Education-program.aspx (last visited Nov. 7, 2023).

[26] *Id.*

[27] *See* Souza & Walk, *supra* note 22, at 1262.

[28] *Id.* at 1263–64.

[29] PUKUI & ELBERT, *supra* note 18, at 20 (indicating that aliʻi refers to a chief or chiefess, officer, ruler, monarch, noble, king or queen).

[30] *See* Souza & Walk, *supra* note 22, at 1264.

[31] *See id.* The push for English-medium schools was supported by the ruling aliʻi and seen as necessary to ensure equal footing with foreigners, securing success and power in a quickly changing society. *Id.*

[32] *See id.* at 1270–71. Foreign interests saw any efforts to perpetuate Hawaiian culture as detrimental to their efforts to maintain power and influence within society. *Id.*

[33] *Id.* (describing the illegal overthrow of Queen Liliʻuokalani in 1893, and how the eventual establishment of the Republic of Hawaiʻi by pro-American westerners was seen as necessary to obtain a protected status from the United States).

had quickly declined in all aspects of society, and the last Hawaiian-medium schools disappeared by 1897.[34] In 1896, English was declared the official government language and the "sole medium of instruction" used in Hawaiʻi's public schools.[35] Those in power, the western elite, heavily supported a "policy of assimilation through education in English" as they pushed for the "Americanizing" of the Hawaiian people.[36]

As a result, using ʻŌlelo Hawaiʻi on public school campuses was strictly forbidden.[37] Threats of termination were common for teachers who dared to utter ʻŌlelo Hawaiʻi, and haumāna frequently received corporal punishment for speaking in Hawaiian.[38] The emphasis on English as the sole medium through which children were allowed to communicate extended beyond the school itself.[39] Education officials conducted house visits and reprimanded parents for speaking ʻŌlelo Hawaiʻi in their own homes.[40] By the early 1980s, the destruction of ʻŌlelo Hawaiʻi was nearly complete.[41] With only a couple thousand native speakers left, very few children knew the language, and most were residents of the "lone remaining Hawaiian-speaking community on the island of Niʻihau."[42]

Although opportunities to access Hawaiian history, culture, and public education in ʻŌlelo Hawaiʻi have increased since 1978, barriers remain, resulting in insufficient access for all families.[43] This Comment examines the extent to which the State of Hawaiʻi has met the 1978 ConCon delegates'

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[34] *Id.* at 1265, 1270.

[35] *Id.* at 1270.

[36] *Id.* at 1271 (citing a report prepared by the U.S. Hawaiian Commission, which was created after the United States' annexation of Hawaiʻi). The Hawaiian Commission's recommendations for Hawaiʻi discussed the benefits of English-medium instruction for the American-controlled territorial government and the ability to "Americanize" the people of Hawaiʻi. *Id.*

[37] *Id.* at 1271–73.

[38] *Id.* at 1271.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1273–74.

[42] *Id.* at 1274. The largest number of native speakers were found on Niʻihau due to the unique isolation of the island that was purchased in 1864 by Niʻihau Ranch, preventing outsiders from relocating to the island and resulting in the only Native Hawaiian majority population at the time of statehood. Melody Kapilialoha MacKenzie*, Historical Background, in* NATIVE HAWAIIAN LAW: A TREATISE 2, 18 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapuaʻala Sproat eds., 2015); Julian Aguon, *Native Hawaiians and International Law*, *in* NATIVE HAWAIIAN LAW: A TREATISE 352, 386 (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapuaʻala Sproat eds., 2015).

[43] Video Conference Interview with Daylin-Rose H. Heather & Ashley Obrey, Native Hawaiian Legal Corp. (June 9, 2022) [hereinafter Heather & Obrey Interview] (discussing the need to remove barriers and create equity for Ka Papahana Kaiapuni programs similar to those offered through English-medium schools).

intent to provide access to Hawaiian Education, with a particular emphasis on ways to ensure all haumāna have reasonable access to ʻŌlelo Hawaiʻi. The examination includes statutes, policies, administrative rules, and programs developed over the last four decades, emphasizing Hawaiian language immersion schools or Ka Papahana Kaiapuni ("Kaiapuni"), also known as "Kaiapuni Educational Programs,"[44] and other Hawaiian Education programs in the public school system. This Comment begins in Part I with a history of Hawaiian Education in the public schools, including the methods schools used to bring kūpuna[45] into classroom spaces, the development of the first Hawaiian Immersion programs, as well as changes in the law and Board of Education ("BOE") policies in support of Hawaiian Education.

Part II of this Comment explores the legal challenges brought against Hawaiʻi's Department of Education for its failure to meet its constitutional obligations to provide Hawaiian Education, with a particular emphasis on the Hawaiʻi Supreme Court's 2019 decision in *Clarabal v. Department of Education* requiring reasonable access to Kaiapuni education.[46] In Part III, this Comment investigates the State of Hawaiʻi's teacher licensing process and the challenge of attracting, educating, and maintaining a quality teaching force knowledgeable in Hawaiian Education. Part IV explores the Office of Hawaiian Education and its efforts since 2014 to implement Board of Education policies focused on Hawaiian Education and to support Kaiapuni classroom teachers.[47]

Finally, Part V of this Comment provides a menu of strategies that the State of Hawaiʻi could use to ensure reasonable access for all haumāna. Despite challenges, recent growth in Hawaiian Education is promising, furthering the "goal of reviving and preserving ʻŌlelo Hawaiʻi and the shared culture."[48] The State of Hawaiʻi's path to ensuring reasonable access and promoting BOE's policy that "all students in Hawaii's public schools . . .

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[44] For purposes of this Comment, the term Ka Papahana Kaiapuni or "Kaiapuni" refers to Hawaiian Language Immersion programs or schools within Hawaiʻi's public school system.

[45] PUKUI & ELBERT, *supra* note 18, at 186 (indicating that kupuna is the Hawaiian word for grandparent, ancestor, relative or close friend of the grandparent's generation, and kūpuna is the plural version of the word).

[46] *See* Clarabal v. Dep't. of Educ., 145 Hawaiʻi 69, 446 P.3d 986 (2019).

[47] *See Hawaiian Education,* STATE OF HAW. DEP'T. OF EDUC., https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/home.aspx (last visited Nov. 7, 2023); *see also Presentation on Teacher Positions Filled; 5-Year Teacher Retention Rates; and Effectiveness of Teacher Shortage Differentials in the Areas of Special Education, Hard-to-Staff, and Hawaiian Language Immersion Programs on Teacher Vacancies and Retention*, STATE OF HAW. BD. OF EDUC., https://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/HR_1202022_%20Presentation%20on%20Teacher%20Positions.pdf (last visited Nov. 7, 2023) (outlining the history, implementation, and data collected on teacher shortage differentials).

[48] *See Clarabal*, 145 Hawaiʻi at 87, 446 P.3d at 1004.

graduate with proficiency in and appreciation for the indigenous culture, history, and language of Hawaii"[49] must include not only adequate funding and resources, but also a comprehensive plan to expand training in ʻŌlelo Hawaiʻi and Hawaiian culture, facilitate increased professional development, target efforts to increase licensed Hawaiian Education teachers, and improve academic and financial planning.[50] Steps towards expansion in all these areas will further improve reasonable access for all of Hawaiʻi's haumāna and help fulfill the promise of article X, section 4, of the state constitution ratified by the people of Hawaiʻi in 1978.

II. HISTORY OF THE HAWAIIAN EDUCATION PROGRAM

A. *Hawaiian Education: 1978 to 2014*

Before the 1980s, the curriculum in Hawaiʻi's public schools focused on Hawaiian Education was very limited, taught only in certain grades or on specific subjects.[51] In addition, most courses that covered Hawaiian issues focused more on "facts, events, people, environment[,] and geography" and not on the culture and language.[52] Shortly after the enactment of the Hawaiian Education constitutional provision, the Hawaiʻi Department of Education ("HIDOE") created the Hawaiian Studies Program ("HSP") in response to the constitutional requirement to deliver Hawaiian Education.[53] The centerpiece of HSP was launching what is known as the Kūpuna Component of the Hawaiian Education Program.[54] In line with the constitutional mandate that "the use of community expertise . . . be encouraged as [a] suitable and essential means in the furtherance of the Hawaiian educational program," the

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[49] STATE OF HAW. BD. OF EDUC., Policy 105-7, Hawaiian Education (2014) [hereinafter BOE Policy 105-7], https://boe.hawaii.gov/policies/Board%20Policies/Hawaiian%20Education.pdf.

[50] *See id.*

[51] *See* Standing Comm. Rep. No. 57, *in* CONCON PROCEEDINGS, *supra* note 5, at 637–38; *see also History of Hawaiian Education*, *supra* note 25 (indicating that prior to the 1980s, there were no specific curricular requirements to teach Hawaiian Education).

[52] *See* Standing Comm. Rep. No. 57, *in* CONCON PROCEEDINGS, *supra* note 5, at 638.

[53] *See Hawaiian Studies,* STATE OF HAW. DEP'T. OF EDUC. [hereinafter *Hawaiian Studies*], https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/HSP.aspx (last visited Nov. 7, 2023) (describing the Hawaiian Studies program).

[54] *See Hawaiian Studies Program: Kūpuna Component,* STATE OF HAW. DEP'T. OF EDUC. [hereinafter *Kūpuna Component*], https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/Kupuna.aspx (last visited Nov. 7, 2023) (describing the history and evolution of the Kūpuna program).

Kūpuna Component sought to bring community members into classroom spaces.[55]

In addition to the efforts from within HIDOE, the 1978 amendments to the Hawai'i State Constitution provided the structural springboard for activists in the Hawaiian community to push for efforts to revitalize 'Ōlelo Hawai'i through the public school system. One of the most impactful efforts was the founding of the non-profit 'Aha Pūnana Leo by a group of 'Ōlelo Hawai'i educators in 1982.[56] Through their research, the leaders of 'Aha Pūnana Leo revealed a path to supporting the survival and revitalization of 'Ōlelo Hawai'i by implementing Hawaiian-Medium Education schools, modeled after similar programs in New Zealand and the Hawaiian-Medium Education schools that existed during the time of the Hawaiian Monarchy.[57] 'Aha Pūnana Leo selected the Hawaiian phrase "Pūnana Leo," which means "nest of voices," to reflect the method of learning through which the "students are 'fed' solely their native language and culture much like the way young birds are cared for in their own nests."[58]

Over the years, 'Aha Pūnana Leo has seen great success in facilitating families' ability to seek Hawaiian immersion educational opportunities for their keiki,[59] from pre-kindergarten through twelfth grade.[60] The year 1987 saw the first pilot of two Hawaiian Language Immersion Programs at Waiau Elementary on O'ahu, and Keaukaha Elementary School on the east side of Hawai'i Island.[61] Hawai'i's immersion programs "deliver instruction

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[55] HAW. CONST. art. X, § 4; *see Kūpuna Component*, *supra* note 54 (detailing how the Kūpuna program brought those with knowledge of Hawaiian language, culture, and history into schools).

[56] *See Our History,* 'AHA PŪNANA LEO [hereinafter *Our History*, 'AHA PŪNANA LEO], https://www.ahapunanaleo.org/history-hl-1 (last visited Nov. 8, 2023).

[57] *Id.*

[58] *Id.*

[59] PUKUI & ELBERT, *supra* note 18, at 142 (indicating that keiki is the Hawaiian word for child).

[60] *See Kaiapuni Schools – Hawaiian Language Immersion*, STATE OF HAW. DEP'T. OF EDUC. [hereinafter *Kaiapuni Schools*], https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/Hawaiian-language-immersion-schools.aspx (last visited Nov. 8, 2023). Kaiapuni programs can be found on both HIDOE and Public Charter School campuses. *Id.* Most Kaiapuni programs operate on a larger school site housing both English-medium and Kaiapuni programs. *Id.* A few school campuses, such as Ānuenue School and Kamakau Lab Public Charter School have a fully immersive Kaiapuni program in every classroom. *Id.*

[61] *See Hawaiian Language Immersion Program*, STATE OF HAW. DEP'T. OF EDUC. [hereinafter *Hawaiian Language Immersion Program*], https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/translation.aspx (last visited Nov. 8, 2023); *see also Board Minutes of Meeting February 15, 1990,* STATE OF HAW. BD. OF EDUC. [hereinafter *1990 BOE Minutes*], https://drive.google.com/file/d/1yhfFWlzDblGlUnMxSvYR9avorzFsL49U/view (last visited Nov. 8, 2023).

exclusively through the medium of Hawaiian language" and introduce English instruction starting in the fifth grade.[62] As of 2023, twenty-eight out of 294 public and charter schools now offer Kaiapuni programming.[63]

Throughout the 1980s and 1990s, advocacy to expand opportunities for Hawaiian immersion continued at the state legislature, and community stakeholders, such as ʻAha Pūnana Leo, pushed for the passage of laws to codify Kaiapuni as a valid method of educating Hawaiʻi's haumāna.[64] Unfortunately, while 1986 was a critical year in which the legislature lifted the "90-year ban on teaching in Hawaiian in public and private schools,"[65] the legislature provided minimal funding and waited another eighteen years before passing additional legislation related to Hawaiian Education.[66]

In 2004, advocates for Hawaiian Education achieved an important legislative landmark with the enactment of Hawaiʻi Revised Statutes (HRS) § 302H, a chapter singularly focused on Hawaiian Language Medium Education.[67] HRS § 302H-1 codified HIDOE's ability to deliver educational programming "in the medium of Hawaiian language."[68] HRS § 302H-4 also included a provision describing how public schools with students interested in enrolling in Kaiapuni programs may obtain access to such programs:

> When fifteen or more qualified children in any one departmental school district wish to enroll in the Hawaiian language medium education program, the superintendent of education may provide facilities for a Hawaiian language

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[62] *See Hawaiian Language Immersion Program*, *supra* note 61 (describing the first Hawaiian language immersion schools).

[63] *See Kaiapuni Schools*, *supra* note 60 (listing the current Hawaiian language immersion programs in HIDOE and Public Charter Schools); Video Conference Interview with ʻĀnela Iwane, Kaiapuni Educ. Specialist, Haw. Dep't of Educ., Off. of Hawaiian Educ. (June 23, 2022) [hereinafter Iwane Interview] (discussing Hawaiian Education and Ka Papahan Kaiapuni programs).

[64] *See Our History*, ʻAHA PŪNANA LEO, *supra* note 56.

[65] *See id.*; *see also* 1986 Haw. Sess. Laws 50–51 (altering the requirement that no less than fifty percent of the school day be spent teaching "the oral expression, the written composition, and the spelling of the English language" to allow for "special projects using the Hawaiian language as approved by the board of education").

[66] *See* Souza & Walk, *supra* note 22, at 1276–79. Despite enrollment increases, a failure of the state to adequately fund and resource Hawaiian Education, funding remained stagnant and decreased throughout the 1990s, resulting in litigation against the State of Hawaiʻi in 1995 and 1998. *Id.* A settlement in 2000 resulted in an agreement to raise funding from $200,000 to $1,000,000 per year. *Id.*

[67] HAW. REV. STAT. § 302H-1–7 (2004); *see also* STAND. COMM. REP. NO. 3144, 22ND LEG. SESS., *reprinted in* 2004 HAW. SEN. J. 800 (explaining the need for official legislative support of HIDOE, in response to the May 2000 OHA litigation settlement, which created a five year partnership between OHA and HIDOE to implement Hawaiian language programs).

[68] HAW. REV. STAT. § 302H-1 (2004).

> medium education program or provide transportation to the nearest schooling site providing the program, including a charter school site or laboratory school site.[69]

However, despite the legislative intent, the use of "may" in the provision gives HIDOE significant discretion.[70] Even if there were "fifteen or more" haumāna seeking Kaiapuni programming, HIDOE has the ultimate authority to determine when, where, and *if* it offers Kaiapuni programming within a given geographic area or whether it will provide transportation for Kaiapuni students.[71]

Additionally, as with many actions of the state legislature, the passage of the Hawaiian Language Medium Education legislation came with a challenge: the legislature was unwilling to provide immediate funding for expanding Hawaiian language medium programs until HIDOE and BOE could produce a "comprehensive plan by Hawaiian language medium education advocates."[72]

The issue of adequate funding and support is an ongoing challenge for Kaiapuni programming, and Hawaiian Education in general.[73] Since 2004, schools have funded most, if not all, of their school's programming needs via Weighted Student Formula ("WSF") funds, which are specific dollar amounts assigned to each student.[74] While the legislature allocates to HIDOE some standalone Hawaiian Education funding to supplement school budgets,

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[69] *Id*. § 302H-4 (2004).

[70] Interview with Dr. Kalehua Krug, Dir., Ka Waihona o Ka Na'auao Pub. Charter Sch., in Kapolei, Haw. (June 17, 2022) [hereinafter Krug Interview] (discussing Hawaiian Education). Dr. Krug is a subject matter expert on 'Ōlelo Hawai'i and Hawaiian culture-focused frameworks in education. *Id.* Previously Dr. Krug worked as an immersion teacher and educational specialist at both the University of Hawai'i and Hawai'i Department of Education, Office of Hawaiian Education. *Id.*

[71] *Id.* (detailing how the HIDOE's discretion to determine busing opportunities means that many haumana cannot easily commute to Kaiapuni programs).

[72] *See* CONF. COMM. REP. NO. 127-04, 22ND LEG. SESS., *reprinted in* 2004 HAW. SEN. J. 800.

[73] *See* Off. of Hawaiian Affs. v. Dep't of Educ., 951 F. Supp. 1484, 1488 (D. Haw. 1996) In 1995, OHA filed a claim against the State of Hawai'i asserting that the state failed to provide sufficient resources for Hawaiian language programs. *Id.* The case was eventually dismissed on narrow grounds. *Id.*; *see also* discussion *infra* Part II and Section V.C.

[74] *See Weighted Student Formula*, STATE OF HAW. DEP'T. OF EDUC. [hereinafter *Weighted Student Formula*], https://www.hawaiipublicschools.org/VisionForSuccess/SchoolDataAndReports/StateReports/Pages/Weighted-Student-Formula.aspx (last visited Dec. 15, 2023) (explaining how the "Weighted Student Formula is a fair and equitable way to distribute funds for school budgets," providing a "baseline amount per student" as well as "additional funding ('weights') aligned with different student needs and characteristics"); *see also* discussion *infra* Part II and Section V.C.

it has never been enough.[75] The cost of curricular materials and support required for the delivery of Hawaiian Education and Kaiapuni is often higher than regular school curricula.[76] "Off-the-shelf"[77] curriculum is unavailable, and teachers often have to produce and duplicate materials at the school level.[78] Even in schools with well-established Kaiapuni programs, administrators frequently have to balance the competing priorities of English-medium programs against the needs of Kaiapuni programs.[79] For example, unlike in gifted and talented programs where haumāna are assigned additional funding, Kaiapuni haumāna are given no such consideration.[80]

Underfunding and lack of resources contributed to the difficulties HIDOE faced getting a Hawaiian Education program up and running. Despite HIDOE's best efforts, the Hawaiian Studies Program had a rough start in Hawaiʻi's public schools.[81] The Kūpuna Component's initial rollout was

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[75] Krug Interview, *supra* note 70 (discussing the need for more robust funding for Kaiapuni programs).

[76] Iwane Interview, *supra* note 63; Interview with Wilbert Holck, Exec. Dir., Haw. State Tchrs. Ass'n, in Honolulu, Haw. (June 1, 2022) [hereinafter Holck Interview] (discussing the added costs of Kaiapuni programs); *see also Teacher Shortage Crisis Forces Principals to Hire Hawaiian Immersion Teachers Who Don't Speak Hawaiian*, HAW. STATE TCHRS. ASS'N (Nov. 14, 2019) [hereinafter *Teacher Shortage Crisis*], https://www.hsta.org/news/recent-stories/teacher-shortage-crisis-forces-principals-to-hire-hawaiian-immersion-teachers-who-dont-speak-hawaiian/.

[77] Sarah Schwartz, *Off-the-Shelf or Custom-Made? Why Some Districts Are Designing Their Own Curriculum,* EDUCATIONWEEK (Sept. 29, 2022), https://www.edweek.org/teaching-learning/off-the-shelf-or-custom-made-why-some-districts-are-designing-their-own-curriculum/2022/09 (describing the nature of "off-the-shelf" curriculum and the need for more culturally responsive customized materials).

[78] Iwane Interview, *supra* note 63; Holck Interview, *supra* note 76. To produce high quality curriculum materials such as textbooks, workbooks, handouts, and other materials, teachers must spend considerable time outside of work generating these printed materials. Iwane Interview, *supra* note 63; Holck Interview, *supra* note 76. Further, the need to reproduce materials on duplication machines at each school increases costs for delivery of Kaiapuni. Iwane Interview, *supra* note 63; Holck Interview, *supra* note 76; *see Teacher Shortage Crisis*, *supra* note 76.

[79] Krug Interview, *supra* note 70. Principals who have Kaiapuni programs on their campus must balance spending to ensure both English language and Kaiapuni program needs are met. *Id.* Because of the higher cost for things like curriculum, and no additional weighted funds allocated to Kaiapuni to offset those costs, principals have to make difficult decisions, often leaving Kaiapuni programs to make do with less. *Id.*

[80] *See Weighted Student Formula*, *supra* note 74 (discussing that while some students, such as gifted and talented and English language learners, are assigned a higher formula for weighted student formula funding, Kaiapuni students are not calculated at a higher weighted student formula rate).

[81] *See* THE AUDITOR, STATE OF HAW., *Management Audit of the Department of Education's Hawaiian Studies Program: A Report to the Governor and the Legislature of the State of Hawaiʻi, Report No. 08-02*, at 3 (2008) [hereinafter *Hawaiian Education Audit*], https://files.hawaii.gov/auditor/Reports/2008/08-02.pdf.

poorly implemented, with vague guidelines and a lack of proper oversight, leading to longstanding dissatisfaction among families and stakeholders.[82] For example, HIDOE failed to provide Kūpuna training, time to prepare lessons, and often failed to pay community members for working.[83] In 2007, the state legislature called for an audit of the Hawaiian Studies Program, and the state auditor's findings were critical of HIDOE.[84] In particular, the audit exposed frequent misuse of funds, with nearly three million in resources diverted for "purposes with little or no connection to a Hawaiian education."[85] Additionally, the audit revealed that over twenty schools used the funding for things such as computers and furniture despite discontinuing their Kūpuna Component.[86] Some schools even purchased culturally inappropriate curricula contrary to BOE policy.[87]

Unfortunately, the Great Recession hit Hawai'i's shores shortly after the 2008 audit, and the state government's attention turned to budget cuts, Furlough Fridays, and keeping public schools open as much as possible.[88] Therefore, while the money from Hawai'i's hurricane relief fund in 2010 addressed some of the immediate budget woes, the severe budget restrictions continued, and it would be at least five years before HIDOE could move on.[89]

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[82] *Id.* at 10, 29.

[83] *Id.* at 27; *see infra* notes 186–89 and accompanying text.

[84] *Hawaiian Education Audit*, *supra* note 81, at 27.

[85] *Id.*

[86] *Id.*

[87] *Id*. at 37. Schools were required, per BOE Policy 2240, to purchase textbooks from an approved list or justify selections not on the list. *Id.*; *see Instructional Materials Policy*, State of Haw. Bd. of Educ., (last amended Jan. 5, 2006), https://boe.hawaii.gov/policies/2200series/Pages/2240.aspx. Some schools purchased and used a textbook entitled *Hawaiians of Old*, which was not on an approved list as the University of Hawai'i found the textbook inappropriate due to its "preponderance of sadism and violence," and portrayal of pre-contact Hawai'i as a "dark and scary world with merciless rulers, senseless rules, and harsh life or death consequences." *Hawaiian Education Audit*, *supra* note 81.

[88] *See* Beth Giesting, *Furlough Fridays, and Other Recession Lessons*, HAW. BUDGET & POL'Y CTR (July 9, 2023, 9:00 AM), https://www.hibudget.org/blog/furlough-fridays-recession-lessons-hawaii (describing the draconian cuts made to public education between 2008 and 2011 to balance lost revenue from the great recession).

[89] *See State Fiscal Reserves*, DEP'T. OF BUDGET & FIN., https://budget.hawaii.gov/budget/about-budget/state-fiscal-reserves/ (last visited Nov. 8, 2023) ("Act 143. . . appropriated $67.0 million from [the Hurricane Relief Fund] . . . to restore public school instructional days for school year 2010-11 that were reduced as part of a cost cutting, collective bargaining agreement that furloughed public school teachers for 21 days of which 17 were instructional days."); Giesting, *supra* note 88; Holck Interview, *supra* note 76 (discussing the difficulty of the fiscal cuts between 2008 and 2013).

B. *Hawaiian Education: 2014 to Present*

Despite the Great Recession, the 2008 Hawaiian Education audit was not forgotten; it created enough political pressure for BOE to reevaluate its policies surrounding HIDOE's implementation of Hawaiian Education.[90] In 2011, under the guidance of the newly appointed BOE Chairperson Don Horner, a BOE task force began to audit, reorganize, and revise all BOE policies, seeking to create "policies that describe[d] the outcomes the Board [was] seeking for the educational system."[91] Horner tasked BOE Student Achievement Committee Chairperson Cheryl Kaʻuhane Lupenui with revising the policies on Hawaiian Education and Kaiapuni.[92] For over a year, Lupenui led more than forty stakeholder meetings to revise two policies: BOE Policy 105-7 addressing Hawaiian Education, and BOE Policy 105-8 addressing Ka Papahana Kaiapuni.[93]

The passage of the revised Hawaiian Education and Kaiapuni policies in 2014 marked a significant shift; BOE finally strengthened its backing and prioritized providing adequate support for Hawaiian Education.[94] The strengthened support included a directive to the school superintendent to allocate resources for personnel, curriculum, and professional development for Hawaiian Education.[95] Significantly, the revised policies moved Hawaiian Education from under the Office of Curriculum Instruction & Student Support, elevating the status of Hawaiian Education within HIDOE and creating a standalone Office of Hawaiian Education ("OHE").[96] The revised policies also called for the OHE Director to have a place on the

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[90] *See Board Policies*, STATE OF HAW. BD. OF EDUC., https://boe.hawaii.gov/policies/Pages/Board-Policies.aspx (last visited Nov. 8, 2023); *see also BOE Sets Firm Support of Hawaiian Education,* STATE OF HAW. BD. OF EDUC. (Feb. 18, 2014), https://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/BOE-sets-firm-support-of-Hawaiian-Education.aspx (describing BOE's year-long effort to work with stakeholders to revise BOE policies for the advancement of Hawaiian Education).

[91] *See Board Policies*, STATE OF HAW. BD. OF EDUC., https://boe.hawaii.gov/policies/Pages/Board-Policies.aspx (last visited Nov. 8, 2023); Michael Keeny & Tiffany Hill, *"The Death of Public School": Ten Years Later*, HONOLULU MAG. (May 2, 2011), https://www.honolulumagazine.com/the-death-of-public-school-ten-years-later/ (explaining that prior to 2011, BOE was an elected body and Horner became the first governor-appointed Board of Education chair).

[92] *See BOE sets firm support of Hawaiian Education*, STATE OF HAW. BD. OF EDUC. (Feb. 18, 2014), https://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/BOE-sets-firm-support-of-Hawaiian-Education.aspx.

[93] BOE Policy 105-7, *supra* note 49; STATE OF HAW. BD. OF EDUC., Policy 105-8, Ka Papahana Kaiapuni (2014) [hereinafter BOE Policy 105-8], https://boe.hawaii.gov/policies/Board%20Policies/Hawaiian%20Education.pdf.

[94] BOE Policy 105-7, *supra* note 49.

[95] *Id.*

[96] *Id.*

Superintendent's leadership team, singling out Hawaiian Education as the only subject matter to have such priority.[97] Along with the elevation of OHE, Policy 105-8 outlined BOE's goals and expectations for Kaiapuni programs and required HIDOE to develop a strategic plan for the program to ensure that "[e]very student within the State of Hawai'i's public school system . . . ha[s] reasonable access to the Kaiapuni Educational Program."[98]

Unfortunately, despite BOE's efforts in 2014 to provide reasonable access, the expansion of Kaiapuni schools remains very slow.[99] With only twenty-eight Kaiapuni programs and schools across the state, 'Ōlelo Hawai'i advocates continue to criticize HIDOE for failing to implement additional Kaiapuni programs.[100] However, HIDOE must first determine whether there is an adequate demand within a geographic area to support opening a

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[97] *See id.* BOE Policy 105-7 created a standalone Office of Hawaiian Education and recognized that Hawaiian Education holds added significance as a subject matter and priority of the Board of Education. *See Office of Hawaiian Education*, OHE HUB, https://sites.google.com/k12.hi.us/ohehub/office-of-hawaiian-education?authuser=0 (last visited Sept. 18, 2023). The creation of a director position elevated Hawaiian Education as an area of curricular focus with priority at the highest levels of HIDOE. *Id.*; *see Department Advances Hawaiian Education,* STATE OF HAW. DEP'T. OF EDUC. (Feb. 3, 2015), https://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/Hawaiian-Ed.aspx (describing the importance of the Office of Hawaiian Education Director position in providing "organizational leadership for growth of Ka Papahana Kaiapuni").

[98] BOE Policy 105-8, *supra* note 93; *see* Clarabal v. Dep't. of Educ., 145 Hawai'i 69, 71, 446 P.3d 986, 988 (2019). Clarabal's directive also reflects BOE Policy 105-8:

> On review, we hold that the Hawaiian education provision was intended to require the State to institute a program that is *reasonably* calculated to revive the Hawaiian language. Because the uncontroverted evidence in the record demonstrates that providing *reasonable* access to Hawaiian immersion education is currently essential to reviving the Hawaiian language, it is a necessary component of any program that is *reasonably* calculated to achieve that goal. The State is therefore constitutionally required to make all *reasonable* efforts to provide access to Hawaiian immersion education.

Clarabal, 145 Hawai'i at 71, 446 P.3d at 988 (emphases added).

[99] *See* Krug Interview, *supra* note 70.

[100] *Id.*; *see* HAA Honolulu, *The State of Hawaiian Education: Hōike Ea 2022,* YOUTUBE (July 24, 2022) [hereinafter *Hawaiian Education a Critical Discussion*], https://www.youtube.com/watch?v=1bgkWv_7KZo (recording a panel discussion on the state of Hawaiian Education). The panel was moderated by 'Ilima Long, and the panelists included Kalehua Krug, Kahele Dukelow, Kaleikoa Ka'eo, and Hiapo Perreira. *Hawaiian Education a Critical Discussion*, *supra*. The panel discussed the challenges of providing quality educational programing while also addressing the lack of availability of Kaiapuni and other Hawaiian Education programing, the challenges of Kaiapuni quality versus quantity, the lack of 'Ōlelo Hawai'i teachers, and whether partial access to an 'Ōlelo Hawai'i immersion program is better than no access. *Id.*

Kaiapuni program.[101] But determining whether there is an adequate demand is also challenging because HIDOE has no accurate or practical means of measuring the community demand for Kaiapuni programs.[102] In addition, HIDOE's determination of community demand for Kaiapuni programs may not accurately reflect the true demand as many parents are ill-informed of their ability to seek such access for their keiki.[103]

However, BOE's focus on recognizing the importance of the Indigenous language and culture of Hawaiʻi did not stop in 2014.[104] A year after revising the Hawaiian Education and Kaiapuni policies, BOE passed policy E-3: Nā Hopena Aʻo ("HĀ").[105] HĀ is a "framework of outcomes that reflects the HIDOE's core values and beliefs in action throughout the public educational system."[106]

Despite attempts by HIDOE and BOE to improve their efforts towards Hawaiian Education, it was not fast enough for many parents and community members who had run out of patience and sought ways to compel HIDOE to create more opportunities for Hawaiian Education.

III. LEGAL CHALLENGES TO HAWAIIAN EDUCATION

HIDOE's early attempts to provide access to Hawaiian Education were wholly inadequate, leading to litigation by the Office of Hawaiian Affairs

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[101] *Id.*

[102] *Id.* Some Kaiapuni advocates push for multiple locations to ensure adequate access, while others advocate for a Kaiapuni model prioritizing limited resources, whereby community demand needs to be evident before a program should open. *Id*.

[103] *See id.*; Video Conference Interview with Dawn Kauʻi Sang, Dir., Off. Hawaiian Educ., in Honolulu, Haw. (June 3, 2022) [hereinafter Sang Interview] (discussing the current and future work of OHE, providing information regarding the recent program launched at Kailua High School, and unexpected additional enrollment requests from haumāna who previously participated in K-6 Kaiapuni programs but had moved to English medium programs in middle school) Because there are limited options for access to Kaiapuni programing beyond 6th grade on Oʻahu, it is not uncommon for haumāna to switch to English-medium schools in the 7th grade. Sang Interview, *supra*.

[104] *See* Clarabal v. Dep't. of Educ., 145 Hawaiʻi 69, 77, 446 P.3d 986, 994 (2019).

[105] STATE OF HAW. BD. OF EDUC., Policy E-3, Nā Hopena Aʻo ("HĀ") (2015) [hereinafter BOE Policy E-3], https://boe.hawaii.gov/policies/Board%20Policies/Nā%20Hopena%20A'o%20(HĀ).pdf (explaining that the HIDOE Superintendent tasked OHE with pilot implementation of the HĀ framework to "identify the best strategy to inform future expansion of [the] work"); *Nā Hopena Aʻo (HĀ)*, STATE OF HAW. BD. OF EDUC., https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/HA.aspx (last visited Nov. 10, 2023).

[106] BOE Policy E-3, *supra* note 105 (highlighting that HĀ established six outcomes for students rooted in Hawaiʻi: "a sense of belonging, responsibility, excellence, aloha, total-well-being and Hawaii").

("OHA") in 1995.[107] In *Office of Hawaiian Affairs v. Department of Education*, OHA asserted that BOE and HIDOE violated state and federal law by failing to provide sufficient resources, such as classrooms, learning materials, and teachers, for Hawaiian language programs.[108] OHA alleged that BOE and HIDOE violated article X, section 4 of the Hawai'i State Constitution "by failing 'to provide a comprehensive Hawaiian education program' and failing to encourage 'community expertise' to develop Hawaiian-language programs and teachers," as well as failing to support the "customary rights" for the use of Hawaiian language protected by HRS § 1–1.[109] Additionally, OHA's lawsuit asserted a violation of the Native American Languages Act ("NALA") of 1990 and the First and Fourteenth Amendments of the U.S. Constitution.[110] NALA preserves, protects, and promotes Native Americans' rights to have education in their own languages.[111]

Unfortunately, OHA's attempt to address significant underfunding issues and seek better government support for Hawaiian Education and Kaiapuni schools was unsuccessful.[112] The court dismissed each of OHA's claims on narrow grounds; most crushing was the court's failure to find an affirmative duty on the State "to promote [the] Hawaiian language through funding immersion programs."[113] The court also held that if NALA were to apply to the State of Hawai'i, it would "at most, . . . prevent[] the State from barring the *use* of Hawaiian languages in schools."[114]

While OHA's suit was unsuccessful in establishing a federal law cause of action, further litigation filed in 1998 led to a settlement in which HIDOE

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[107] *See* Off. of Hawaiian Affs. v. Dep't of Educ., 951 F. Supp. 1484, 1487–88 (D. Haw. 1996).

[108] *Id.*

[109] *Id.* at 1487. Section 1–1 of the Hawai'i Revised Statutes established the "common law of England" as the law of the State of Hawai'i, except as provided by the "Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage." *Id.*; HAW. REV. STAT. § 1–1. While OHA argued that § 1-1 required the state to protect the "customary rights" of Hawaiians to use the Hawaiian language, the court remanded the state law claims to state court citing the Eleventh Amendment of the U.S. Constitution. *Off. of Hawaiian Affs.*, 951 F. Supp. at 1487.

[110] *Id*. (holding that while the case started in state court, the HIDOE quickly sought and successfully moved the case into federal court and U.S. District Court Judge Alan Kay's decision articulated the many legal barriers to OHA's success while acknowledging that legislative efforts supported Hawaiian-language revitalization); 25 U.S.C.A. § 2904.

[111] *See* Souza & Walk, *supra* note 22, at 1276–77.

[112] *Off. of Hawaiian Affs.*, 951 F. Supp. at 1501.

[113] *See id.* at 1494–95, 1498 (ruling in favor of the state's sovereign immunity and holding that NALA is merely a policy goal to encourage and promote the use of native language, and created no private right of action).

[114] *Id.* at 1495 (emphasis added).

agreed to increase funding for Kaiapuni programs.[115] At the time of settlement in 2000, HIDOE set aside roughly 1.5 million dollars for Kaiapuni program support.[116] OHA also committed additional funding to help support the needs of Hawaiian-medium schools.[117] In addition, OHA established a trust fund, which OHE administers, and provides approximately $175,000 annually for special Hawaiian Education projects.[118]

With only twenty-eight schools statewide,[119] access to Kaiapuni programs remains very limited despite BOE's recent efforts to establish policies supporting Hawaiian Education. The lack of access to any Kaiapuni program on the island of Lānaʻi led to the Clarabal litigation in October 2014.[120] Before 2013, the Clarabal ʻohana lived in Maui where the Clarabal keiki were enrolled in the Kaiapuni program at Pāʻia Elementary.[121] Then, in 2013, the Clarabal ʻohana moved to the island of Lānaʻi where there were no Kaiapuni programs.[122] Because of their prior immersion experience, the Clarabal's two daughters could only read and write in ʻŌlelo Hawaiʻi.[123] The Clarabal keiki struggled academically throughout their first year at the Lānaʻi school.[124] They were reprimanded for doing their work in ʻŌlelo Hawaiʻi, and one keiki had to repeat a grade.[125] The Clarabal ʻohana worked with school officials

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[115] *See* Souza & Walk, *supra* note 22, at 1278.

[116] *See id.*

[117] *See id.*

[118] *See Fiscal Year 2021 Appropriation Summary,* STATE OF HAW. DEP'T. OF EDUC. [hereinafter *Fiscal Year 2021 Appropriations*], https://www.hawaiipublicschools.org/DOE%20Forms/budget/FY2021-Act-9-Appropriation-Summary.pdf (last visited Nov. 10, 2023); Iwane Interview *supra* note 63.

[119] *See Kaiapuni Schools*, *supra* note 60; *see also Fiscal Year 2021 Appropriations*, *supra* note 118. While twenty-eight offerings of Kaiapuni across the state may seem adequate, most of the programs are not K-12. *Kaiapuni Schools*, *supra* note 60. For example, on Hawaiʻi Island there is only one elementary non-charter Kaiapuni program and on Lānaʻi there is only K-1 instruction in ʻŌlelo Hawaiʻi. *Id.* While funding for Hawaiian Education has increased to approximately 5.5 million dollars a year, the total funds set aside by HIDOE for all Hawaiian Education and Kaiapuni programs is still less than one-half of one percent (0.28%) of the overall two billion-dollar HIDOE budget. *Fiscal Year 2021 Appropriations*, *supra* note 118.

[120] *See* Clarabal v. Dep't. of Educ., 145 Hawaiʻi 69, 77, 446 P.3d 986, 994 (2019); *see also* Video Conference Interview with Sharla Manley, former Litig. Dir., Native Hawaiian Legal Corp. (July 22, 2022) [hereinafter Manley Interview] (discussing her role as lead counsel in *Clarabal v. Dep't of Educ*., the significant barriers the Clarabal ʻohana faced in seeking Kaiapuni programing for their keiki on Lānaʻi, and the intense reluctance from the school administration due to alleged resistance within the school staff to use school resources for a Kaiapuni program).

[121] *Clarabal*, 145 Hawaiʻi at 77, 446 P.3d at 994.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at n.17

over an entire year, relying on promises from the school's administration that there would be a Kaiapuni teacher available in the 2014–2015 academic year.[126] Yet, when Ms. Clarabal showed up on the first day of school with her keiki, the classroom was empty because the school had failed to secure a Kaiapuni teacher.[127] Thus, the Clarabal ‘ohana felt they had no choice but to take legal action against HIDOE.[128]

The Clarabals' lawsuit centered around HIDOE's failure to provide a Kaiapuni program on Lāna‘i, which was required under article X, section 4 of the Hawai‘i Constitution.[129] In 2019, the Hawai‘i Supreme Court ruled in favor of the Clarabal ‘ohana and held:

> [T]he Hawaiian education provision was intended to require the State to institute a program that is reasonably calculated to revive the Hawaiian language. Because the uncontroverted evidence in the record demonstrates that providing reasonable access to Hawaiian immersion education is currently essential to reviving the Hawaiian language, it is a necessary component of any program that is reasonably calculated to achieve that goal. The State is therefore constitutionally required to make all reasonable efforts to provide access to Hawaiian immersion education.[130]

Although the court remanded the case for a further determination on whether HIDOE "ha[d] taken all reasonable measures to provide access to a Hawaiian immersion program to Clarabal's two daughters," the parties later reached a settlement outside of court.[131] Afterward, OHE helped launch the first combined grade K-1 Kaiapuni program on Lāna‘i School's campus

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[126] *Id.*; Manley Interview, *supra* note 120 (discussing how the school administration led the Clarabals to believe that a Kaiapuni program would open on Lāna‘i in school year 2014–15. The Clarabals were encouraged to and helped to prepare the classroom. However, there was no teacher on the first day of school and the position was still vacant weeks later and never filled).

[127] *See Clarabal*, 145 Hawai‘i at 77, 446 P.3d at 994.

[128] *Id.*; Manley Interview *supra* note 120.

[129] *See Clarabal*, 145 Hawai‘i at 77–78, 446 P.3d at 994–95.

[130] *See id.* at 71, 446 P.3d at 988.

[131] *See id.* at 87*,* 446 P.3d at 1005; *see also* Suevon Lee, *Lanai School Gets Hawaiian Immersion Classroom*, HONOLULU CIV. BEAT (Oct. 6, 2021), https://www.civilbeat.org/2021/10/lanai-school-gets-hawaiian-immersion-classroom/ (reporting that although the case was remanded for further determination, the parties subsequently reached a settlement. However, HIDOE and the Clarabal ‘ohana have not publicly disclosed any information on the terms of the settlement agreement).

during the 2021–2022 academic year, seven years after the lawsuit was first filed.[132]

While the Hawaiʻi Supreme Court did not specify what it considered to be reasonable access, it did indicate that the school's previous efforts, such as hiring a long-term substitute teacher to provide three hours of weekly instruction in ʻŌlelo Hawaiʻi, were likely insufficient.[133] The court also suggested possible steps to remedy the issue on Lānaʻi, including financial incentives to attract teachers, providing transportation on and off-island, utilizing more than one teacher for instruction, using community members who know ʻŌlelo Hawaiʻi, modifying the school schedule, or "any other alternative method of providing access to a Hawaiian immersion program."[134] While all of the options proposed by the court could be utilized, all of them would require the state to make a more concerted effort to address funding priorities for Hawaiian Education.[135]

While *Clarabal* established a constitutional mandate for reasonable access to Kaiapuni in our public schools, many factors continue to affect HIDOE's ability to fully deliver the promise of Hawaiian Education, including a need to strengthen and expand funding and teacher licensing,[136] increased professional development coursework for all employees,[137] improvements in Academic and Financial planning for all schools,[138] and an update to assess the success of HIDOE efforts since the 2008 audit of Hawaiian Education.[139]

IV. ENSURING QUALITY TEACHERS: HAWAIʻI TEACHER STANDARDS BOARD

Qualified teachers must be available to staff the Kaiapuni classrooms for HIDOE to increase access to Kaiapuni programs across the state. But like in other states across the nation, individuals must hold a license or a special permit issued by the Hawaiʻi Teachers Standards Board ("HTSB"), the licensing authority for Hawaiʻi public school teachers, before they can teach.[140] Such licensing can be a significant barrier to those who speak ʻŌlelo Hawaiʻi but do not have the traditional teaching credentials, such as a four-year teaching degree.

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[132] *See* Lee, *supra* note 131.

[133] *See Clarabal*, 145 Hawaiʻi at 92–93, 446 P.3d at 1009–10.

[134] *Id.* at 87, 446 P.3d at 1004.

[135] *See Fiscal Year 2021 Appropriations*, *supra* note 118; *see supra* notes 72–80 and accompanying text (discussing HIDOE's pre-existing funding challenges).

[136] *See infra* Section V.A.

[137] *See infra* Section V.B.

[138] *See infra* Section V.C.

[139] *See infra* Section V.D.

[140] *See* HAW. REV. STAT. § 302A-801, -805 (2001).

Like BOE's Hawaiian Education policies, HTSB has promulgated several administrative rules in support of the growing need for teachers of Hawaiian culture, history, and ʻŌlelo Hawaiʻi.[141] Initially, HTSB provided no option to seek a license in any area of Hawaiian Education, forcing many to pursue licensing in social studies or in a foreign language.[142] However, in 2002, the HTSB appointed a Hawaiian Studies Panel to study and make recommendations for establishing a license in Hawaiian Studies.[143] The work of the panel has evolved into the current Hawaiian Focus Workgroup, formed in 2022, to review both licensing standards and teacher preparation programs to ensure the needs of Hawaiian Education programs across the state are met.[144]

Over the last twenty years, various licensure types related to Hawaiian Education have been approved.[145] Advocates for Hawaiian Education emphasized the importance of ensuring haumāna enrolled in Kaiapuni schools have access to a teacher fluent in ʻŌlelo Hawaiʻi.[146] Unfortunately, despite the increase in available licenses related to Hawaiian Education, the number of vacancies for licensed teachers who possess knowledge of Hawaiian history, culture, and ʻŌlelo Hawaiʻi expertise continue to be at critical levels.[147] Hawaiʻi has some of the highest teacher turnover and vacancy rates nationwide[148] and impacts on Kaiapuni programs are even

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[141] Interview with Felicia Villalobos, Exec. Dir., Haw. Tchrs. Standards Bd. (HTSB), in Honolulu, Haw. (June 3, 2022) [hereinafter Villalobos Interview] (discussing HTSB work related to in-state educator preparation programs and Hawaiian special permit and teacher licensing for areas of Hawaiian language, knowledge, culture, and Kaiapuni).

[142] *Id.*

[143] *Id.*

[144] *Id.* (discussing how because some educators have expressed confusion regarding the nuanced differences in the five Hawaiian Education license types, the panel is considering combining and streamlining the areas into two to three licenses).

[145] *See License Fields,* STATE OF HAW., HAW. TCHR. STANDARDS BD., https://hawaiiteacherstandardsboard.org/content/wp-content/uploads/License-Fields-5-5-21.pdf (last visited Nov. 10, 2023).

[146] Sang Interview, *supra* note 103; Krug Interview, *supra* note 70; Heather & Obrey Interview, *supra* note 43.

[147] *See Office of Hawaiian Education Seeks Teachers for Kaiapuni and Hawaiian Knowledge Classrooms,* HAW. STATE DEP'T. OF EDUC. (Mar. 18, 2019) [hereinafter *Office of Hawaiian Education Seeks Teachers for Kaiapuni and Hawaiian Knowledge Classrooms*], https://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/OHE-seeks-Kaiapuni-teachers.aspx.

[148] *See* The Associated Press, *Hawai'i Teacher Retention Rate Hovers Just Above 50%*, HAW. PUB. RADIO (Jan. 22, 2022, 9:30 AM), https://www.hawaiipublicradio.org/local-news/2022-01-22/hawaii-teacher-retention-department-of-education; Matt Barnum, *Teacher Turnover Hits New Highs Across the U.S.*, CHALKBEAT (Mar. 6, 2023, 12:00 AM), https://www.chalkbeat.org/2023/3/6/23624340/teacher-turnover-leaving-the-profession-quitting-higher-rate.

more significant.[149] Although Kaiapuni offerings are expanding, the number of Kaiapuni teacher vacancies continues to increase, from thirty-one openings in 2017 to seventy-five in 2022.[150]

In 2016, in line with Hawaiʻi Administrative Rules title 8, HTSB approved the establishment of a special permit in Kaiaʻōlelo-Kaiapuni Hawaiʻi, Hawaiian Language Immersion, and Hawaiian Knowledge.[151] Anyone from the community may apply for a special permit to teach in Kaiapuni programs in public schools for up to five years, renewable for a total of ten years, even if they have no university-level education.[152]

While not ideal, the Hawaiian special permit serves as a temporary stopgap in the system. The special permit system, however, does not support the long-term need for fully licensed teachers who have both Hawaiian knowledge and traditional western university pedagogy in the field of education.[153] Many institutions support the implementation of the Hawaiian special permit, including OHA, Kamehameha Schools, the ʻAha Kauleo Hawaiian Language Immersion Advisory Council, and OHE.[154] Supporters of the special permit argue that cultural knowledge combined with fluency in ʻŌlelo Hawaiʻi is a unique skill set that haumāna in Kaiapuni schools need much more than the western pedagogy learned in traditional teacher preparation programs.[155]

The initial rollout of the Hawaiian special permit program encountered difficulties because there was no existing plan that would allow those with a permit to easily work toward a teaching credential and full licensure.[156]

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[149] Holck Interview, *supra* note 76 (discussing HSTA's efforts to end the teacher shortage crisis and the high teacher vacancy rates in Hawaiʻi's public schools); *see Ending Hawaiʻi's Teacher Shortage Crisis,* HAW. STATE TCHRS. ASSOC., https://www.hsta.org/crisis/ (last visited Nov. 10, 2023) (outlining HSTA's goals to develop and expand programs to attract new teachers and retain existing ones).

[150] Iwane Interview, *supra* note 63.

[151] HAW. ADMIN. R. § 8-54-9.6 (LEXIS through 2023); *see also New Business Item 16-06 Hawaiian Language Immersion Licenses and Permits,* STATE OF HAW., HAW. TCHR. STANDARDS BD. [hereinafter HTSB NBI 16-06], https://hawaiiteacherstandardsboard.org/content/wp-content/uploads/2016-2017_NBI-16-06-Hawaiian-Language-Immersion-Licenses-and-Permits.pdf (last visited Nov.10, 2023) (approving criteria for awarding special permits to eligible individuals to fill critical shortage vacancies in needed fields).

[152] HAW. ADMIN. R. § 8-54-9.6 (LEXIS through 2023).

[153] *See* HTSB NBI 16-06, *supra* note 151; Iwane Interview, *supra* note 63.

[154] *See Office of Hawaiian Education Request Regarding Hawaiian Language Immersion Teachers Temporary Permit and License, Report by: HSTB Executive Director Lynn Hammonds,* STATE OF HAW. DEP'T. OF EDUC., HAW. TCHR. STANDARDS BD., (on file with author provided by HTSB); Villalobos Interview, *supra* note 141.

[155] Krug Interview, *supra* note 70 (discussing how the cultural and linguistic competency of Kaiapuni teachers is critical for delivery of a high-quality and culturally appropriate Kaiapuni program, and how without such competency, Kaiapuni programs will struggle for success even if the teachers have traditional educational pedagogy preparation).

[156] Iwane Interview, *supra* note 63.

However, OHE quickly recognized the expectation gap and worked with HTSB to remedy the permit system and implement yearly evaluations and accountability checks to ensure progress towards a teaching degree.[157] Today, individuals seeking a Hawaiian special permit must work with OHE, which verifies that each permittee is fluent in ʻŌlelo Hawaiʻi, has completed thirty hours of teacher induction professional development, and has submitted a cultural growth and development plan working towards teacher licensure.[158]

While the special permit serves to meet the state's immediate need for Kaiapuni teachers fluent in ʻŌlelo Hawaiʻi, the licensing board and local universities are also working to increase the total number of licensed teachers.[159] As a result, Hawaiʻi Administrative Rules title 8, section 54-19, requires educator preparation programs to provide "evidence that their [teacher] candidates are prepared to incorporate . . . into their practice: the integration of Hawaiian language, history and culture in order to promote and perpetuate traditional ways of knowing, learning and teaching."[160] To ensure that every educator pursuing an in-state teaching degree will be aware of Hawaiian Education, all educator preparation programs offered in the State of Hawaiʻi, not just the Kaiapuni preparation programs, must meet this requirement regardless of the education degree sought.[161] Currently, each in-state educator preparation program, both private and public, must provide HTSB proof of their efforts to meet the requirement for integration of Hawaiian Education into their programs.[162]

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[157] *Id.*

[158] *See* HTSB NBI 16-06, *supra* note 151; Iwane Interview, *supra* note 63; *see also Office of Hawaiian Education Seeks Teachers for Kaiapuni and Hawaiian Knowledge Classrooms*, *supra* note 147 (requiring permit holders to complete thirty hours of induction professional development, providing teachers with HIDOE orientation and support as new teachers). Each permit holder must develop their cultural growth and development plan, showing evidence of working towards the coursework required to obtain full teacher licensure. *Office of Hawaiian Education Seeks Teachers for Kaiapuni and Hawaiian Knowledge Classrooms, supra* note 147.

[159] Video Conference Interview with Kahea Faria, Assistant Specialist, Univ. of Haw. at Mānoa, Inst. for Tchr. Educ. (June 15, 2022) [hereinafter Faria Interview] (discussing teacher preparation programs. Ms. Faria is a native speaker, raised on the island of Niʻihau, and currently works supporting teacher candidates, especially those seeking work in Hawaiian Education. Ms. Faria is a subject matter expert in ʻŌlelo Hawaiʻi and Hawaiian culture-focused frameworks in education).

[160] HAW. ADMIN. R. § 8-54-19 (LEXIS through 2023).

[161] *Id.*; Villalobos Interview, *supra* note 141 (explaining that the HAR requirement helps ensure that each educator pursuing an in-state teaching degree will be aware of Hawaiian Education, irrespective of the degree subject matter).

[162] HAW. ADMIN. R. § 8-54-19 (LEXIS through 2023).

However, accomplishing this requirement remains a challenge, as many programs lack staff with subject matter expertise in Hawaiian Education.[163] For example, the University of Hawaiʻi at Mānoa offers over fifteen educator licensure pathways, including elementary, multiple secondary subjects, and specialty areas such as early childhood and special education, making it nearly impossible to provide resources and staff to support the integration of Hawaiian Education into each program.[164] It is also challenging for educator preparation programs to find ways to incorporate such requirements into the existing curricula plans for each of the educator degree programs and licensure pathways.[165]

Additionally, unlike states such as Alaska, North Dakota, and South Dakota, which require their educators to complete coursework related to the Indigenous peoples of that area,[166] Hawaiʻi does not require out-of-state applicants to show competency in Hawaiian Education.[167] A lack of exposure to the unique context of teaching in Hawaiʻi's public schools is further compounded by forty-two percent of the newly employed teachers in Hawaiʻi graduating from out-of-state teacher preparation programs, and nearly twenty-eight percent having no teacher preparation coursework.[168] Teacher unfamiliarity with Hawaiian Education must be addressed, as understanding these areas is "essential in the fulfillment of their roles as educators."[169]

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[163] Villalobos Interview, *supra* note 141; Faria Interview, *supra* note 159.

[164] *See College of Education: School for Teacher Education,* UNIV. OF HAW. AT MĀNOA, COLL. OF EDUC., https://manoa.hawaii.edu/catalog/schools-colleges/education/ste/ (last visited Nov. 10, 2023).

[165] Faria Interview *supra* note 159.

[166] *See Teacher License Reciprocity Guidelines by State,* CONCORD UNIV., DEP'T. OF EDUC. CERTIFICATION [hereinafter *Teacher License Reciprocity Guidelines by States*], https://concord.edu/wp-content/uploads/Academics/PDF/Teacher-Education-Reciprocity-Guidelines-by-State.pdf (last visited Nov. 10, 2023).

[167] Villalobos Interview *supra* note 141; *see Teacher License Reciprocity Guidelines by State, supra* note 166.

[168] *See* STATE OF HAW. DEP'T. OF EDUC., EMPLOYMENT REPORT SCHOOL YEAR 2021–2022 [hereinafter EMPLOYMENT REPORT], https://www.hawaiipublicschools.org/Reports/EmploymentReport2021-22.pdf (last visited Aug. 1, 2023) (reporting that 41.7% of all newly hired teachers earned their teaching degree out-of-state, 30.7% earned in-state, and 27.6% were hired without any teaching degree).

[169] *See* Kealiʻi Kukahiko et al., *Pūpūkai Holomua: Moving Hawaiian Education for All Learners Beyond the COVID Pandemic*, 17 AAPI NEXUS J., 9 (Fall 2020) (describing "how the unique contexts of Hawaiʻi differs from the continental United States"); HAW. ADMIN. R. § 8-54-19 (LEXIS through 2023); *see* discussion *infra* Section V.A.

V. OHE'S EFFORTS IN SUPPORT OF REASONABLE ACCESS TO HAWAIIAN EDUCATION

As discussed above, OHE was established in 2015 after BOE's revised Hawaiian Education policies were adopted.[170] In line with BOE's Nā Hopena A'o policy, OHE seeks to "develop the skills, behaviors, and dispositions that are reminiscent of Hawai'i's unique context, and to honor the qualities and values of the indigenous language and culture of Hawai'i."[171] OHE's effort includes working within the broader community, faculty and staff to implement HĀ.[172]

Director Dawn Kau'i Sang has led OHE since its inception with a passion for moving past a monocultural, western-focused educational system and a desire to find ways to implement changes and effect generational change for Hawai'i's haumāna.[173] Director Sang also recognizes the need to address both student and Kaiapuni teachers' historical trauma, including the residual impacts of the mandates of the federal No Child Left Behind ("NCLB") standardized testing and the resulting perception that Kaiapuni haumāna and programs are failures.[174]

Since its inception, OHE has made remarkable progress – a testament to its dedication and passion for Hawai'i's keiki. Within six months of Sang's

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[170] BOE Policy 105-7, *supra* note 49; BOE Policy 105-8, *supra* note 93.

[171] *See* OHE Hub, *Nā Hopena A'o (HĀ),* STATE OF HAW. DEP'T. OF EDUC., OFF. OF HAWAIIAN EDUC., https://sites.google.com/k12.hi.us/ohehub/n%C4%81-hopena-a%CA%BBo-h%C4%81?authuser=0 (last visited Nov. 10, 2023).

[172] *Id.*

[173] Sang Interview, *supra* note 103 (describing the importance of moving beyond a monocultural system in education); *see* Jessica Terrell, *First-Ever Head of Hawaiian Education Foresees 'Revolutionary' Changes*, HONOLULU CIV. BEAT (Aug. 24, 2015), https://www.civilbeat.org/2015/08/first-ever-head-of-hawaiian-education-foresees-revolutionary-changes/ (describing Sang's goal of "an education system with multiple pathways and world views, where all students are provided the opportunity to graduate biliterate, bilingual and bicultural" and the need to "transform the way [Hawai'i's] public education (system) does education").

[174] *Id.* NCLB was a federal law passed in 2002, requiring schools to implement standardized testing which measured a school's adequate yearly progress for student achievement. No Child Left Behind Act of 2001, Pub. No. 107-110 115 Stat. 145 (2002). Because NCLB was based on a high-stakes pass/fail model, it created perceptions in the community, and among Kaiapuni haumāna, parents, and most especially educators, that Kaiapuni Schools were "junk schools." Sang Interview, *supra* note 103. However, that narative is wholly false, driven by standardized testing which was neither written in 'Ōlelo Hawai'i nor based on a culturally-responsive assessment model. *See generally* Henry May et al., *Using State Tests in Education Experiments: A Discussion of the Issues* app. A, NAT'L CTR. EDUC. EVALUATION & REG'L ASSISTANCE, https://ies.ed.gov/ncee/pdf/2009013.pdf (last visited Sept. 18, 2023) (discussing the relationship between NCLB and state testing policies); Elise Trumbull & Sharon Nelson-Barber, *The Ongoing Quest for Culturally-Responsive Assessment for Indigenous Students in the U.S.*, 4 POL'Y & PRAC. REVS. (June 7, 2019).

appointment, OHE published its priorities plan and a plan for significant revisions to the Kaiapuni education administrative framework; both documents have served as a roadmap to successfully expanding access to Hawaiian Education for all haumāna.[175] The priorites and framework seek to create opportunites to maximize OHE's resouces and impact, with much of the initial focus on professional development of teachers and administrators,[176] as well as implementaion of community engagement activities via the schools, and partnerships with multiple agencies and organizations throughout the community.[177]

Under Director Sang's leadership, and in compliance with BOE policy, HIDOE continuously seeks guidance and feedback from key stakeholders such as OHA, the University of Hawaiʻi, ʻAha Pūnana Leo, and the Charter School Commission regarding Hawaiian Education and Kaiapuni programs.[178] One of OHE's primary methods of gathering community feedback is via ʻAha Kauleo, which BOE initially established as the Hawaiian Language Immersion Advisory Council in 1990.[179] The Advisory Council's purpose was to advise on "matters concerning the education of children in the program," as well as make recommendation for procedures, activities, and "needs of Hawaiian language immersion students."[180] Today, ʻAha Kauleo is a community-based consortium consisting of parent, teacher, and administrator representatives from Kaiapuni schools, collegiate level representatives, and community partners, such as OHA, Kamehameha Schools/Bishop Estate (Kamehameha Schools), and ʻAha Pūnana Leo.[181] In

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[175] *See Plan for Office of Hawaiian Education Priorities*, STATE OF HAW. DEP'T. OF EDUC., OFF. OF HAWAIIAN EDUC. (Dec. 9, 2015) [hereinafter *OHE Priorities*], https://www.hawaiipublicschools.org/DOE%20Forms/Hawaiian/OHE_DeliveryPlan.pdf; *see also The Foundational & Administrative Framework for Kaiapuni Education,* STATE OF HAW. DEP'T. OF EDUC., OFF. OF HAWAIIAN EDUC. (2015) [hereinafter *Kaiapuni Framework*], https://www.hawaiipublicschools.org/DOE%20Forms/KaiapuniFrameworkFinal.pdf.

[176] *OHE Priorities*, *supra* note 175, at 1.

[177] *Kaiapuni Framework*, *supra* note 175, at 17, 36, 38.

[178] *See Hawaiian Language Immersion Program*, *supra* note 61.

[179] *See 1990 BOE Minutes*, *supra* note 61, at 19–22.

[180] *Id.*

[181] *See* ʻAHA KAULEO [hereinafter ʻAHA KAULEO], https://sites.google.com/hawaii.edu/aha-kauleo/home?authuser=0 (last visited Oct. 12, 2023); *see also* Iwane Interview, *supra* note 63. Ironically, while ʻAha Kauleo has advised HIDOE and OHE on matters related to Hawaiian Education for more than thirty years, the BOE recently called the ʻAha's role into question. Iwane Interview*, supra* note 63. Thankfully, OHE staff were able to unearth the original BOE actions creating the advisory council and reinforcing the critical role of community advisors. *Id.* While Ms. Iwane declined to go into specifics about the nature of the questioning, it seems that recent BOE members turnover has contributed to a lack of understanding among BOE members regarding the importance of Hawaiian Education, related policies, and the role of ʻAha Kauleo. *See id.*

addition to its advocacy work within HIDOE and with BOE, 'Aha Kauleo's work also includes advocating for legislative changes and funding support for Kaiapuni schools.[182]

With OHE's overall plan of priorities and revised Kaiapuni education administrative framework, the OHE staff has charted a course to improve the Hawaiian Studies and Hawaiian Language Immersion programs, furthering the intent of the 1978 delegates to the ConCon.[183]

A. *Hawaiian Studies Program*

One of the primary ways through which OHE integrates the HĀ framework is through the Hawaiian Studies Program.[184] The Hawaiian Studies Program is a "K-12 program, [delivered in English-medium classrooms,] that provides curriculum support and resources in the instruction and learning of Hawaiian culture, history, and language."[185] The primary method for integrating Hawaiian concepts and content into classrooms continues to be through funding school-level Kūpuna Component positions in local elementary schools.[186]

In the 1980s, the Kūpuna Component consisted of Native Hawaiian elders from the community.[187] Today, however, many of the staff are much younger and are graduates of Kaiapuni programs or enrolled in Hawaiian Studies coursework at local universities.[188] As a result, HIDOE rebranded the name of HSP staff from Kūpuna to Cultural Personnel Resources ("CPR") to more accurately reflect the types of community members working in our schools.[189]

OHE recently expanded a school's ability to utilize their legislative funding in multiple ways.[190] In 2020, OHE released a new model, the first in forty years, that gives schools more flexibility in implementing Hawaiian

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[182] *See* 'AHA KAULEO, *supra* note 181.

[183] *See OHE Priorities*, *supra* note 175; *see Kaiapuni Framework*, *supra* note 175.

[184] *See Hawaiian Studies Program,* STATE OF HAW. DEP'T. OF EDUC., OFF. OF HAWAIIAN EDUC. [hereinafter *Hawaiian Studies Program*], https://sites.google.com/k12.hi.us/ohehub/hawaiian-studies-program-hsp?authuser=0 (last visited Oct. 12, 2023).

[185] *Id.*

[186] *See id.* ("Elementary schools statewide receive funding to hire Kūpuna (or CPR's) as part-time teachers on the school staff."); *Kūpuna Component*, *supra* note 54 ("The Kūpuna Component aims to enrich students' learning about cultural practices, historical information, and the Hawaiian language.").

[187] *See Kūpuna Component*, *supra* note 54.

[188] Video Conference Interview with Ku'uleialohapoint'ole Makua, Hawaiian Stud. Educ. Specialist, Hawaiian Stud. Program, in Honolulu Haw. (June 23, 2022) [hereinafter Makua Interview] (discussing the dwindling group of original elders who began with the Kūpuna program, and the gradual transition to those who have graduated from Kaiapuni programs).

[189] *See Kūpuna Component*, *supra* note 54.

[190] Makua Interview, *supra* note 188.

Studies and the Kūpuna funds.[191] The new program is called the ʻĀina Aloha Pathway, which provides a set of learning targets and addresses ʻŌlelo Hawaiʻi, Kuanaʻike,[192] and Honua.[193] The revised management and options for repurposing Kūpuna funds for the ʻĀina Aloha Pathway offer the necessary infrastructure and funding for schools to go out into the community and consult with cultural practitioners on a regular basis.[194] In addition, the new flexible structure significantly expands educational opportunities for haumāna by allowing schools to seek out and easily fund place-based learning experiences, such as visits to local fishponds.[195]

As an added support for school campuses hoping to attract and retain CPR, BOE recently changed its administrative rules to allow a significant increase in the pay rate for part-time temporary teachers.[196] In 2005, the compensation rate was $22.43 per hour for part-time temporary teachers with a bachelor's degree and $20.67 per hour for part-time temporary teachers without an undergraduate degree.[197] In 2021, the BOE sought to repeal the entire rule to allow more flexibility to increase pay over time.[198]

In May of 2022, BOE issued a new policy in which a part-time temporary teacher's pay would be based on the full-time teacher's salary schedule, allowing for regular increases as teacher pay increases.[199] This BOE action paved the way for the first pay increase for CPR staff in sixteen years.[200]

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[191] *See ʻĀina Aloha Competency Survey and Process Guide,* STATE OF HAW. DEP'T. OF EDUC., OFF. OF HAWAIIAN EDUC.) [hereinafter *ʻĀina Aloha*].

[192] PUKUI & ELBERT, *supra* note 18, at 171. Kuana means "position" or "standing." *Id.* ʻIke means "knowledge" and "perceive." *Id.* at 96. Together, kuanaʻike in this context means "worldview." *ʻĀina Aloha*, *supra* note 191, at 1.

[193] PUKUI & ELBERT, *supra* note 18, at 80. Honua means "land, earth, or world." *Id.* In this context it means place; *ʻĀina Aloha supra* note 191, at 2; *see also* Makua Interview, *supra* note 188 (discussing how the program has grown from seven schools in school year 2019-2020 to sixteen schools in school year 2021-2022 and allows more flexibility of funding use to meet individual school needs related to Hawaiian Studies).

[194] Makua Interview, *supra* note 188.

[195] *Id.*

[196] *See Board Action on Pay Rates for Part-Time Temporary Employees*, STATE OF HAW. BD. OF EDUC. (Dec. 16, 2021) [hereinafter *Board Action on Pay Rates*], https://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/GBM_12162021_Board%20Action%20on%20Pay%20Rates%20PTT.pdf; HAW. ADMIN. CODE § 8-66-8 (LEXIS through 2023) (noting the compensation rates for part-time teachers, such as Kūpuna or CPR, was codifed into the administrative rules in 2012 and repealed in May of 2022).

[197] *Board Action on Pay Rates*, *supra* note 196. The compensation rate was later codified in the Hawaiʻi Administrative Rules. HAW. ADMIN. CODE § 8-66-8 (LEXIS through 2023).

[198] *Board Action on Pay Rates*, *supra* note 196.

[199] *Id.* (noting the BOE repealed HAR § 8-66 by public hearing on July 15, 2021).

[200] *Id.* (recording that compensation was increased to between $26.39 and $42.16 per hour).

B. *Hawaiian Language Immersion Program: Ka Papahana Kaiapuni*

OHE's second priority is the Hawaiian Language Immersion Program ("HLIP").[201] Since 1987, HIDOE has maintained a HLIP,[202] the Kaiapuni program, in the public school system.[203] The Kaiapuni program delivers instruction entirely in ʻŌlelo Hawaiʻi from kindergarten to the fifth grade and introduces English for the first time at the middle and high school levels.[204] Every haumāna has the right to seek enrollment into a Kaiapuni program.[205] A student is not required to be Native Hawaiian to enroll.[206]

In 2000, the litigation in *OHA v. HIDOE* resulted in settlement, sparking an increase in funding for Hawaiian Education, particularly for Kaiapuni programs.[207] The settlement generated increased funding for Hawaiian Education, especially for Kaiapuni programs.[208] The additional resources were utilized to establish thirty-six "off-ratio" teaching positions, which were annually distributed to Kaiapuni programs throughout the state.[209] The initial goal of providing off-ratio Kaiapuni positions was to supplement school-level programs and reduce fiscal pressures on schools to meet Kaiapuni staffing needs.[210] Unfortunately, over the years, some schools have over-relied on the additional staffing funded by the state.[211] As a result, administrators have often failed to make use of the funds each Kaiapuni haumana brings to their campuses to meet Kaiapuni needs.[212] The failure to plan resource allocation in a thoughtful manner creates inequity in educational opportunities for students and leads to the burnout of Kaiapuni teachers, who often have to juggle instruction planning and translating materials for multiple subject areas.[213]

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[201] *See Office of Hawaiian* Education, OHE HUB, https://sites.google.com/k12.hi.us/ohehub/office-of-hawaiian-education (last visited Sept. 23, 2023).

[202] Over time, the Hawaiʻi Language Immersion Program has also become known as Ka Papahana Kaiapuni or "Kaiapuni." *Hawaiian Language Immersion Program*, *supra* note 61.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *See* Souza & Walk, *supra* note 22, at 1278–79; *see also supra* Part II.

[208] *See* Souza & Walk, *supra* note 22, at 1278–79.

[209] Iwane Interview, *supra* note 63. An off-ratio position is an extra teaching position that is not funded by a school's budget. *Id.* Instead, the funding for an off-ratio position comes from other means, such as a grant or additional state or federal funding. *Id.*

[210] *Id.*

[211] *Id.*; Krug Interview, *supra* note 70.

[212] Krug Interview, *supra* note 70 (discussing how each student enrolled on a campus is assigned a weighted student formula value that is used for fiscal planning purposes).

[213] Holck Interview, *supra* note 76 (discussing HSTA's efforts to support the challenges of teaching in a Kaiapuni program); *see Teacher Shortage Crisis*, *supra* note 76.

Initially, off-ratio positions were provided to schools using a two-one-two ratio, whereby each Kaiapuni elementary school received two positions, each intermediate school received one position, and each high school received two positions.[214] However, an increase in the number of Kaiapuni schools combined with a lack of commensurate increase in OHE's Kaiapuni budget means the staffing ratio has been unsustainable.[215] For the 2022–2023 school year, OHE projected it would need fifty-one off-ratio positions to meet Kaiapuni program staffing projections; however, funding has been stagnant, only allowing for thirty-five positions for years, forcing OHE to ration the available positions.[216]

Despite budget difficulties, OHE continues to find ways to support the demand for and needed expansion of existing Kaiapuni programs and launches new programs across the state.[217] Six schools have added a new grade level to their Kaiapuni program each year.[218] Recent efforts to open new programs continue, including new programs at Castle High School in school year 2022–2023 and Blache Pope Elementary in 2023–2024.[219] Unfortunately, while community members and advocates of Hawaiian Education continue to seek the expansion of the Kaiapuni program, HIDOE is unable to meet enrollment demands, and most Kaiapuni schools have a waiting list of haumāna seeking enrollment.[220]

Recently, parents and community activists came together to advocate for secondary Kaiapuni programming on the west side of Oʻahu.[221] Andrea Dias-Machado, parent of a sixth grader at Waiau Elementary School, leads the work.[222] She and other families living in west Oʻahu were concerned that once haumāna completed the sixth grade, they would no longer have access to Kaiapuni programs due to the lack of secondary Kaiapuni programming in their area. [223] The only schools on Oʻahu that provide secondary Kaiapuni programming are Ānuenue School in Honolulu, Ke Kula ʻo Samuel M. Kamakau Public Charter School in Kāneʻohe, Kailua High School, and

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[214] Iwane Interview, *supra* note 63.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*; *see also Kaiapuni Schools*, *supra* note 60.
[220] *See Hawaiian Education a Critical Discussion*, *supra* note 99.
[221] Video Conference Interview with Andrea P. Dias-Machado, Owner and Principal Consultant, Huliau Aloha, LLC (June 21, 2022) [hereinafter Dias-Machado Interview]. Ms. Dias-Machado works in community advocacy, seeking to support Hawaiian culture-based programs in support of Native Hawaiian learners, ʻohana, and communities. *Id.* Her current focus is access to secondary-level Kaiapuni programming for haumāna in the ʻEwa Moku. *Id.*
[222] *Id.*
[223] *Id.*

Kahuku High School, all of which are still miles away from the 'Ewa Moku.[224] It is remarkable and perplexing that thirty-five years since the first Kaiapuni school opened at Waiau Elementary, there are still no options for Kaiapuni haumāna in seventh through twelfth grade on the west side of O'ahu.[225] This is particularly shocking because some of the largest concentrations of Native Hawaiians live in that area.[226]

Motivated by the *Clarabal* decision,[227] Dias-Machado used her extensive experience in community organizing to bring stakeholders together and gather data through focus groups held in the fall of 2021.[228] The focus group data revealed a strong need for secondary Kaiapuni schooling in west O'ahu.[229] Additionally, many haumāna either lacked transportation to the secondary program or had to travel long distances to the secondary program.[230] As a result, many felt forced out of the Kaiapuni programs.[231]

Parents and guardians who decided to make the long commute reported a reduced ability to be involved or supportive in their child's education and worries about their children's safety in an emergency situation.[232] Families whose haumāna moved on to schools in Honolulu or on the Windward side reported having to change jobs, adjust their budget for increased transportation costs, and limit or omit spending on other afterschool programs and sports their keiki had wanted to participate in.[233] All stakeholders reported impacts on their 'ohana's quality of life and inability to learn and contribute within their immediate community as crucial factors in deciding if the daily trek to Honolulu or the Windward side was worth the financial and emotional drain.[234]

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[224] *See 'Ewa,* AVA KONOHIKI, http://www.avakonohiki.org/699ewa.html (last visited Oct. 12, 2023). 'Ewa Moku is a land division in the southwestern side of the island of O'ahu which includes the area known as "Pearl Harbor." *Id.* During the Kingdom of Hawai'i the land was known to have cultivation of kalo and fishponds. *Id.* AVA Konohiki is a non-profit organization which works with young Native Hawaiians at the university level to gather and publish Kingdom of Hawai'i land records for public access and use in land management practices which are grounded in traditional Hawaiian land stewardship. AVA KONOHIKI, http://avakonohiki.weebly.com/about-ava.html (last visited Oct. 9, 2023); Dias-Machado Interview, *supra* note 221; *see* also *Kaiapuni Schools*, *supra* note 60.

[225] Dias-Machado Interview, *supra* note 221; *see Kaiapuni Schools*, *supra* note 60.

[226] Dias-Machado Interview, *supra* note 221.

[227] *See* Clarabal v. Dep't of Educ., 145 Hawai'i 69, 71, 446 P.3d at 986, at 988; s*ee also supra* Part II.

[228] Dias-Machado Interview, *supra* note 221.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

Considering the generally slow pace of change within HIDOE, it is remarkable that Dias-Machado's efforts paid off within just one school year.[235] The HIDOE Campbell-Kapolei Complex Area Superintendent and OHE acknowledged the need for Kaiapuni programming on the west side of Oʻahu and launched a satellite campus at Ānuenue School at the start of the 2023-2024 school year.[236] However, opening a satellite campus is only just the beginning of establishing more prominent Kaiapuni programming.[237] In addition to maintaining student demand for a program, the school will need adequate funding, land, and facilities for a permanent home, as well as teachers fluent in ʻŌlelo Hawaiʻi to staff the satellite campus.[238]

Experiences of community members such as Dias-Machado demonstrate a lack of reasonable access and exemplify the ongoing struggles to expand Kaiapuni programs throughout the state. Yet, HIDOE has no accurate methodology to assess the actual demand for Kaiapuni schools.[239] For example, although anecdotal evidence suggests that some HIDOE school staff actively discourage families from applying for Kaiapuni programs, enrollment increased above the expected amount when new Kaiapuni schools opened, and many have waiting lists.[240] Therefore, to ensure reasonable access, HIDOE must establish suitable methods to gauge community interest, while also removing barriers to access, including the need to travel long distances to access Kaiapuni.[241]

C. *Access to Coursework in ʻŌlelo Hawaiʻi*

Kaiapuni teachers must have knowledge of Hawaiian history and culture, as well as fluency in ʻŌlelo Hawaiʻi for the proper delivery of an immersive educational program.[242] Because many teachers did not grow up learning ʻŌlelo Hawaiʻi in a Kaiapuni program or at home, access to coursework in ʻŌlelo Hawaiʻi plays a crucial component in the expansion of teachers who can teach in Kaiapuni schools.[243]

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[235] *Id.* (acknowledging that HIDOE might not have been as receptive to community needs without the *Clarabal* decision).

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*; Krug Interview, *supra* note 70 (noting that the lack of clear data on Kaiapuni interest likely contributed to earlier dismissals by HIDOE asserting that programs were not in demand).

[240] Dias-Machado Interview, *supra* note 221; Krug Interview, *supra* note 70; *see Hawaiian Education A Critical Discussion*, *supra* note 99.

[241] Dias-Machado Interview, *supra* note 221; Krug Interview, *supra* note 70.

[242] Krug Interview, *supra* note 70; *see supra* Parts I, II.

[243] Sang Interview, *supra* note 103; Faria Interview, *supra* note 159.

In 2019, Director Sang successfully secured one million dollars to cover the cost of any HIDOE employee who wished to take ʻŌlelo Hawaiʻi classes through the University of Hawaiʻi community college system.[244] The opportunity to take ʻŌlelo Hawaiʻi coursework was available for five semesters and proved incredibly popular with teachers and other HIDOE employees.[245] While COVID-19 related impacts placed a temporary stop to access, new funding allows for free ʻŌlelo Hawaiʻi coursework through fall of 2024.[246] Such opportunities are critical for teachers seeking higher-level ʻŌlelo Hawaiʻi classes as they are the ones most likely to seek future Kaiapuni teaching positions.[247] Providing a way for teachers to study ʻŌlelo Hawaiʻi at little to no cost will increase HIDOE's ability to attract and retain teachers for Hawaiian Education, especially for Kaiapuni teaching positions.[248]

D. *Reducing Certification Costs: Educator Preparation Programs*

Ultimately, the most significant obstacle affecting reasonable access to Hawaiian Education is the lack of fully qualified teachers.[249] Finding ways to attract, train, and retain teachers, especially for Hawaiian Education programs, is daunting.[250] The Hawaiʻi State Legislature recently began allocating funds for the Grow Our Own ("GOO") Teachers Initiative, a program that provides Hawaiʻi residents an opportunity to obtain a teaching degree at little to no cost.[251] GOO programs have gained much popularity in recent years, especially in Hawaiʻi, where local data shows that state residents are more likely to stay teaching in Hawaiʻi longer.[252] While initial

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[244] *See HIDOE to Provide Free Hawaiian Language Courses For All Employees Through UH Community Colleges,* HAW. STATE DEP'T. OF EDUC. (Nov. 21, 2019), https://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/HawaiianLanguageLearningOpportunity.aspx#:~.

[245] Sang Interview, *supra* note 103.

[246] *Id.* Director Sang continues to seek grants or other funding to pay for future ʻŌlelo Hawaiʻi classes*. Id.*

[247] *Id.*

[248] *Id.*

[249] Iwane Interview, *supra* note 63 (discussing the difficulties of finding individuals who have the language and cultural background to teach Kaiapuni and the challenge of retaining teachers seeking full licensure to continue as Kaiapuni teachers); *see* Suevon Lee, *DOE Offers Free Hawaiian Language Classes to All Staff*, HONOLULU CIV. BEAT (Nov. 21, 2019), https://www.civilbeat.org/2019/11/doe-offers-free-hawaiian-language-classes-to-all-staff/ ("[O]ne of the biggest shortage areas among the state's teaching staff is in the area of Hawaiian language immersion.").

[250] Iwane Interview, *supra* note 63.

[251] *See "Grow Our Own" Teachers Initiative,* UNIV. OF HAW. AT MĀNOA, COLL. OF EDUC. (June 20, 2022, 8:00 PM), https://coe.hawaii.edu/goo/. State stipends would cover the cost of tuition and fees. *Id.*

[252] Holck Interview, *supra* note 76.

GOO funding supported individuals seeking a degree in other high-needs areas, such as special education or math, many in the Hawaiian Education community were concerned that efforts to support Hawaiian Education teacher candidates were insufficient.[253] Thus, in the 2022 legislative session, ʻAha Kauleo, OHA, the University of Hawaiʻi at Mānoa College of Education, the University of Hawaiʻi at Hilo College of Hawaiian Language, and other community advocates pushed for GOO funding specifically for students seeking a teaching degree in Hawaiian Education.[254] Advocates cited the 2019 designation of Hawaiian language and Hawaiian language immersion as a Federal Teacher shortage area and the need to fund teacher candidates in these areas.[255] While the proposed legislation failed to advance during the session, the University of Hawaiʻi at Mānoa College of Education's GOO program is now able to fund Hawaiian Education teacher candidates.[256] Moving forward, more funding like this will remove financial barriers to access. This funding's reduction of the cost of teaching degree programs will help in increasing access as it will provide a pipeline of teachers who can teach in Hawaiian Education.

E. *Attracting and Retaining Teachers: Kaiapuni Shortage Differentials*

HIDOE's ability to attract and retain Hawaiian language immersion teachers significantly impacts a student's access to Kaiapuni programs.[257] For example, in 2019, there were 161 Kaiapuni teacher positions, a third of which were left vacant due to a lack of qualified teachers.[258] Of the filled positions, only fifty-four teachers were fully qualified and licensed in Hawaiian Education.[259] The lack of fully qualified teachers has a significant impact on the availability of high quality education. In December 2019, HIDOE

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[253] Faria Interview, *supra* note 159.

[254] *See Relating to Equitable Distribution of Grow Our Own Resources For Hawaiian Immersion Teachers: Hearing on HB2284 HD1 Before the H. Comm. On Finance.*, 31st Leg., Reg. Sess. (Haw. 2022) [hereinafter *Grow Our Own*] https://www.capitol.hawaii.gov/sessions/Session2022/Testimony/HB2284_HD1_TESTIMONY_FIN_02-25-22.PDF.

[255] *Id.* OHA's testimony explained the need for additional funds to develop more Hawaiian Immersion teachers to "close the gap" by training eighty new teachers. *See id.* Its testimony also emphasized how distribution of these resources furthers the state's obligation to provide access to Hawaiian education programing in public schools. *See id.*

[256] Faria Interview, *supra* note 159; *see Grow Our Own*, *supra* note 254.

[257] Iwane Interview, *supra*, note 63.

[258] *See Board Action on Extra Compensation For Classroom Teachers in Special Education, Hard-To-Staff Geographical Locations, and Hawaiian Language Immersion Programs,* STATE OF HAW. BD. OF EDUC. [hereinafter *Board Action on Extra Compensation*], https://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/Special_12052019_Action%20on%20Extra%20Compensation%20for%20Classroom%20Teachers.pdf (last visited Nov. 5, 2023).

[259] *Id.*

Superintendent Dr. Christina M. Kishimoto requested BOE's approval of shortage differentials to qualified and licensed teachers as a way to fill vacancies in the Hawaiian Language Immersion Programs.[260] In support of her request, Superintendent Kishimoto cited the Hawai'i Supreme Court *Clarabal* decision,[261] arguing that the BOE is "requir[ed] . . . [to] make 'reasonable efforts' to provide students access to Hawaiian language immersion education."[262] Moreover, Kishimoto asserted that the shortage differentials were necessary to comply with BOE Policy 105-8, which states that Kaiapuni teachers should be "appropriately compensated"[263] due to the "additional demands and qualifications of Hawaiian language."[264]

BOE formally approved an annual shortage differential of $8,000, beginning in the spring of 2020, for licensed classroom teachers working at Hawaiian Immersion schools.[265] However, BOE lacked the necessary funding, more than one million dollars, to pay for the shortage differentials.[266] Governor Ige stepped in by setting aside funding for shortage differentials in his proposed budget for the 2020 legislative session.[267] Although the COVID-19 pandemic disrupted distribution of the differentials, BOE repeatedly affirmed its support for providing shortage differentials.[268]

That commitment to recruitment and retention has paid off. The total number of fully qualified teachers filling Kaiapuni positions and the number of teachers qualifying for the shortage differential has grown incrementally.[269] Advocates for Kaiapuni schools see the differential as an effective method of attracting, retaining, and adequately compensating Kaiapuni teachers for the added education, experience, and cultural knowledge they bring to their classrooms.[270] Consequently, the fight for shortage differentials has also increased students' access to Kaiapuni schools,

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[260] *Id.*

[261] *See supra* Part II.

[262] *Board Action on Extra Compensation*, *supra* note 258.

[263] *Board Action on Extra Compensation*, *supra* note 258; *see* BOE policy 105-8, *supra* note 93.

[264] *Board Action on Extra Compensation*, *supra* note 258.

[265] *Id.*

[266] Holck Interview, *supra* note 76.

[267] *Id.* (discussing HSTA's efforts to support implementation of shortage differentials); *see Board Action on Extra Compensation*, *supra* note 258.

[268] Holck Interview, *supra* note 76. The COVID-19 pandemic began a few months after approval of the shortage differentials, causing HIDEO to absorb approximately $1.5 million in Kaiapuni differentials for the next two school years. *Id.* COVID-19 also stopped any additional funding for implementing the shortage differential at six Kaiapuni charter schools, creating a disparity between HIDOE and Charter teachers in Kapauni programs. *Id.*

[269] Iwane Interview, *supra* note 63.

[270] *Id.*

further supporting OHE's efforts to provide reasonable access to Hawaiian Education.

VI. HAWAIIAN EDUCATION PROGRAM: OPTIONS TO ENSURE REASONABLE ACCESS

BOE policies, such as HĀ, cannot be passed and immediately integrated overnight, as ensuring reasonable access to Hawaiian Education requires concrete and deliberate action.[271] The BOE, Superintendent, district and school-level administrators, teachers, and support staff must not only understand HĀ, but they must also embrace it as a foundational component of teaching and learning in Hawaiʻi's public schools.[272]

In *Clarabal*, the court acknowledged that "reasonable access is dependent on the totality of the circumstances" and remanded the case to determine whether "all reasonable steps" had been taken to "afford Clarabal's daughters access to Hawaiian immersion education."[273] While the court did not specifically define what constituted reasonable access to Kaiapuni programs, it provided some concrete possibilities the HIDOE should consider:

> [S]teps might include providing greater financial or other incentives to attract immersion teachers to Lānaʻi, furnishing transportation for a teacher to commute to Lānaʻi, using multiple instructors to share teaching duties, partnering with community members knowledgeable in ʻōlelo Hawaiʻi, modifying school days or hours of instruction to accommodate the availability of a teacher, or adopting any other alternative method of providing access to a Hawaiian immersion program. Ultimately, all reasonable alternatives are to be considered to determine whether access to a Hawaiian immersion program is feasible, and the State is constitutionally obliged to take a reasonable course of action that would afford access.[274]

While the court discussed the issue of reasonable access, it only addressed the issue as applied to Kaiapuni programs[275] and did not address the state's broader obligation to ensure a "Hawaiian education program consisting of language, culture and history in the public schools" for all haumāna.[276] While increased compensation through shortage differentials is

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[271] *See* BOE Policy E-3, *supra* note 105.
[272] Makua Interview, *supra* note 188.
[273] *See* Clarabal v. Dep't of Educ., 145 Hawaiʻi 69, 86–87, 446 P.3d 986, 1003–04 (2019).
[274] *See id.* at 87, 446 P.3d at 1004.
[275] *Id.*; Heather & Obrey Interview, *supra* note 43.
[276] HAW. CONST. art. X, § 4; Heather & Obrey Interview, *supra* note 43.

promising, other methods, such as mandatory professional development, HIDOE's reassessment of current academic and financial planning, and an audit for accountability on the use of Hawaiian Education funding could prove to be effective in supporting a system-wide embrace of the constitutional mandate for Hawaiian Education.[277]

A. *Mandatory Training for All Employees*

Delivery of Hawaiian Education has been embedded in the Hawai'i State Constitution since 1978.[278] Yet, the state does not require or provide for any sort of standardized training for all HIDOE employees, thereby not fulfilling the constitutional provision, BOE Policy 105-7 addressing Hawaiian Education, BOE Policy 105-8 addressing Ka Papahana Kaiapuni, or BOE policy E-3 addressing HĀ.[279] In addition to a lack of standardized training, HIDOE also fails to provide their employees with sufficient knowledge regarding the Hawaiian Education programs. For example, in its annual opening school year packet, HIDOE failed to mention Hawaiian Education as an area of importance, violating BOE policy 105-7, which requires HIDOE to "[p]rovide educators, staff and administrators with a fundamental knowledge of and appreciation for the indigenous culture, history, places and language of Hawaii."[280] If HĀ is genuinely a "framework of outcomes that reflects the HIDOE's core values and beliefs in action throughout the public educational system," then all school stakeholders, not just OHE, should be required to be well-informed of and incorporate the framework into their work and responsibilities.[281]

Systemic change requires the shared knowledge and shared purpose of all stakeholders. Requiring training of all HIDOE employees, not just the teachers, on how to integrate practices such as the 'Āina Aloha Pathway[282] into the curriculum at each school would substantially strengthen teaching practices, allowing the content to be rooted in and centered around Hawai'i and its unique history.[283] This knowledge is especially critical when an average of forty-two percent of our educators come from out-of-state teacher preparation programs.[284] Thus, all HIDOE staff, from the Superintendent to

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[277] *See* HAW. CONST. art. X, § 4.

[278] *Id.*

[279] Heather & Obrey Interview *supra* note 43; BOE Policy 105-7, *supra* note 49; BOE Policy 105-8, *supra* note 93; BOE Policy E-3, *supra* note 105.

[280] *See* STATE OF HAW. DEP'T. OF EDUC., OPENING OF SCHOOL YEAR PACKET FOR SCHOOL YEAR 2022–2023 (May 26, 2022), https://4.files.edl.io/5876/07/17/22/033850-c4483116-121a-4768-a304-a5aa4750515d.pdf; BOE Policy 105-7, *supra* note 49.

[281] BOE Policy E-3, *supra* note 105.

[282] *See 'Āina Aloha*, *supra* note 191, at 1 (outlining learning targets addressing 'Ōlelo Hawai'i, Kuana'ike (worldview), and Honua (place)).

[283] *Id.*

[284] *See* EMPLOYMENT REPORT, *supra* note 168, at 15.

school principals, should be required to complete professional development on Hawaiian Education, including learning about ways to integrate practices into their work, using both the HĀ framework and the ʻĀina Aloha Pathway.[285] Classroom-level staff should also have similar professional development, including opportunities to work in professional learning communities to build and develop their practice in support of Hawaiian Education.[286] Professional development opportunities can be easily incorporated into the school year at little to no cost.[287] The schools already have built-in collaboration and professional development days and hours for teachers and administrators that can be utilized for such work.[288] It is also critical to consider the training of other school-level staff such as educational and administrative assistants.[289] They must understand the importance of Hawaiian Education and Kaiapuni schools to ensure each haumana experiences a positive and supportive learning environment honoring the importance of Hawaiian Education.[290] Although such training may not directly impact the accessibility of Hawaiian Education, it could lead to simple yet significant actions, such as incorporating ʻŌlelo Hawaiʻi into school signage and materials and infusing Hawaiian cultural practices into school events. The small changes will build upon themselves, working towards BOE's policy goal of "[e]nsur[ing] that all students in Hawaii's public schools will graduate with proficiency in and appreciation for the indigenous culture, history, and language of Hawaiʻi."[291]

B. *Coursework Requirements for Teacher Licensure*

The Hawaiʻi Teachers Standards Board and educator preparation programs at local universities should be encouraged to increase support for Hawaiian Education. While the current administrative rules call for in-state educator preparation programs to ensure that candidates can integrate Hawaiian language, history, and culture into their practice to "perpetuate traditional ways of knowing, learning, and teaching," the programs need to improve the

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[285] *See ʻĀina Aloha*, *supra* note 191; *see also* BOE Policy E-3, *supra* note 105.

[286] Professional learning communities occur when a team of educators come together to discuss, learn, and improve their teaching practice.

[287] Holck Interview, *supra* note 76 (discussing ways professional development could be integrated into the school year and day).

[288] *Id.*

[289] Krug Interview, *supra* note 70 (noting that other educational staff play a critical role in supporting and educating the whole child and meeting each haumana's needs).

[290] *Id.*

[291] BOE Policy 105-7, *supra* note 49.

depth and breadth of such preparation.[292] One way to ensure compliance with the administrative rules is for HTSB to scrutinize the coursework required by local universities and further define how programs can comply with the administrative rule requirements for Hawaiian Education.

In addition to in-state educator preparation requirements, HTSB should consider amending all teacher-licensing requirements to include state-specific coursework in Hawaiian studies, like the requirements in states such as Alaska, North Dakota, and South Dakota.[293] For example, to be fully licensed in Alaska, applicants are required to complete three credits in Alaskan Studies and Multicultural Education or Cross-Cultural Communications.[294] The qualifying coursework involves studying the environment, Indigenous Peoples, Alaska's economic and political history, and the importance of effective teaching and learning in a multicultural student population.[295] Requiring similar course work based on Hawai'i's culture, history, and 'Ōlelo Hawai'i could positively impact the teaching and learning in classrooms across the state and ensure better integration and acknowledgment of Hawaiian Education.

C. *Hawaiian Education: School Academic and Financial Plans*

HIDOE academic and financial planning processes can be better utilized in support of Hawaiian Education. Currently, there are two funding mechanisms for Hawaiian studies and Kaiapuni programs. Under the Weighted Student Formula, each haumana is assigned a dollar value, based on individual characteristics.[296] In addition, OHE is awarded some program funds to help cover the cost of school-level off-ratio Hawaiian Studies and Kaiapuni program staffing.[297]

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[292] HAW. ADMIN. R. § 8-54–9.6 (LEXIS through 2023); Faria Interview, *supra* note 159 (explaining how only recently the teacher preparation programs have been able to be more deliberate in incorporating Hawaiian Education components into the curriculum).

[293] *See Teacher License Reciprocity Guidelines by States*, *supra* note 166.

[294] *See Initial Teacher Certificate*, ALASKA DEP'T. OF EDUC. & EARLY DEV., https://education.alaska.gov/teachercertification/certification/initial (last visited Nov. 6, 2023).

[295] *See Alaska Studies Coursework Requirement*, ALASKA DEP'T. OF EDUC. & EARLY DEV., https://education.alaska.gov/teachercertification/alaska-studies (last visited Nov. 6, 2023); *see also Multicultural Education/Cross-Cultural Communication Coursework Requirement*, ALASKA DEP'T. OF EDUC. & EARLY DEV., https://education.alaska.gov/teacher certification/culture (last visited Nov. 7, 2023).

[296] *See Weighted Student Formula*, *supra* note 74. Under WSF, Hawaiian Education is not provided additional funding. *Id.* The only characteristics that are provided additional weighted funds are gifted & talented, economic disadvantaged, limited English Proficiency, and transiency. *Id.*

[297] Iwane Interview, *supra* note 63.

In 2004, WSF became the primary funding mechanism for Hawai'i's public schools, which HIDOE states is a "fair and equitable way to distribute funds for school budgets."[298] Each year a committee sets the base weight or value for each haumana based on the total number of enrolled students.[299] In addition to a base value, haumana may be allocated additional funds if they have certain "needs and characteristics" that impact their learning.[300] Currently, haumāna who are economically disadvantaged, have limited English proficiency, are gifted and talented, or are experiencing homelessness are assigned an additional weight, which increases the amount of money a school is provided for that specific haumana.[301] For example, the base weight for a haumana in the 2021–2022 school year was $4,490.93.[302] If a student had certain characteristics, the base weight could increase by thousands of dollars.[303] However, despite the higher costs of administering a Kaiapuni program, haumāna enrolled in Kaiapuni programs receive no added weight.[304]

Kaiapuni programs have more significant expenses than traditional English-medium classrooms, including the increased cost for smaller class sizes, resource needs, and cultural programming.[305] Thus, one way to more effectively support Kaiapuni program costs and expenses is to create an added weight for each Kaiapuni haumana.[306] Not only would this help adequately fund Kaiapuni programs, but it would also build in financial incentives for schools seeking to expand or develop Kaiapuni programs.[307]

In addition to implementing the WSF, the state legislature established a new process for school planning and spending.[308] Every school principal is required to create an Academic Plan that includes information about the school's demographic data, curriculum, assessment, and instructional practices, and must develop a Financial Plan to meet the needs of the Academic Plan.[309] Although principals are required to work on these plans

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[298] *See Weighted Student Formula*, *supra* note 74.

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.* (indicating that the committee on weights determines the different amounts for weighting each year and weighted amounts can differ from year to year).

[304] *See id.*

[305] *See Teacher Shortage Crisis*, *supra* note 76.

[306] Manley Interview, *supra* note 120.

[307] Krug Interview, *supra* note 70.

[308] *See Weighted Student Formula*, *supra* note 74.

[309] *See Academic Plan and Financial Plan*, STATE OF HAW., DEP'T OF EDUC., https://www.hawaiipublicschools.org/DOE%20Forms/SCC/AcAndFinPlans.pdf (last visited

with a local School Community Council comprised of community and school stakeholders, they are not required to incorporate BOE Policy 105-7 regarding Hawaiian Education or Policy 105-8 regarding Ka Papahana Kaiapuni into their academic and financial planning.[310] Because schools are not required to consider Hawaiian Education needs in their academic and financial plans, schools often lack explicit plans to meet the DOE's constitutional obligation to deliver Hawaiian Education. Therefore, a straightforward way to ensure schools thoughtfully incorporate Hawaiian Education into their teaching and learning practices is to require principals to include Hawaiian Education in their academic and financial plans.

More specifically, principals of Kaiapuni schools should be required to account for the haumāna enrolled in their Kaiapuni programs in their academic and financial plans to ensure that WSF funds are directed appropriately towards programming for those same Kaiapuni haumāna.[311] Such requirements would also ensure that principals are not taking resources away from Kaiapuni haumāna and guarantee that a school is not overly reliant on the OHE-provided off-ratio positions.[312] Including Hawaiian Education in a school's academic and financial plans could also help administrators advocate for additional WSF weights for Kaiapuni haumāna, as it could show that WSF base funding does not cover the total cost of programming for each Kaiapuni haumana. In addition, requiring administrators to incorporate Hawaiian Education into school academic and financial plans would align with the BOE policy requirements for "administration support of Hawaiian Education" and "allocation of resources including personnel and fiscal . . . throughout the department."[313]

D. *Audit of Hawaiian Education*

An updated audit regarding the use of Hawaiian Education funding could prove an effective means to determine the ways in which schools are utilizing Hawaiian Education funding and those in need of additional resources to support Hawaiian Education. It has been over fifteen years since the state last audited HIDOE's Hawaiian Studies Program.[314] It is time to consider another audit of HIDOE's support and implementation of Hawaiian Education and Kaiapuni programming. The state's audit should include not only funding that goes through OHE but also, and more importantly, how school

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Nov. 7, 2023) (indicating that each school's academic and financial plan is supposed to outline the school's priorities and programs along with funding plans).

[310] *Id.*; Krug Interview, *supra* note 70; BOE Policy 105-7, *supra* note 49; BOE Policy 105-8, *supra* note 93.

[311] Krug Interview, *supra* note 70.

[312] *Id.*; *see* Iwane Interview, *supra* note 63 (describing off-ratio positions).

[313] BOE Policy 105-7, *supra* note 49.

[314] *See Hawaiian Education Audit*, *supra* note 81.

administrators are distributing WSF funding for Kaiapuni haumāna. The limited funding provided to OHE is insufficient to continue the expansion of Kaiapuni programming.[315] Without an audit, an independent report, or comprehensive data on Kaiapuni costs, the Hawaiʻi State Legislature is unlikely to be convinced to provide more money and resources for Hawaiian Education.[316] The audit should consider not only spending on Hawaiian Education, but also the geographic locations of Kaiapuni programming, grade level offerings, and whether HIDOE is adequately ensuring financial accountability among school, district, and state level administrators in line with BOE policy.[317] Such an audit would facilitate greater accountability for funding needs for Hawaiian Education.

VII. CONCLUSION

Since its creation in 2015, OHE has expanded professional development, provided flexibility in funding and resources for schools to implement the Hawaiian Studies Program, supported the expansion of ʻŌlelo Hawaiʻi teachers through the Hawaiian special permit, and increased compensation for Kaiapuni classroom teachers through shortage differentials. OHE's efforts toward supporting Hawaiian Education while enduring the last three years of school disruptions from the COVID-19 pandemic have been remarkable.

However, the State of Hawaiʻi's path to increasing and ensuring reasonable access to Kaiapuni educational programming and promoting the BOE's Hawaiian Education policy goal of "[e]nsur[ing] all students in Hawaiʻi's public schools will graduate with proficiency in and appreciations for the indigenous culture, history, and language of Hawaiʻi" must go beyond OHE's current efforts.[318]

HIDOE needs to implement a comprehensive plan to work with universities and HTSB to expand the number of Hawaiian Education licensed teachers and initiate professional development for all employees to ensure knowledge of Hawaiian history, culture, and language.[319] HIDOE should also reassess its current academic and financial planning process and ensure school, district, and state-level administrators are implementing BOE Hawaiian Education and Ka Papahana Kaiapuni policies into their plans.[320]

In addition, the State of Hawaiʻi must prioritize adequate funding and resources. Conducting an independent audit of HIDOE's implementation of

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[315] Iwane Interview, *supra* note 63.
[316] Krug Interview, *supra* note 70.
[317] BOE Policy 105-7, *supra* note 49.
[318] BOE Policy 105-7, *supra* note 49; BOE Policy 105-8, *supra* note 93.
[319] BOE Policy 105-7, *supra* note 49; BOE Policy 105-8, *supra* note 93.
[320] BOE Policy 105-7, *supra* note 49; BOE Policy 105-8, *supra* note 93.

Hawaiian Education and Kaiapuni programs at the state, district, and school level would provide an independent assessment as well as recommendations for improvements in funding allocation and use. These combined efforts would support a system-wide embrace of Hawaiian Education and improve reasonable access for all of Hawai'i's haumāna.[321]

[321] *See* Clarabal, v. Dep't of Educ., 145 Hawai'i 69, 87, 446 P.3d 986, 1004 (2019).

International Adoptions and Overlooked Abuse: Hawai‘i’s Role in Marshallese Adoptions

Diamonté Chamberlain*

ABSTRACT

The United States entered the Compact of Free Association (“COFA”) with the Republic of the Marshall Islands (“RMI”) to atone for U.S. World War II nuclear testing among the islands. Under COFA, the Marshallese people were provided with an easier path to immigrate to the United States. As a result of COFA and the Hawaiian islands’ location within the Pacific, the state stands between individuals who reside in the contiguous United States who wish to adopt and children in the RMI. Unfortunately, historically, these adoptions have not prioritized the best interests of the children involved, leading to human trafficking and cultural deterioration.

Pinpointing the exact cause behind the dubious adoption practices calls for a multifaceted analysis. This Comment focuses specifically on Hawai‘i’s role as a transit point, arguing that the failure of the current agreements to regulate Marshallese adoptions both exemplifies the general shortcomings of the current international adoption system and compounds the effects of such shortcomings in the specific context of Marshallese children adopted by parents in the contiguous United States in two ways.

First, the operation of COFA facilitates problematic adoption processes because it permits Marshallese children to be removed from

* J.D. candidate 2024, University of Hawai‘i at Mānoa William S. Richardson School of Law; Certificate in International Law; B.A. in Sociology, California State University, Sacramento, 2020, *Summa Cum Laude*. This Comment is dedicated to all the Marshallese families affected by the United States’ problematic adoption practices. I would also like to acknowledge my advisor, Professor Randle DeFalco, for his guidance in framing this topic, Professor Dina Shek for her insightful comments on the relationship between Hawai‘i and the Marshallese community, Professor Carole Petersen for her role in cultivating my passion for learning more about international human rights issues, and my husband, Logan Chamberlain, for all the love and support he has given me while researching, writing, and presenting this topic.

their homeland with excessive ease under the court's radar. Second, current Hawai'i adoption laws and regulations provide insufficient protections for Marshallese children.

With the end of phase two of COFA in 2023, this Comment proposes new guidelines for both the United States and Hawai'i – an approach which combines new considerations that Hawai'i family court judges must consider to ensure that adoption recommendations align with international best practices.

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I. INTRODUCTION

A Hawai'i family law attorney came under fire in 2019 when it was discovered that she had been facilitating Marshallese baby selling[1] in Hawai'i since at least 2017.[2] The scheme involved flying pregnant, soon-to-be mothers from the Republic of the Marshall Islands ("RMI") to Hawai'i where they would give birth and almost immediately relinquish their parental rights.[3] The attorney worked with a local woman who would care for the children until the attorney arranged placement with high-paying adoptive parents on the contiguous United States.[4] Many of the adoptive parents were on long domestic waitlists until suddenly, the process was expedited by the Hawai'i attorney.[5] Often, the adoptive parents were flown to Hawai'i to meet their new child within a matter of days of "placement."[6] For most of the adoptive parents flown to Hawai'i, suspicions about the process were not triggered until they were taking their new baby back home with them to the

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[1] *See, e.g.*, Jonathan G. Stein, *A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should Be Modified to Include the Consent Provisions of the Uniform Adoption Act*, 24 T. JEFFERSON L. REV. 39, 45 (2001). The term "baby selling" is used in scholarly work to describe the camouflaged practice of children being sold by their birth parents to adoptive parents for large sums of money in order to receive the child. *See id.*

[2] John Hill, *This Honolulu Lawyer Has Run a Marshallese Baby Business with Impunity*, HONOLULU CIV. BEAT (Nov. 20, 2019), https://www.civilbeat.org/2019/11/this-honolulu-lawyer-has-run-a-marshallese-baby-business-with-impunity/ [hereinafter Hill, *This Honolulu Lawyer Has Run a Marshallese Baby Business with Impunity*].

[3] *Id.* United Nations Convention Against Transnational Organized Crime and the Protocols Thereto define human trafficking as:

> The recruitment, transportation, transfer, harbouring [sic] or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

G.A. Res. 55/25, Annex II Part I, art. 3(a) (Nov. 15, 2000).

[4] Hill, *This Honolulu Lawyer Has Run a Marshallese Baby Business with Impunity*, *supra* note 2.

[5] *Id.*

[6] *Id*.

contiguous U.S. without government approval[7] and in potential violation of both RMI and U.S. laws.[8]

The Hawai'i attorney's actions are not the only instance of unethical adoptions out of the RMI coming under scrutiny since the creation of the Compact of Free Association ("COFA").[9] Around the same time as the Hawai'i scandal, another Marshallese adoption fixer was arrested in Arizona while transporting two Marshallese women, one pregnant and the other a new mother, to the United States for purposes of giving up their children in exchange for money they were promised.[10] These cases took the Marshallese community by surprise because it revealed that baby-selling continued to plague the island nation despite historical efforts to stop these practices.[11] Seeking to combat human trafficking and baby selling, the RMI passed an adoption act[12] in the early-2000s and amended COFA with the United States to restrict visa-free travel for adoptions.[13] Recent cases, however, reveal that

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[7] *See id.*

[8] *See generally* Ahilemah Jonet, *International Baby Selling for Adoption and the United Nations Convention of the Rights of the Child*, 7 N.Y.L. SCH. J. HUM. RTS. 82 (1989) (exploring international law and policies related to the protection of children).

[9] Compact of Free Association of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (establishing that Marshallese citizens were allowed into the United States without a visa as long as it was not for permanent immigration). COFA was created to grant the RMI independence from the United States and to compensate RMI citizens for U.S. World War II nuclear testing damage. *Id.*

[10] Hilary Hosia & Ben Doherty, *The Baby-Selling Scheme: Poor Pregnant Marshall Islands Women Lured to the US,* THE GUARDIAN (Jan. 7, 2021, 10:00 PM), https://www.theguardian.com/world/2021/jan/08/the-baby-selling-scheme-poor-pregnant-marshall-islands-women-lured-to-the-us. Former Arizona elected official Paul Petersen pleaded guilty to human smuggling, conspiracy to smuggle illegal aliens, and fraud in a U.S. federal court for adoptions he facilitated in both Utah and Arizona out of the Marshall Islands. *Id.* There were dozens of victims involved in this baby selling and brazen human trafficking. *Id.* The scheme involved luring pregnant Marshallese women to the United States with the promise of a new life in America and large sums of money, in exchange for giving up their children to American families. Prosecutors believe at least seventy babies were adopted this way – "sold" for up to $40,000 each. *Id.*; *see* John Hill, *Well-Known Adoption Fixer Charged with Human Trafficking*, HONOLULU CIV. BEAT (Mar. 25, 2019), https://www.civilbeat.org/2019/03/well-known-adoption-fixer-charged-with-human-trafficking/ [hereinafter Hill, *Well-Known Adoption Fixer Charged with Human Trafficking*]; United States v. Peterson, 22 F.4th 805, 806 (8th Cir. 2022).

[11] Hosia & Doherty, *supra* note 10; John Hill & Emily Dugdale, *Marshallese Adoptions Fuel a Lucrative Practice for Some Lawyers*, HONOLULU CIV. BEAT (Nov. 28, 2018), https://www.civilbeat.org/2018/11/marshallese-adoptions-fuel-a-lucrative-practice-for-some-lawyers/.

[12] Adoptions Act 2002, 26 M.I.R.C., ch. 8 (2002) (creating a prohibition against solicitation and processes for establishing "adoptable" children and gaining adoption consent).

[13] Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720, 2761 (2003) (prohibiting persons "coming to the United States pursuant to an adoption

the current laws do not adequately address unethical adoptions in practice.

The RMI has a long, troubling history[14] as a "baby market" due to its ethnic and cultural vulnerability.[15] The RMI's vulnerability at the hands of the United States dates back decades before the most recent instances of baby selling to a strategic war period.[16] Seeking to atone for its World War II nuclear testing in the pacific region, the United States entered into COFA with the RMI.[17] Under COFA, the Marshallese people were compensated and provided with an easier path to immigrate to the United States.[18] As a result of COFA's migration ease, individuals who reside in the contiguous United States often adopt Marshallese children.[19] Situated between the RMI and North America, Hawai'i has become a transitory stop for many Marshallese children en route to their final adoptive homes on the contiguous United States.[20] Unfortunately, most of the adoptions of Marshallese children by U.S. families do not prioritize the best interests of the children involved.[21]

The prevalence of baby selling, especially in the context of the RMI, is largely a consequence of the profoundly under-regulated global twenty-first century practice of international adoptions.[22] Children of color are at the

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outside the United States, or for the purpose of adoption in the United States . . . [from] admission under the Compact," essentially revoking visa-free travel when an adoption was involved).

[14] *See generally* (discussing how the internationalization of selling babies from one country to parents of another country has reached epidemic proportions). The evidence of such activity can be found in many sources including United Nations reports. *Id.*

[15] Jessica Terrell, *Black Market Babies*, HONOLULU CIV. BEAT, https://www.civilbeat.org/projects/black-market-babies/ (last visited Nov. 17, 2023); *see also* Julianne M. Walsh, *Adoption and Agency: American Adoptions of Marshallese Children* (Ctr. for Pac. and Islands Stud. conf. "Out of Oceania: Diaspora, Community, and Identity," 1999) [hereinafter Walsh, *Adoption and Agency*]. Due to a lack of government regulation, baby selling became so prevalent that in the 1990s the remote island nation had the highest per-capita adoption rate in the world. Walsh, *Adoption and Agency, supra* note 15.

[16] Walsh, *Adoption and Agency*, *supra* note 15, at 2 (discussing the breadth of Marshallese adoptions from 1996 through 1999).

[17] *See infra* Section II.B.

[18] Compact of Free Association of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

[19] *See infra* note 57.

[20] The Marshall Islands are a widely scattered cluster of atolls located just above the equator north of New Zealand in the Micronesian hemisphere. The islands sit between Japan and Hawai'i. *See infra* Section II.B.

[21] *See infra* Section IV.B.

[22] Asif Efrat et al., *Babies Across Borders: The Political Economy of International Child Adoption*, 59 INT'L STUD. Q., 615, 626–27 (2015). International adoptions have proven to be bureaucratically complex and often corrupt. *See* KAREN A. BALCOM, THE TRAFFIC IN BABIES: CROSS-BORDER ADOPTION AND BABY-SELLING BETWEEN THE UNITED STATES AND CANADA,

greatest risk of falling victim to the exploitative international adoption system.[23] Problems related to wealth and inequality in the treatment of children of color in international adoptions are nothing new.[24] Indeed, the current international adoption regime can be largely traced back to the sharp increase in such adoptions in the wake of racial tensions during World War II.[25] Following World War II, thousands of children were trafficked across State lines to be placed in new homes as a result of the humanitarian crisis created by the war.[26] Many non-white children from Europe who were left parentless were given up for international adoption due to the local racial prejudice against them.[27] The wars triggered a novel prevalence of transracial adoptions.[28] Between 1950 and 1960, Black and Native American children were targeted for adoptions in United States, revealing a form of racial

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1930-1972, at 232–35 (2015). Because international adoptions require two countries' laws and systems to work together, this complex jurisdictional nature can lead to oversight and gaps in the laws on international adoptions. *See id.*

[23] Richard Tessler et al., *The Many Faces of International Adoption*, 10 CONTEXTS 34, 36 (2011) (highlighting that the most prominent "sending" countries are China and Korea, and that Latin American and African countries follow closely behind). The United States Department of State has stated:

> The anti-trafficking efforts outlined in the updated National Action Plan to Combat Human Trafficking are directly linked to the Administration's broader efforts to address inequities for marginalized groups. These communities often experience overlapping social and economic inequities, and individuals may suffer multiple forms of abuse. As a result, individuals from these communities may be more vulnerable to becoming victims of human trafficking.

U.S. Dep't of State, Submission to the Committee on the Rights of the Child on Measures to Give Effect to its Obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Doc. CRC/C/OPSC/USA/5 at 3 n.1 (Jan. 23, 2022).

[24] *See infra* Section II.A (discussing treatment of Black German children in the context of international adoptions).

[25] *See* discussion *infra* Section II.A.

[26] *See generally* RACHEL RAINS WINSLOW, THE BEST POSSIBLE IMMIGRANTS: INTERNATIONAL ADOPTION AND THE AMERICAN FAMILY (2017) (providing an ambitious and wide-ranging analysis of the rise of international adoption from the 1940s to the 1970s).

[27] *See generally* Von Stephanie Siek, *Germany's 'Brown Babies': The Difficult Identities of Post-War Black Children of GIs*, SPIEGEL INT'L (Oct. 13, 2009, 4:48 PM), https://www.spiegel.de/international/germany/germany-s-brown-babies-the-difficult-identities-of-post-war-black-children-of-gis-a-651989.html (discussing a 1968 study that estimated that up to 7,000 Black German children were adopted by Americans). This was in large part due to the racial tensions within German society between White Germans and non-White individuals. *Id.*

[28] *See infra* Section II.A

exploitation and control.[29] Many non-white children are victims of differential treatment in the adoption system.[30] This differential targeting and treatment of children of color in post-war adoptions extends to the context of the United States and RMI relationship.[31]

The aftermath of World War II led to the United States' trusteeship over the Marshall Islands.[32] As one of its first acts of "international oversight," the United States selected the Marshall Islands as the Pacific site for testing nuclear weapons.[33] As a result, the Marshallese people were the first population to be exposed to nuclear fallout, even though the effects were still not yet known.[34] Additionally, the people of the Marshall Islands were displaced and forced to relocate due to the testing.[35] Ultimately, this led to COFA,[36] which allowed Marshallese individuals to immigrate to the United

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[29] Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 557, 574 (2022) ("The late 1950s and 1960s marked the beginning of a period of significant growth in the transracial adoption of both Black and Native children by white parents, as well as the rise of the contemporary family regulation system. Both of these developments began as explicit means of racial control."); *see* David Ray Papke, *Transracial Adoption in the United States: The Reflection and Reinforcement of Racial Hierarchy*, MARQ. U. L. SCH. LEGAL STUDS. RSCH. PAPER SERIES, July 2012, Rsch. Paper No. 11–15 at 24.

[30] Ronald Hall, *The US Adoption System Discriminates Against Darker-Skinned Children*, The Guardian (Feb. 21, 2019, 4:45 PM), https://theworld.org/stories/2019-02-21/us-adoption-system-discriminates-against-darker-skinned-children (quoting Professor Kimberly Jade Norwood who noted, "In the adoption market, race and color combine to create another preference hierarchy: white children are preferred over nonwhite.").

[31] *See infra* Section IV.B.

[32] Advisory Comm. on Hum. Radiation Experiment, Final Report of the Advisory Committee on Human Radiation Experiments (1995) [hereinafter ACHRE]; *see infra* Section II.B.

[33] ACHRE, *supra* note 32; *see infra* Section II.B.

[34] *The Legacy of U.S. Nuclear Testing and Radiation Exposure in the Marshall Islands*, U.S. EMBASSY IN THE REPUBLIC OF THE MARSHALL ISLANDS (Sept. 15, 2012), https://mh.usembassy.gov/the-legacy-of-u-s-nuclear-testing-and-radiation-exposure-in-the-marshall-islands/. According to the United States:

> The United States conducted 67 nuclear explosive tests in the Marshall Islands between 1946 and 1958 . . . . Twenty-three tests were conducted on Bikini Atoll, and 44 were conducted on or near Enewetak Atoll. The hydrogen bomb test on March 1, 1954, code-named Castle Bravo, far exceeded the size expected by scientists. This factor, combined with shifting wind patterns, sent some of the radioactive fallout over the inhabited atolls of Rongelap and Utrik. Within 52 hours, the 86 people on Rongelap and 167 on Utrik were evacuated to Kwajalein for medical care.

Id.

[35] *Id.*

[36] 48 U.S.C. § 1901.

States without visas[37] and required the United States to provide compensation[38] to certain populations for the harmful effects the nuclear weapons caused to their health and livelihood.[39] In the years since, COFA has made traveling to and settling in the contiguous United States accessible for people from the Marshall Islands.[40] Agreements between these nations eased some of the oversight previously required for such movement, however, at the expense of exacerbating existing holes within international law governing adoptions.[41]

Children's rights have been on international legal advocates' minds long before COFA considerations.[42] These rights were first expressed as Declarations and later as Conventions that States were encouraged to sign on

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[37] The United States grants immigrant visas based on family ties, adoption, employment, special immigration categories and offers visas for individuals eligible for the diversity visa. *U.S. Visas: Immigrate*, U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/us-visas/immigrate.html (last visited Nov. 6, 2023). Essentially all visa categories require some person or agency to sponsor an individual's immigration. *See id.* COFA, however, granted persons who were Marshallese citizens on November 2, 1986, who acquired citizenship by birth, on or after the effective date of the Constitution of the Federated States of Micronesia, or who were a naturalized citizens, or who were an immediate relative of a person from the previous three categories to be exempt from provisions within the United States' Immigration and Nationality Act, which require possession of a valid visa or border crossing identification card for admission. *Id.*; *see* Compact of Free Association of 1985, Pub. L. No. 99-239, § 141, 99 Stat. 1770 (1986).

[38] *The Legacy of U.S. Nuclear Testing and Radiation Exposure in the Marshall Islands*, U.S. EMBASSY IN THE REPUBLIC OF THE MARSHALL ISLANDS (Sept. 15, 2012), https://mh.usembassy.gov/the-legacy-of-u-s-nuclear-testing-and-radiation-exposure-in-the-marshall-islands/. ("Among other programs, this compensation included direct financial settlement of nuclear claims, resettlement funds, rehabilitation of affected atolls, and radiation related health care costs."). "The Department of Energy Special Medical Care Program and the Environmental Monitoring Program continue to provide services to the affected atolls." *Id.*

[39] *Id.*

[40] *See generally* U.S. Gov't Accountability Off., GAO-20-491, Compacts of Free Association: Populations in U.S. Areas Have Grown, with Varying Reported Effects (2020) (describing estimated migration populations and recent trends in compact migration). More than 94,000 COFA migrants live and work in the United States and its territories, according to Census Bureau data. *Id.* Data from Census Bureau surveys spanning nearly fifteen years show that the COFA migrant populations in the United States grew by an estimated sixty-eight percent, from about 56,000 to about 94,000. *Id.* Historically, many COFA migrants have lived in Hawai'i, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI). *Id*.

[41] *See* Terrell, *supra* note 15; Walsh, *Adoption and Agency, supra* note 15.

[42] *E.g.*, *History of Child Rights*, UNICEF, https://www.unicef.org/child-rights-convention/history-child-rights (last visited Oct. 30, 2023).

to and incorporate.[43] As early as 1924, the League of Nations[44] recognized and affirmed the existence of rights specific to children and the responsibility of adults towards children.[45] International efforts were not focused on children's rights again until 1989 when the United Nations adopted the International Convention on the Rights of the Child ("CRC").[46] The international community, however, quickly realized that the previous conventions did not stop baby selling.[47]

In 1993, the Hague Conference on Private International Law[48] formed a

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[43] *International Adoption*, U.S DEPT'T OF STATE – BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/Intercountry-Adoption.html (last visited Nov. 13, 2023) ("Intercountry adoption is the process by which you adopt a child from a country other than your own through permanent legal means and then bring that child to your country of residence to live with you permanently."); *see infra* Part III.

[44] *The League of Nations*, THE UNITED NATIONS OFF. AT GENEVA, https://www.ungeneva.org/en/about/league-of-nations/overview (last visited Sept. 18, 2023). The League of Nations, which existed from 1920 to 1946, was the first intergovernmental organization established "to promote international cooperation and to achieve international peace and security." *Id.* It was the predecessor of what we now know of today as the United Nations. *Id.* Its founding document – the Covenant of the League of Nations – was drafted during the peace negotiations at the end of the First World War. *Id.*

[45] *Declaration of the Rights of the Child - 1923*, CHILD RTS. INT'L NETWORK (Mar. 27, 2001), https://archive.crin.org/en/library/un-regional-documentation/declaration-rights-child-1923. The fundamental needs of children were summarized in five points. *Id.* The document discusses the well-being of children and recognized their right to development, assistance, relief, and protection. *Id.*; *see infra* Section III.A.

[46] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. The CRC Preamble states that the members of the convention adopted this treaty recognizing children's rights because they:

> Recall[ed] that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance, [were] [c]onvinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, [and recognized] that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. . . .

Id. According to the Congressional Research Center, the CRC defines a child as "any human being under the age of 18," and calls on Parties to take all appropriate measures to ensure that children's rights are protected – including the right to a name and nationality; freedom of speech and thought; and freedom from exploitation, torture, and abuse. CONG. RSCH. SERV., R40484, The United Nations Convention on the Rights of the Child 11 (2015); *see infra* Section III.B.

[47] Stein, *supra* note 1, at 73.

[48] *See infra* Section III.C.

committee to review international adoption practices in order to develop a workable international scheme to prevent baby selling, which became known as *The Hague Conference on Private International Law: Final Act of the Seventeenth Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*.[49] During the conference, the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* ("Hague Convention") was drafted to provide the international community with a novel *best interest of the child* framework in hopes that by focusing on the child, a reduction in baby selling would ensue.[50]

The United States did not fully incorporate the Hague Convention into its domestic adoption laws until 2008.[51] Four years later, the Universal Accreditation Act of 2012[52] required that every international adoption service provider comply with the Hague Convention requirements.[53] The United States, however, has failed to ratify many of the other conventions which protect children, including the CRC.[54] Because of this, many holes still exist within U.S. federal adoption law, especially when it comes to implementing international standards for adoption decisions based on the *best interest of the child.*[55]

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[49] Hague Conference on Private International Law: Final Act of the Seventeenth Session, Including the Convention on Protection of Children and Co-Operation in Respect of International Adoption, May 29, 1993, *reprinted in* 32 INT'L LEGAL MATERIALS, 1134, 1134 [hereinafter Hague Convention].

[50] *Id.*; Stein, *supra* note 1, at 73–74.

[51] *What is the Hague Adoption Convention?*, CONSIDERING ADOPTION, https://considering adoption.com/internationaladoption/international-adoption-processesand-resources/hague-adoption/ (last visited Feb. 24, 2023) [hereinafter *What is the Hague*]. The Hague requires states to establish several procedural safeguards around international adoptions. *Id.* While some of the Hague Convention's provisions entered into force upon the United States' signing, full ratification required the accreditation of adoption agencies and systems put in place for approving persons who could provide adoption services. *See* Mary Helen Carlson et al., *International Family Law*, 36 INT'L L. 665, 668 (2002).

[52] Intercountry Adoption Universal Accreditation Act of 2012, Pub. L. 112-276, 126 Stat. 2466, (2013) (implementing regulations for "any person offering or providing international adoption services").

[53] *What is the Hague Adoption Convention?*, *supra* note 51.

[54] *UN Treaty Body Database*, OHCHR, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en (last visited Sept. 18, 2023). The United States signed the CRC February 16, 1995, but has yet to ratify the treaty. *See* CONG. RSCH. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 4–5 (2015).

[55] *See* U.S. DEP'T OF STATE, SUBMISSION TO THE COMMITTEE ON THE RIGHTS OF THE CHILD ON MEASURES TO GIVE EFFECT TO ITS OBLIGATIONS UNDER THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY 25 (2022). While the United States has general regulations

Although Hawaiʻi has focused its adoption policies on the *best interest of the child* standard, this has not been enough to address the baby selling concerns.[56] In the early 2000s,[57] after it was discovered that Hawaiʻi was at the center of unethical adoptions out of the Marshall Islands,[58] the RMI passed a 2002 Adoptions Act aimed at better regulating the adoption of Marshallese children.[59]

In addition to RMI legislation targeting adoption practices, the RMI government also made attempts to address the problem with Hawaiʻi

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providing that accredited agencies and approved persons must ensure that international adoptions take place in the best interests of the child, most of its efforts are primarily focused on outreach and education rather than implementing standards that will better facilitate ethical adoptions that focus on the child's best interest. *See id.*

[56] *See In re* AK, 151 Hawaiʻi 15, 508 P.3d 289 (App. 2022) (ruling that the Family Court properly granted Department of Human Services' petition for adoption by Resource Caregivers to adopt children, and denied appellants' petition to adopt children, under Hawaiʻi Revised Statutes section 578-8(a), because, in part, the court's adoption decision was based on its analysis of the best interests of children in light of numerous factors); *see also In re* Ask, 152 Hawaiʻi 123, 522 P.3d 270 (2022) (finding that the Family Court did not abuse its discretion in granting adoption to foster parents who had been caring for young children for more than two years and denying adoption by children's aunt and uncle because the court properly considered Hawaiʻi Revised Statutes section 571-46(b) factors and other evidence to determine which adoption served children's best interests).

[57] *See* Samuel F. McPhetres et al., *Micronesia in Review: Issues and Events*, *1 July 1999 to 30 June 2000*, 13 CONTEMP. PAC. 200, 214 (2001). The RMI government became increasingly alarmed by the previous years' growing number of Marshallese children adopted to American families. Julianne M. Walsh, *Political Review of the Marshall Islands: Issues and Events, 1 July 1999 to June 2000*, 13 CONTEMP. PAC. 211, 214 (2001). In the last days of the 1999 congressional session, RMI Minister of Foreign Affairs Phillip Muller proposed Bill 159, attempting to halt adoptions until the appropriate legislation was designed and implemented. *Id.* Dr. Julianne M. Walsh is the Associate Specialist of the University of Hawaiʻi at Mānoa's Center for Pacific Islands Studies. *Julianne Walsh*, Univ. Haw. at Manoa CPIS, https://hawaii.edu/cpis/people/core-faculty/julie-walsh/ (last visited Nov. 14, 2023). Dr. Walsh's research interests include Marshallese models of leadership and authority, RMI-US relations, Marshallese histories, Micronesian traditions and politics, COFA migrant experiences, RMI-US adoptions, indigenizing education, and public anthropology. *Id.*

[58] Emily Dugdale & John Hill, *Why A Crackdown on This Growing Adoption Pipeline Just Hasn't Worked*, HONOLULU CIV. BEAT (Nov. 27, 2018), https://www.civilbeat.org/2018/11/why-a-crackdown-on-this-growing-adoption-pipeline-just-hasnt-worked-2/. Just before RMI legislators took up the adoption issue, word spread among the community that a five-year-old Marshallese boy was dragged by a representative of a large American adoption agency kicking and screaming on the concrete floor of Amata Kabua International Airport on Majuro. OFFSHORE, *The Adoptions*, HONOLULU CIV. BEAT, at 0:01–2:30 (Apr. 12, 2018), https://soundcloud.com/civilbeat/s3-episode-1-the-adoptions. The airport scene, coupled with the fact that the number of mothers traveling to Hawaiʻi to birth children in Honolulu accelerated, was the alarm awakening the community to the gravity of the issue. *Id.*

[59] Adoptions Act 2002, 26 M.I.R.C. (2002).

specifically. Letters between the RMI's Minister of Cultural and Internal Affairs and then Hawai'i First Circuit Senior Family Judge Catherine Remigio confirmed that efforts were to be made from both sides to ensure that the child's best interest was prioritized in all adoptions between the RMI and Hawai'i.[60] The RMI was deeply concerned that intercountry adoptions were arranged directly between private individual facilitators[61] and adoptive parents in the United States.[62] Yet these practices have continued. Furthermore, a large hurdle to ensuring the protection of Marshallese women and children from exploitation in the intercountry adoption process with the United States is that the language of adoption laws in both countries is too broad, leading to abuse of the system, negligent oversight, and ineffective enforcement.[63]

There are also significant criminal implications involved in the discussions of baby selling and human trafficking.[64] Pinpointing the exact cause behind the dubious practices associated with the adoptions between the United States and RMI calls for a multifaceted analysis. While it is beyond the scope of this Comment to outline a multifaceted analysis, this Comment focuses on the recommendations by Hawai'i Family Court judges to address consent

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[60] Letter from Amenta Matthew, Minister of Cultural and Internal Affs. Republic of Marsh. Is., to the Hon. Catherine H. Remigio, Senior J. of Haw. Fam. Ct. (Nov. 6, 2017) (on file with author) [hereinafter Letter to Hon. Judge Remigio].

[61] *See Professional and Vocational Licensing*, DEP'T. OF COM. AND CONSUMER AFF. PRO. & VOCATIONAL LICENSING DIV., https://cca.hawaii.gov/pvl/ (last visited Nov. 7, 2023) (listing all licensed vocations in the state, which does not include "adoption facilitator"). Adoption facilitators are not licensed or monitored. *Id.* Because facilitators are not credentialed, they are not required to meet any standards involving education, experience, insurance, or personnel. *See e.g.*, Ben Winslow, *Bill to Regulate Adoption 'Facilitators' May Make a Comeback After Human Smuggling Case in Utah*, FOX13 (Oct. 11, 2019, 2:56 PM), https://www.fox13now.com/2019/10/10/bill-to-regulate-adoption-facilitators-may-make-a-comeback-after-human-smuggling-case-in-utah. Facilitators typically charge a substantial amount of money for advertising and "matching" prospective adoptive parents with a birth mother. *See id.* Once facilitators match adoptive parents with a mother, they are no longer involved. *See* Jeremy Loudenback, *California Bans 'Adoption Facilitators' Known to Engage in Questionable Practices*, THE IMPRINT (July 27, 2023, 3:29 PM), https://imprintnews.org/adoption/california-bans-adoption-facilitators-known-to-engage-in-questionable-practices/243297#:~:text=But%20they%20face%20little%20oversight,tens%20of%20thousands%20of%20dollars. Facilitators do not provide counseling, legal advice, nor procedural oversight to make sure the adoption plan is followed and finalized. *Id.* ("These [adoption facilitators] sometimes encourage expectant mothers to disregard legal issues, such as the rights of birth fathers, payments for living expenses, post-adoption contact and the requirement to acknowledge Indigenous lineage to ensure adoptions comply with the federal Indian Child Welfare Act.").

[62] *See id.*; *infra* Section IV.A.

[63] WINSLOW, *supra* note 26.

[64] *See generally* Rana M. Jaleel, *The Wages of Human Trafficking*, 81 BROOKLYN L. REV. 563 (2016) (providing an in-depth discussion of the human trafficking network and U.S. criminal laws on human trafficking).

issues, which have cultural underpinnings, and the application of international best practices to highlight how Hawaiʻi, as a transit point for Marshallese adoptions, can change its family laws to better prevent the exploitation of Marshallese individuals.

This Comment argues[65] that the current Hawaiʻi-RMI agreements pertaining to the regulation of the adoption of Marshallese children fail to adequately protect against questionable adoption practices. This failure to protect Marshallese children both exemplifies the general shortcomings of the current international adoption system and compounds the effects of such shortcomings in the specific context of Marshallese children adopted by mainland parents in the United States in two ways.

First, the operation of COFA facilitates problematic adoption processes because it permits Marshallese children to be removed from their homeland with excessive ease under the court's radar.[66] Second, current Hawaiʻi adoption laws and regulations provide insufficient protections for Marshallese children.[67] These dynamics have resulted in a system wherein the major flaws in the current international adoption regime are exacerbated when it comes to Marshallese children because of the historical structural factors that have made RMI residents increasingly subject to exploitation.[68]

With COFA's 2023 renewal, many terms are still being negotiated for its next phase; this Comment proposes new guidelines for the U.S.-RMI adoption process. In doing so, it recommends an approach which combines re-emerging adoption considerations for Hawaiʻi Family Court judges with international best practices. This Comment argues that Hawaiʻi should implement a consent hearing for birth parents[69] and advocates for a focus on a *best interest of the child* standard which incorporates the child's right to their identity. This can be accomplished by taking extensive steps to keep children with families who share cultural origins.

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[65] Some of the claims made by this Comment are necessarily difficult to establish, given the nature of the conduct in question. Those who traffic, buy, or steal children for processing through the adoption system do not advertise their illicit activities. Indeed, considerable effort is made to conceal or ignore such conduct. Hence, this Comment draws from an array of academic fields and sources to highlight the issues apparent with the current intercountry adoption system and how those issues effect Marshallese communities.

[66] *See infra* Section IV.B.

[67] *See infra* Section IV.B.

[68] *See infra* Section IV.B.

[69] *See* G.A. Res. 55/25, *supra* note 3. Because the UN definition of human trafficking includes the transportation of persons by deception, coercion, or payment for consent, consent hearings are necessary to ensure that Marshallese mothers have not been induced into their consent by coercion or deception, in violation of international law. *See id.*

Part II of this Comment discusses the war-torn history and humanitarian crisis that led to the modern international adoption system, particularly within the context of the U.S.-RMI relationship. Part III focuses on the evolution of international law regarding the rights of children, particularly as recognized by the international community and established in the *Geneva Declaration on the Rights of the Child 1924*[70] (Geneva Declaration), CRC, and the Hague Convention.

Part IV discusses the evolution of the United States' domestic laws in the adoption system. Part IV also focuses on the United States' historical attitude toward adoptions and how that has influenced the relationship and dynamics of adoption law between the State of Hawai'i and the RMI. Part IV further explores how the current international adoption system fails Marshallese children, many of whom are sold to adoptive parents who have no knowledge or intention[71] of creating an environment that fosters the children's ethnic and cultural identities. The dismissal of cultural identity[72] in the *best interest of the child* considerations leads to harmful effects for both Marshallese parents and adopted children.[73] This Comment argues that the United States should amend its agreements with the RMI to apply the principle of subsidiarity.[74]

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[70] *See* Resolution on Child Welfare, Sept. 26, 1924, League of Nations Doc. 39047 (1924) (endorsing the Declaration of the Rights of the Child) [hereinafter Geneva Declaration].

[71] M. Elizabeth Vonk, *Cultural Competence for Transracial Adoptive Parents*, 46 SOC. WORK 246, 247–48 (2001). It is not enough for adoptive parents to be aware of the functional impacts of race and culture; these individuals must also be committed to understanding the effects of racism and mechanisms of oppression. *See id.* One framework of cultural competence stresses the importance of transforming adoptive parents' attitudes, knowledge, and skills into their approach for meeting their transracial adoptive child's unique racial and cultural needs. *Id.*

[72] *See, e.g.*, *id.* at 248. "Racial identity" refers to "one's self-perception and sense of belonging to a particular group . . . includ[ing] not only how one describes and defines oneself, but also how one distinguishes oneself from members of other ethnic groups." *Id.* (citing R.G. McRoy, *Attachment and Racial Identity Issues: Implications for Child Placement Decision Making*, 3 J. MULTICULTURAL SOC. WORK, 59–74 (1994). "'Cultural identity' is related to, but separate from racial identity; it is 'determined by the particular society to which the individual belongs [and includes] behaviors, beliefs, rituals, and values.'" *Id.* (citing ROBBIE J. STEWARD & AMANDA L. BADEN, THE CULTURAL-RACIAL IDENTITY MODEL: UNDERSTANDING THE RACIAL IDENTITY AND CULTURAL IDENTITY DEVELOPMENT OF TRANSRACIAL ADOPTEES (1995)).

[73] *See id.* When transracially adopted children are raised in homogenous or ethnocentric White culture, it makes it difficult for them to identify with and take pride in their race, ethnicity, or birth culture. *Id.* Indeed, some research has shown that children raised in these environments "would prefer to be white," feel a sense of shame about their appearance and origins, and actively seek to avoid people of their same ethnic or cultural origins. *Id.* at 248, 251.

[74] *See* CRC, *supra* note 46, at Preamble. The principle of subsidiarity, as applied to child welfare, states that it is in the best interest of children to be raised by family or kin. *See id.* If

The Hawai'i State Legislature should also adopt a law that incorporates the 2004 recommendations of the Hawai'i Family Court judges and international best practices into its adoption regulations. In doing so, the focus would be on children's right to heritage and a rich ethnic cultural upbringing, which is fundamental to the *best interest of the child* standard used to assess the necessity of adoption placements.[75] This Comment concludes by analyzing the benefits and possible shortcomings with this proposal, but ultimately concludes that these changes aid in protecting vulnerable populations like Marshallese women and children.

II. THE WORLD WAR II HUMANITARIAN CRISIS: BIRTHING THE INTERNATIONAL ADOPTION SYSTEM AND IMPOVERISHING THE MARSHALL ISLANDS

In the 1940s, overt institutional racism was rampant around the world, evidenced by Germany's mission to wipe out the Jewish "race" [76] and America's Jim Crow era.[77] Racial discrimination plagued all aspects of

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immediate family/kin are unable, or unavailable, domestic placement with a foster or adoptive family is the next best option. *See id*. Finally, if neither of these alternatives is viable, then permanent placement with an appropriate family in another country through intercountry adoption is best. *See id.*; *see also infra* Section III.B.

[75] CRC, *supra* note 46, at art. 4(b).

[76] *Antisemitism in History: Nazi Antisemitism*, U.S. HOLOCAUST MEMORIAL MUSEUM, https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-nazi-antisemitism (last visited Sept. 20, 2023). Before World War II, the Nazi party rose to power in Germany and gained popularity by utilizing antisemitic rhetoric that painted Jewish people as the source of a variety of Germany's social, political, and economic problems. *World War II*, HISTORY (Jun. 27, 2023), https://www.history.com/topics/world-war-ii/world-war-ii-history. World War II began when Nazi Germany invaded Poland in 1939. *Id.* ("Among the people killed were 6 million Jews murdered in Nazi concentration camps as part of Hitler's racists and diabolical 'Final Solution,' now known as the Holocaust.").

[77] *See, e.g.*, *Jim Crow Laws*, HISTORY (Sept. 11, 2023), https://www.history.com/topics/early-20th-century-us/jim-crow-laws. ("The roots of Jim Crow, separate but equal, laws began as early as 1865 at the end of the Civil War and immediately following the ratification of the 13th Amendment, which abolished slavery in the United States"). Black codes were strict local and state laws that outlined how formerly enslaved people could work, which effectuated indentured servitude, taking away voting rights and controlling where formerly enslaved people lived and how they traveled. *Id.*; *see also* Paru Shah & Robert S. Smith, *Legacies of Segregation and Disenfranchisement: The Road from Plessy to Frank and Voter ID Laws in the United States*, 7 *RUSSELL SAGE FOUN. J. SOC. SCIENCES*, 134, 136 (2021); STETSON KENNEDY, JIM CROW GUIDE TO THE U.S.A.: THE LAWS, CUSTOMS AND ETIQUETTE GOVERNING THE CONDUCT OF NONWHITES AND OTHER MINORITIES AS SECOND-CLASS CITIZENS (2011).

society, including the American family[78] and Germany's post-World War II treatment of "Brown Babies."[79] This racism, and the resultant international humanitarian crisis involving thousands of European children orphaned by the war gave rise to the modern international adoption system.[80] This same racist war history is also what impoverished the RMI and made it vulnerable to exploitation within the larger international adoption system.[81]

A. *The War History That Led to the Adoption Dilemma in Europe and Beyond*

World War II was the largest and most violent war in history.[82] "Official casualty sources estimate battle deaths at nearly 15 million military personnel and civilian deaths at over 38 million."[83] Post-World War II international adoptions gave Americans an opportunity to respond to the needs of European children, mainly from Germany, who were orphaned by the war.[84] Between 1948 and 1953, United States families adopted approximately 5,814 European children, most of whom were White.[85] Though most of the children who were adopted abroad were orphaned by World War II, other children

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[78] *See* Wesley Hiers, *Party Matters: Racial Closure in the Nineteenth-Century United States*, 47 SOC. SCI. HIST., 255, 282 (2013). During the Reconstruction Era, local governments and the national Democratic Party thwarted equality efforts, effectuated by Black codes blending into Jim Crow laws. *Id.* These Jim Crow laws separated Blacks and Whites in all aspects of American public and private life. *Jim Crow Laws*, HISTORY (Sept. 11, 2023), https://www.history.com/topics/early-20th-century-us/jim-crow-laws.

[79] Around World War II, Black mixed-race children with German mothers were called Negermischlinges or "Brown Babies." *See infra* Section II.A.

[80] Leslie Doty Hollingsworth, *International Adoption among Families in the United States: Considerations of Social Justice*, 48 SOC. WORK J. 209, 210 (2003).

[81] *See* LAUREN HIRSHBERG, SUBURBAN EMPIRE: COLD WAR MILITARIZATION IN THE US PACIFIC 2 (Earl Lewis et al. eds. 2022) (describing the "continual quest for security for those coming under the realm of an expanding base empire – the relational insecurities produced by this security project – and the historic and ongoing US attempts to erase those costs.") (emphasis omitted).

[82] *Conflict Casualties: World War II*, DEFENSE CASUALTY ANALYSIS SYSTEM, https://dcas.dmdc.osd.mil/dcas/app/conflictCasualties/ww2 (last visited Jan. 19, 2024) [hereinafter *WWII Conflict Casualties*].

[83] *Id.*

[84] The casualties from the war were roughly 6,600,000–8,800,000 Germans, 2,600,000–3,100,000 Japanese, 24,000,000 Russians, 5,600,000 Polish, and 2,067,600 French. *Research Starters: Worldwide Deaths in World War II*, NAT'L WWII MUSEUM NEW ORLEANS, https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war (last visited Nov. 20, 2023). In order to respond to the catastrophically large number of children orphaned by the war, in 1948, following World War II, U.S. Congress passed a loose immigration policy known as the Displaced Persons Act, which allowed more than 200,000 European refugees and orphans to emigrate from their countries to the United States. BARBARA MOE, ADOPTION: A REFERENCE HANDBOOK 50 (1998).

[85] *See WWII Conflict Casualties*, *supra* note 82.

were not orphans; instead, they were products of foreign Black soldiers who had relations with German women in spite of racial tensions that persisted long after the end of the war.[86]

After the Allied Forces defeated Germany in World War II, the United States occupied West Germany.[87] Although American soldiers were tasked with promoting peace and democracy to a country ravaged by fascism, Black soldiers themselves were subject to discrimination by White soldiers as the Jim Crow laws prevailed in the U.S. military.[88] During the war, the Allied nations deployed between 30,000 and 40,000 segregated Black soldiers to regions within Germany.[89] The Germans viewed the occupation by Black soldiers as a particular "disgrace to the honor and worth of the German people and the White race."[90] But nothing escalated racial tensions more than relationships between African American soldiers and White German women.[91]

By the middle of the twentieth century, approximately 68,000 children of German women and Allied occupation troops were in the occupied zones of West Germany, many of which were fathered by Black soldiers.[92] The mixed-race Black children were called *Negermischlinges* or "Brown Babies."[93] The new generation of Black children in Germany led German scientists to, once again,[94] examine and interpret the allegedly "problematic" nature of these children within German society.[95] In 1951, Walter Kirchner's dissertation was one of two studies commissioned by the Berlin mayor to research the "Negro" problem.[96] Using an analytical framework and social

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[86] *See* Yara-Collette Lemke Muniz de Faria, *Black German 'Occupation' Children: Objects of Study in the Continuity of German Race Anthropology*, *in* CHILDREN OF WORLD WAR II: THE HIDDEN ENEMY LEGACY 249, 260 (Kjersti Ericsson & Eva Simonsen eds., 2005).

[87] *Id.*

[88] Alexis Clark, *Why Mixed-Race Children in Post-WWII Germany Were Deemed a 'Social Problem'*, HISTORY (June 3, 2021), https://www.history.com/news/mixed-race-babies-germany-world-war-ii.

[89] Muniz de Faria, *supra* note 86.

[90] *Id.*

[91] *Id.* at 249.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 254. Black German children born after 1945 were neither the first German-born occupation children, nor the first mixed-race occupational children. *Id.* During the Rhineland occupation about 500 children were born of German women and African soldiers used in the French occupation from Morocco, Algeria, Tunisia, Madagascar, and Senegal following World War I. *Id.*

[95] *Id.*

[96] *Id.*

anthropological lens,[97] Kirchner concluded that "Afro-German children represented a potential social problem because of the disharmony which could be expected as a result of their racial mixture."[98] His dissertation continued earlier racist World War I anthropology research into heredity and eugenics.[99] Kirchner's study, and many other similarly problematic studies conducted during this period, portrayed biracial Black children as isolated problems, and completely ignored the effects of children's social environment on their behavior.[100]

As can be expected from such damaging "scientific" conclusions, in the mid to late 1950s, efforts were made[101] for many of these German "Brown Babies" to be put up for adoption in the United States.[102] A 1968 study estimated that "up to 7,000 Black German children were adopted by Americans."[103] Many of these babies would grow up to never know that they were adopted, or German for that matter.[104] Children of this era were only the catalyst to what we know of as the vagrant dangers of cultural wiping as a result of the international adoption system.

The treatment of these children, unfortunately, paved the way for continued problematic treatment of minority children. *Nguyen v. Kissinger* was one of the first cases that signaled there were questionable practices underlying the international adoptions system, specifically with children of color during wartime.[105] The case was a class action brought against the

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[97] *Id.*

[98] *Id.* at 257. The studies suggested that biological change, caused by what German's perceived as colonial forced racial mixing, "influenced the intellectual capabilities and mental constitution of a given social group and, therefore, required practical social strategies and responses. Here theories of heredity and racial anthropology combined to form a biologist model of society bringing together pseudo-objective scientific methods and socio-political assumptions." *Id.* at 250.

[99] *Id.* at 250, 255–56. ("[A] review of [German] anthropological and genetic interpretations from the first half of the century shows that the social and mental 'inferiority of racially mixed people' came to be taken for granted as the result of genetic deficiencies assumed to result from racial mixture.").

[100] *Id.* at 257–58.

[101] *Id* at 259. Because the mixed-race German children were labeled as "other," this implied they were "not really German." *Id*. "[E]ducators and private individuals pleaded for a complete separation of the children from their white German social contacts through adoption into foreign countries." *Id*.

[102] Von Stephanie Siek, *Germany's 'Brown Babies': The Difficult Identities of Post-War Black Children of GIs*, SPIEGEL INT'L (Oct. 13, 2009), https://www.spiegel.de/international/germany/germany-s-brown-babies-the-difficult-identities-of-post-war-black-children-of-gis-a-651989.html. The U.S. Army had a policy of not acknowledging paternity claims brought against its soldiers stationed abroad. *Id.*

[103] *Id.*

[104] *Id.*

[105] WINSLOW, *supra* note 26, at 16; Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1194 (9th Cir. 1975).

United States government for their role in airlifting thousands of Vietnamese children out of South Vietnam in 1975 during the Vietnam War.[106] The plaintiffs, children abducted following the war,[107] sued the United States Immigration and Naturalization Service asserting that the involuntary detention of Vietnamese children in the United States in the custody of persons other than their parents violated their fundamental human rights and Fifth Amendment rights.[108] The plaintiffs sought the compilation and production of information concerning children paroled[109] into the United States from Vietnam under 8 U.S.C.A. § 1182(d)(5)[110] so that due diligence could be conducted in locating their families.[111]

The plaintiffs highlighted the problematic nature of the children being immediately placed for adoption once they were in the United States:

> From plaintiffs' assertions, it appears that some of the children have a living parent, and were merely left in orphanages for safekeeping (Vietnamese orphanages allegedly serve some of the functions of day care centers). The parent(s) may or may not know.[112]

For the plaintiffs, these harrowing scenarios invoked key questions regarding proper consent and care.[113] The court held that jurisdiction was proper under the court's habeas corpus power because the suit challenged the legality of the children's custody.[114] Finally, it granted the plaintiffs

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[106] WINSLOW, *supra* note 26, at 16.

[107] Cindy Trieu, *Litigation, Legislation, and Lessons: "Operation Babylift" and International Adoption*, 2014 PROCEEDINGS OF GREAT DAY 26, 38 (2015), https://knightscholar.geneseo.edu/cgi/viewcontent.cgi?article=1125&context=proceedings-of-great-day.

[108] *Nguyen Da Yen*, 528 F.2d at 1197.

[109] *Id.* at 1198. The Immigration and Nationality Act ("INA") authorizes the Attorney General to exercise discretion to temporarily allow certain noncitizens to physically enter or remain in the United States if they are applying for admission but do not have a legal basis for being admitted. Immigration and Nationality Act § 212(d)(5)(A); 8 U.S.C.A. § 1182(d)(5). The Department of Homeland Security may only grant parole if the agency determines that there are urgent humanitarian reasons for the person to enter the United States. Immigration and Nationality Act § 212(d)(5)(A); 8. U.S.C.A. §1182(d)(5).

[110] *Nguyen Da Yen*, 528 F.2d at 1198; Immigration and Nationality Act § 212(d)(5)(A); 8 U.S.C.A. § 1182(d)(5) governs the temporary admission or "parole" of nonimmigrants to the United States for humanitarian or public benefit reasons. Immigration and Nationality Act § 212(d)(5)(A); 8 U.S.C.A. § 1182(d)(5).

[111] *Nguyen Da Yen*, 528 F.2d at 1197.

[112] *Id.*

[113] *Id*.

[114] *Id.* at 1202.

expanded discovery rights, but only to information necessary to determine each child's custody status.[115]

More importantly, *Nguyen* underscored the growing distrust in the humanitarian motivation for "child saving," and it demonstrated the power of private individuals who facilitated the evacuation of children from the orphanages of Saigon.[116] As such, it became evident to the international community that foreign policy and welfare laws needed to be scrupulously reexamined.[117] This case also illuminated the vulnerability that children of color face due to exploitative practices by Western countries and the White perception of their role as "child savers,"[118] a phenomenon still occurring today.[119] This fact is particularly evident in the context of American adoptions out of the RMI.[120]

Post-war, international adoptions succeeded as a long-term solution to child welfare, not because it was in the interest of any one particular group in the world, but rather because the humanitarian crisis of the wars awakened the international community to the idea that child welfare was in the interest of all. The international adoption system emerged through the work of governments (national, state, and foreign); social welfare professionals; volunteers (social entrepreneurs, religious humanitarians, and NGOs); national and local media; adoptive parents; and prospective adoptive parents working collaboratively to find new solutions to century-old problems.[121] These combined efforts contributed to the making of a system that would embrace adoption as a response to a host of overseas social welfare

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[115] *Id.* at 1205.

[116] WINSLOW, *supra* note 26, at 16.

[117] *See* Trieu, *supra* note 107, at 39 (discussing the impact of Nguyen Da Yen v. Kissinger).

[118] *See* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 201 (2001). Within human rights scholarship, rhetoric around racial relations highlight this notion of "savages-victims-saviors (SVS)." *Id.* The connotations of such roles reinforce the global racial hierarchy where "savages and victims are generally non-White and non-Western," while saviors are largely Western White societies. *See id.* at 207.

[119] *See generally,* MATTHEW HUGHEY, THE WHITE SAVIOR FILM: CONTENT, CRITICS, AND CONSUMPTION (2014) (discussing the "white savior trope" in American cinema which depicts messianic characters in unfamiliar or hostile settings discovering something about themselves and their culture in the process of saving members of other races from terrible fates through examining the Hollywood constructed images of idealized White Americans).

[120] David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413, 413 (2007) [hereinafter Smolin, *Intercountry Adoption and Poverty*]. Adoption proponents commonly view intercountry adoption as an appropriate response to the extensive poverty that exists in many developing nations. *Id.* Intercountry adoption is perceived as a humanitarian act that transfers a child from extreme poverty and its vulnerabilities and limitations to the wealth, comfort, and opportunities of developed nations. *Id.* The extreme nature of poverty in developing countries underscores the impetus to rescue children from its harsh effects. *Id.*; *see infra* Section IV.C.

[121] WINSLOW, *supra* note 26, at 12.

emergencies.[122] In this regard, international adoption law melded cultural, social, and economic political projects.[123] War-orphaned children provoked the necessary political discourses that led to revisions in immigration and social welfare laws as evidenced by "[c]ongressional records, hearings, federal immigration and child protection policies, state-based social welfare records, and NGO and agency accounts[.]"[124]

Efforts of Western private organizations and individuals succeeded in persuading federal agencies at various levels and stages to facilitate international adoptions through liberalized immigration policies by reclassifying child refugees as immigrants, making them subject to neither quotas nor ceilings.[125] While volunteers worked behind the scenes in many countries to engage in policymaking, the absence of a well-developed body of laws governing both the international and domestic adoptions encouraged the growth of unethical baby-taking.[126]

B. *Impoverishing a Nation: The RMI, the First Guinea Pig for Post-WWII Nuclear Testing and the Creation of COFA*

The Marshall Islands are a widely-scattered cluster of atolls located just above the equator north of New Zealand in Oceania.[127] The Micronesian islands were designated as the first and only Strategic Trusteeship[128] territory

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[122] *See generally*, J. Boyd, The Suspension of Inter-country Adoption of Children Orphaned as a Result of Natural Disaster (2021) (M.A., mini-dissertation, North West University) (discussing a variety of disasters that led to international adoptions and the necessary safeguards that need to be implemented in the context of South Africa). International adoptions have become the solution to many natural disasters and emergencies that cause children to become orphaned or unaccompanied. *Id.*

[123] WINSLOW, *supra* note 26, at 19.

[124] *Id*.

[125] *Id.* at 15.

[126] Many accounts of adoptions that happened during this period reveal just how prevalent baby selling was across the globe – so much so that the U.N. thought it important to address. *See, e.g.*, BALCOM, *supra* note 22, at 237–42; Jonet, *supra* note 8.

[127] *Federated States of Micronesia*, ONE WORLD NATIONS ONLINE, https://www.nationsonline.org/oneworld/micronesia.htm (last visited Nov. 20, 2023).

[128] *See* U.N. Charter art. 75. Article 75 of the Charter of the United Nations provides for the establishment of "an International Trusteeship System for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements." *Id.*; Patsy Mink, *Micronesia: Our Bungled Trust*, 6 TEX. INT'L L. F. 181, 182 (1971) ("After the United States entered World War II in 1941, the Trust Territory assumed vital importance in the Pacific campaign."). The United States retained the RMI as a strategic trust territory because American leaders insisted that Japan would not have been successful in attacking Pearl Harbor if it were not for their control over the islands leading up to and during World War II. *Id.*

by the United Nations (UN) in 1947.[129] These islands extend "from the equator near eastern Indonesia some 1,300 nautical miles toward Japan, and extend from a point 600 miles east of the Philippines some 2,000 nautical miles east toward Hawai" and the United States.[130]

Prior to World War II, the islands were under the control of Japan, which facilitated relative prosperity for the islands.[131] The Micronesians and Japanese reaped economic gain from fisheries, sugar and alcohol production, the pearl shell industry, and the construction of roads and ports.[132] World War II, however, destroyed Micronesia's budding economy.[133] By the end of the war, the Japanese left the islands and the United States assumed their role as occupiers.[134] After the United Nations granted the right to control Micronesia to the United States under the trusteeship, the United States not only destroyed some of the islands with their nuclear testing, but also permitted other islands to "decay through indifference" and lack of economic and social investment.[135] Following World War II, the United States selected the

[129] S.C. Res. 21, art. 2 (Apr. 2, 1947); *see* ACHRE, *supra* note 32, at 367.

[130] Mink, *supra* note 128; U.N. Geospatial Information Section, Trust Territory of the Pacific Islands [cartographic material]: Itinerary of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands (Apr. 1961), https://digitallibrary.un.org/record/3807460?ln=en.

[131] *See generally* FRANCIS X. HEZEL, STRANGERS IN THEIR OWN LAND: A CENTURY OF COLONIAL RULE IN THE CAROLINE AND MARSHALL ISLANDS 186–241 (1995) (discussing Japan's colonial rule between World War I and World War II over Micronesian islands, including the Marshall Islands). As one of the allied countries in World War I (WWI), Japan sent military forces to the RMI which had been under German control. Mink, *supra* note 128, at 184–85. After the defeat of Germany in WWI, on December 17, 1920, the Council of the League of Nations confirmed a mandate for the former German islands north of the Equator to Japan, to be administered in accordance with Article 22 of the Covenant of the League of Nations. S.C. Res. 21, pmbl. ¶ 3 (Apr. 2, 1947); Mink, *supra* note 128, at 185.

[132] Ronron Calunsod, *Occupation Legacy: Marshall Islands Residents Use Japanese Term for Traditional Handicrafts*, JAPAN TIMES (Dec. 20, 2017) https://www.japantimes.co.jp/news/2017/12/20/national/occupation-legacy-marshall-islands-residents-use-japanese-term-traditional-handicrafts/; Mink, *supra* note 128, at 184–85.

[133] *See* Letter from Warren R. Austin, Rep. of the U.S., to the Sec'y-Gen., U. N. (Feb. 18, 1949) (transmitting a report on the first year of the administration of the Trust Territory of the Pacific Islands under the Trusteeship Agreement of July 18, 1947). Coconut palm plantations were destroyed, small industries and shops in the large centers were devastated, and the war caused disruption of ordinary trade channels, reducing the efforts of most of the native peoples to struggling for survival. *Id.*; Mink, *supra* note 128, at 185.

[134] *See* Jonathan M. Weisgall, *Micronesia and the Nuclear Pacific Since Hiroshima*, 5 SAIS REV. 41, 42 (1985) ("Toward the end of the war, there was little doubt that Micronesia would remain under U.S. control. The only debate was whether to annex the islands or place them under the trusteeship system of the new United Nations.").

[135] Mink, *supra* note 128, at 184, 196.

Marshall Islands as the site of the Pacific Proving Grounds[136] to test nuclear weapons.[137] Nuclear testing began on July 1, 1946, with Operation Crossroads, which involved two tests at Bikini Atoll.[138] Operation Crossroads sought to investigate the effect of nuclear weapons on naval warships.[139] In preparation for this operation, Bikinians were evacuated in March 1946.[140] The first detonation in Operation Crossroads did not lead to any immediate radioactive exposure to the island population.[141] However, further underwater detonations led to radioactive exposure and caused significant contamination issues[142] in the atoll itself, causing a delay in the return of the local population to their homes. [143]

"In 1948, the U.S. government forced residents of Enewetak Atoll to evacuate due to expanded nuclear testing with Operation Sandstone."[144] Although the Marshallese filed a complaint about the thermal fusion testing with the United Nations, the United States was permitted to continue its testing over the objection of the Marshallese Congress Hold-Over Committee, Japan, and India.[145]

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[136] *See* Aimee Bahng, *The Pacific Proving Grounds and the Proliferation of Settler Environmentalism*, 11 J. TRANSNAT'L. AM. STUD. 45, 52 (2020) (describing the securitization ideology prompting the United States' selection of the Marshall Islands as a "laboratory" for nuclear testing).

[137] U.N. Charter art. 83, Repertory of Practice (Supp. 2, vol. III, 1955-1959) https://legal.un.org/repertory/art83/english/rep_supp2_vol3_art83.pdf (noting that both the Soviet Union and India filed requests for hearings concerning nuclear tests in the Trust Territory of the Pacific Islands).

[138] ACHRE, *supra* note 32.

[139] *Marshall Islands*, THE NAT'L MUSEUM OF NUCLEAR SCI. & HIST.: ATOMIC HERITAGE FOUND., https://ahf.nuclearmuseum.org/ahf/ location/marshall-islands/ (last visited Nov. 20, 2023) [hereinafter *Marshall Islands*].

[140] ACHRE, *supra* note 32, at 367.

[141] *Id.*

[142] *Id.*

[143] *Id.* (noting that when the Bikinians returned in 1969, it was believed that the known radioactive contamination would be mitigated by restrictions on the consumption of certain native foods and reliance on imported foods).

[144] *Marshall Islands*, *supra* note 139; Letter from Warren R. Austin, Rep. of the U.S., U.N., to J.A.L. Hood, President, Sec. Council of the U.N. (Dec. 2, 1947). On December 2, 1947, the United States notified the UN Security Council that, "effective December 1, 1947, Eniwetok [sic] Atoll in the trust territory of the Pacific Islands, [was] . . . closed for security reasons, in order that the United States Government, acting through its Atomic Energy Commission, [could] conduct necessary experiments relating to nuclear fission." *Id.*

[145] Note from W.B. McCool, Sec'y, Atomic Energy Comm'n of the U.N., to the Atomic Energy Comm'n, U.N. (Apr. 3, 1956) (regarding the petitions of the Marshallese and related UN actions). On March 8, 1956, the Mission held a meeting at Majuro with the members of

A week after another test called Castle Bravo[146] caused dangerous levels of radioactive fallout upon the populated atolls of Rongelap and Utirik, the United States launched a medical study of the Marshallese, which included providing medical treatment to individuals they believed were exposed to radiation.[147] Labeled Project 4.1, this study is criticized by modern researchers and scholars as unethical for many reasons.[148] First, the U.S. government lacked informed consent as the Marshallese people did not knowingly agree to be exposed to such radiation.[149] Second, the U.S. government was subjecting the Marshallese people to a study they did not know was being conducted.[150] The Marshallese people later expressed that they felt as though they were "used as '*guinea pigs'* in a 'radiation experiment.'"[151]

After years of Project 4.1 research in the RMI, the United States realized its unethical treatment and exploitation of the region.[152] To remedy the harm, the United States created a joint agreement, the Compact of Free Association, which was signed into effect in 1986 and granted the RMI independence from the United States.[153] In the agreement, the United States acknowledged the gravity of radiation exposure their nuclear testing created, its detrimental effects on the health of the Marshallese, and the long-term environmental impacts on the RMI.[154] Thus, the agreement had two main purposes.[155] First, it created a $150 million fund to compensate the Marshallese people for

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the Marshallese Congress Hold-Over Committee. *Id.* The Committee stated that the people of the Marshall Islands had been informed officially that further nuclear tests would take place in the near future in the Trust Territory. *Id.* The Committee wished to go on record before the Visiting Mission that they reiterated the position they had taken when they presented their petition in April 1954, namely that nuclear explosion tests in the Marshalls be discontinued. *Id.*

[146] *Marshall Islands*, *supra* note 139 ("Bravo was the first test of a deliverable hydrogen bomb."). "Castle Bravo," the second test of a hydrogen bomb, was detonated over Bikini Atoll, used lithium deuteride as its fuel. *Id*.; CONG. RSCH. SERV. RL32811, REPUBLIC OF THE MARSHALL ISLANDS CHANGED CIRCUMSTANCES PETITION TO CONGRESS (2005).

[147] Marshall Islands, *supra* note 139.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] ACHRE, *supra* note 32, at 368.

[152] *See id.*; CONG. RSCH. SERV., RL32811, REPUBLIC OF THE MARSH. IS. CHANGED CIRCUMSTANCES PETITION TO CONGRESS (2005). "Some experts argue that the nuclear tests, in addition to rendering the four atolls of Bikini, Enewetak, Rongelap, and Utrik uninhabitable or dangerously irradiated, caused high incidences of birth defects, miscarriage, and weakened immune systems as well as high rates of thyroid, cervical, and breast cancer." *Id.* Experts additionally "contend that more than a dozen Marshall Islands atolls, rather than only four, were seriously affected." *Id.*

[153] *See*, ACHRE, *supra* note 32, at 376.

[154] *Id*.

[155] *Id*.

damage done by the United States' nuclear testing program.[156] Second, due to the uncertainty of the long-term effects of radiation on the natural environment combined with the RMI's environmental cultural practices, such as planting and harvesting of native species and fishing in surrounding ocean water for food consumption, the agreement permitted Marshallese citizens to immigrate from the islands to the United States without needing to obtain a visa.[157]

Unfortunately, it did not take long for the United States to find that the free movement of the Marshallese people to the United States made them particularly vulnerable to exploitive practices related to baby selling and human trafficking.[158] By 2003, there was a joint resolution to amend COFA and, among other things, change the immigration provision to bar parents who were giving their children up for adoption in the United States from using the visa-free immigration process.[159] The amended agreement to provide immigration safeguards for mothers traveling to the United States for the purpose of adoption was ultimately adopted by both the United States and the RMI.[160] In making this change, the United States emphasized that COFA was founded upon respect for human rights and fundamental freedoms for all and that the current practices violated those principles and hindered them from becoming realized.[161] However, the exploitive history between the United States and the RMI once again emerged between the regulations and into the current adoption practices.[162]

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[156] *Id*.

[157] *See The Legacy of U.S. Nuclear Testing and Radiation Exposure in the Marshall Islands*, *supra* note 38.

[158] Letter to Hon. Judge Remigio, *supra* note 60, at 2–3; *see infra* Section IV.B.

[159] Compact of Free Association Amendments Act of 2003, H.R.J. Res. 63 108th Cong. Art. IV § 141 (2003) (enacted).

[160] *Id.* COFA was changed in late 2003 to provide procedural safeguards in adoptions. *Id.* Under the newly amended Compact, a visa is required for Marshallese citizens traveling into the U.S. for purposes of adoption, made retroactive to March 1, 2003. *Id*. Whether this visa requirement applies to only the child already born in the Marshall Islands or also to the pregnant birthmother who travels into the U.S. and delivers the baby on U.S. soil is unclear. *See id*.

[161] *Id.* at §104; *see* Status of Citizens of the Freely Associated States of the Federated States of Micronesia and the Republic of the Marshall Islands, U.S. DEPARTMENT OF HOMELAND SECURITY-U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Sept. 2020) https://www.uscis.gov/sites/default/files/document/fact-sheets/FactSheetVerifyFASCitizens.pdf .

[162] Hill, *This Honolulu Lawyer Has Run a Marshallese Baby Business with Impunity*, *supra* note 2.

III. THE INTERNATIONAL ADOPTION SYSTEM: AN OVERVIEW OF HOW WE SHOULD BE THINKING ABOUT CHILDREN

The issues presented by the United States-RMI dynamic are not novel.[163] Indeed, for nearly a century, the international community has remained committed to the welfare of children, developing legal frameworks that not only ensure the rights of children are recognized and affirmed, but also seek to provide children with an environment needed to flourish into the next generation of altruistic adults.[164] What follows is an overview of the evolution of international law, from general recognition of children's rights to protections specific to international adoptions.

A. *The First Declaration to Recognize Children*

Global politics and war have been two of the biggest factors driving the creation of new international laws or changing existing ones.[165] After witnessing the horror of World War I,[166] Ms. Eglantyne Jebb, a British social reformer and activist, realized that children needed special protection.[167] In 1919, Ms. Jebb established the Save the Children Fund in London which provided a wide-range of assistance such as spreading awareness of the impacts of the war on children, raising money, and feeding and educating starved children, which was all aimed at protecting and caring for the children

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[163] *See* BALCOM, *supra* note 22.

[164] *See infra* Section III.A.

[165] *See* James Marten, *The History of the Declaration of the Rights of the* Child, OUPBLOG, (Nov. 5, 2018) https://blog.oup.com/2018/11/history-declaration-rights-of-the-child/. The 1924 Geneva Declaration of the Rights of the Child was drafted in response to the famine caused by WWI blockades. *Our History*, SAVE THE CHILDREN, https://www.savethechildren.org.uk/about-us/our-history (last visited Nov. 20, 2023); G.A. Res. 1386 (XVI) at 7 (Nov. 20, 1959). The Universal Declaration of Human Rights (UDHR) was passed in 1948 along with all four of the Geneva Conventions. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Sept. 23, 2023). These declarations and conventions have paved the way for the adoption of more than seventy human rights treaties, applied today on a permanent basis at global and regional levels. *See*, *e.g.*, INT'L COMM. RED CROSS, https://www.icrc.org/en (last visited Sept. 23, 2023); Eugene A. Korovin, *The Second World War and International Law*, 40 AM. J. INT'L L. 724, 751 (1946) ("The new international law and order that is being born after the Second World War presupposes maximum strengthening of the force and significance of international treaties, as the chief foundation for the entire postwar system of international law.").

[166] *See, e.g., Our History*, SAVE THE CHILDREN, https://www.savethechildren.org.uk/about-us/our-history (last visited Nov. 20, 2023) ("After the First World War ended, Britain kept up a blockade that left children in cities like Berlin and Vienna starving. Malnutrition was common and rickets were rife.").

[167] *Declaration of the Rights of the Child – 1923*, CHILD RIGHTS INTERNATIONAL NETWORK (Mar. 27, 2001), https://archive.crin.org/en/library/un-regional-documentation/declaration-rights-child-1923.

who had lived through the war.[168] With the support of the International Committee of the Red Cross ("ICRC"),[169] in 1920, the Save the Children Fund was organized and structured around the International Save the Children Union ("ISCU").[170] With fewer emergencies to respond to, ISCU was able to shift their primary focus to political campaigning and drafting laws recognizing the responsibility all adults have to the wellbeing of children.[171]

ISCU's efforts launched new considerations into the western international discourse. On February 23, 1923, ISCU adopted the first version of the Declaration of the Rights of the Child during the ICRC's fourth general assembly.[172] The Declaration of the Rights of the Child represented the first contemplation of children's rights within international law.[173] In response, on September 26, 1924, the League of Nations adopted the declaration recognizing basic children's rights and titled it the *Geneva Declaration*.[174]

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[168] *Geneva Declaration of the Rights of the Child, 1924*, HUMANIUM, https://www.humanium.org/en/geneva-declaration/ (last visited Nov. 20, 2023).

[169] The ICRC is an independent and neutral organization, stemming from the Geneva Conventions of 1949. *Who We Are*, INT'L COMM. RED CROSS, https://www.icrc.org/en/who-we-are (last visited Sept. 23, 2023) ("The ICRC operates worldwide, helping people affected by conflict and armed violence and promoting the laws that protect victims of war.") ICRC efforts include creating access to education, addressing sexual violence, addressing climate change and conflict, building economic security, and more. *What We* Do, INT'L COMM. RED CROSS, https://www.icrc.org/en (last visited Nov. 20, 2023).

[170] SAVE THE CHILDREN, *supra* note 165.

[171] *Id*.

[172] *Id.* Ms. Jebb sent the draft declaration to the League of Nations, stating that she believed "we should claim certain rights for the children and labor [sic] for their universal recognition." *Id.* The draft was later ratified during the fifth general assembly, on February 28, 1924. *Geneva Declaration of the Rights of the Child, 1924*, HUMANIUM, https://www.humanium.org/en/geneva-declaration/ (last visited Nov. 20, 2023).

[173] *Geneva Declaration of the Rights of the Child, 1924*, HUMANIUM, https://www.humanium.org/en/geneva-declaration/ (last visited Nov. 20, 2023).

[174] Geneva Declaration, *supra* note 70. The Geneva Declaration recognized five basic principles:

> (1) the child must be given the means requisite for its normal development, both materially and spiritually.
>
> (2) The child that is hungry must be fed, the child that is sick must be helped, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored.
>
> (3) The child must be the first to receive relief in times of distress.

B. *Modern Protection for and Recognition of Children on the International Scale*

The ambiguity of the modern international *best interest of the child* standard has led to its erratic enforcement.[175] However, to understand what the standard should incorporate in its use, it is important to look at its development and the international goals that surrounded its creation. While the Geneva Declaration only recognized five idealistic goals, it set a major precedent among the international community in the way children should be viewed and protected.[176]

Nothing significantly related to children's rights was internationally recognized again until 1986 when the UN General Assembly acknowledged by declaration that social and legal rights associated with the welfare of children needed to be engrained in foster and adoption placements for children on both the national and international scale.[177] To promote this, key provisions of the declaration realize that the first priority is for a child to be cared for by his or her own parents and that child welfare depends upon good family welfare.[178] Just three years later, the United Nations recognized

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> (4) The child must be put in a position to earn a livelihood and must be protected against every form of exploitation.
>
> (5) The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

Id.; Declarations in international law are typically not binding. *Glossary*, UNTC, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (last visited Jan. 24, 2024) ("The term 'declaration' is used for various international instruments. However, declarations are not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations."). The General Assembly of the League of Nations once again approved the Geneva Declaration. *Geneva Declaration of the Rights of the Child, 1924*, HUMANIUM, https://www.humanium.org/en/geneva-declaration/ (last visited Jan. 24, 2023). Although the signatories promised to incorporate the principles of the document into their national laws, they were not legally bound to do so. *Id.*

[175] Nigel Cantwell, *Are 'Best Interests' a Pillar or a Problem for Implementing the Human Rights of Children?*, *in* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: TAKING STOCK AFTER 25 YEARS AND LOOKING AHEAD 61, 61–69 (Ton Liefaard & Julia Sloth-Nielsen eds., 2016) (discussing the problematic nature of the vague "best interest" standard as a consequence of not having a reference point or similar standard for its application).

[176] Office of the U.N. High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, 3 U.N. Doc. HR/PUB/07/1 (2007), https://www.ohchr.org/sites/default/files/Documents/Publications/LegislativeHistorycrc1en.pdf (last visited Nov. 19, 2023); *see* Geneva Declaration, *supra* note 70.

[177] United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85 (Dec. 3, 1986) [hereinafter Protection and Welfare of Children].

[178] *Id.* at arts. 2, 3.

human rights for children in the Convention on the Rights of the Child.[179] The CRC recognizes that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding," which emphasizes the international appreciation of child identity development.[180] Article 29 of the CRC provides:

> States Parties agree that the education of the child shall be directed to . . . [t]he development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.[181]

This emphasizes some of the crucial considerations in children's rights. Article 3 of the CRC explicitly prioritizes the *best interest of the child*, which obligates State compliance within both private and public social welfare spheres.[182] This consideration has been incorporated into many States' laws, however, the CRC does not define the term *best interest of the child*.[183] Thus, States have wide discretion in determining how they will ensure they adhere to best interest of the child.[184]

As of July 1, 2020, all Member States of the United Nations, except the United States, have ratified or acceded to the CRC.[185] In addition, "170 States [have] ratified or acceded to the Optional Protocol[186] on the involvement of

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[179] *See* CRC, *supra* note 46, at Preamble.

[180] *See id.* The CRC article 8 requires that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference," and that "where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing his or her identity." *Id*. at art. 8.

[181] *Id*. at art. 29(1)(c).

[182] *Id*. at art. 3(1).

[183] *See id.* at arts. 3, 9, 18, 21, 40.

[184] *See* MICHAEL FREEMAN, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 3: THE BEST INTERESTS OF THE CHILD 25–31 (2007).

[185] U.N. Secretary-General, *Status of the Convention on the Rights of the Child*, ¶ 3, U.N. Doc. A/75/307 (Aug 12, 2020).

[186] Optional Protocols are treaties that typically provide additional procedures regarding a human rights treaty or further addresses issues of previously enacted treaties. *What is an Optional Protocol?*, U.N. ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm (last visited Dec. 27, 2023).

children in armed conflict;[187] [and] 176 States [have] ratified or acceded to the Optional Protocol on the sale of children, child prostitution, and child pornography."[188] The CRC monitoring committee[189] observed that a majority of States have reviewed their domestic legislation to ensure that it complies with the CRC.[190] However, as described above, the United States has yet to ratify the CRC and is therefore not bound by its principles, including the principle that States should take more measures to identify children in vulnerable or marginalized situations.[191]

In 2022, the United Nations stated that illegal international adoptions violate human rights.[192] In particular, such adoptions violate the sale of or trafficking in children[193] and the right for every child to preserve their identity,[194] leading to devastating consequences on the lives and rights of victims.[195] The *United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* was adopted by the UN General Assembly in 1986.[196] It was the first international agreement to recognize the principle of subsidiarity, which provides that an international adoption should only take place when suitable adoptive parents cannot be identified in the child's country of origin.[197]

The CRC also emphasizes the principle of subsidiarity, stating that "inter-country adoption may be considered as an alternative means of child's care, if the child . . . cannot in any suitable manner be cared for in the child's country of origin."[198] Many countries have incorporated the international best practice of subsidiarity by classifying international adoption as an *exceptional measure*, contemplated only after all attempts to realize a

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[187] U.N. Secretary-General, *Status of the Convention on the Rights of the Child*, ¶ 3, U.N. Doc. A/75/307 (Aug 12, 2020).

[188] *Id*.

[189] The monitoring committee is in charge of reviewing State's reports for monitoring compliance to the conventions. *Id.*

[190] *Id.* at ¶ 5.

[191] *Id.* at ¶¶ 3, 6.

[192] U.N. Human Rights Office of the High Commissioner, *Illegal Intercountry Adoptions Must Be Prevented and Eliminated: UN Experts* (Sep. 29, 2022), https://www.ohchr.org/en/press-releases/2022/09/illegal-intercountry-adoptions-must-be-prevented-and-eliminated-un-experts#:~.

[193] *See* Livia Ottisova et al., Psychological Consequences of Human Trafficking: Complex Posttraumatic Stress Disorder in Trafficked Children, 44 BEHAVIORAL MEDICINE 234 (2018).

[194] CRC, *supra* note 46, at art. 29(1)(c).

[195] U.N. Human Rights Office of the High Commissioner, *supra* note 192.

[196] Protection and Welfare of Children, *supra* note 177.

[197] *Id.* at art. 17.

[198] CRC, *supra* note 46, at art. 21(b).

domestic adoption are exhausted first.[199] Sometimes this is done by enforcing a period during which the adoption agency must find a suitable domestic placement before they can begin looking internationally.[200] Other States require that priority be given to their nationals abroad if the State is unable to find a domestic placement for the child.[201]

The international community has prioritized the subsidiarity principle for many reasons.[202] First, States and scholars have recognized that children should not be separated from their families, especially on a permanent basis because families are the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.[203] Scholars have argued that the permanency of guardianships or third-party community members serves the child interests at least as well, if not better than an international adoption would.[204] Second, it is also now recognized that children have a right to their identity,[205] including knowing and respecting their parents, culture, language, and values of the country from which they come.[206] Since international adoptions sever the rights of birth parents legally and culturally, children lose the right to their identity under systems that do not prioritize the subsidiarity principle.[207]

C. *A Flawed Attempt to Regulate Intercountry Adoptions*

In 1993, thirty-eight Hague Conference Member States came together to draft the Hague Convention.[208] In response to the novel large-scale migration of children across large geographical distances, the Hague Convention established standardized safeguard practices for international adoptions.[209] The drafting was inspired by news reports of atrocities involving

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[199] U.N. Department of Economic and Social Affairs/Population Division, *Child Adoption: Trends and Policies*, at 42, U.N. Doc. ST/ESA/SER.A/292 (2009).

[200] *Id*.

[201] *Id*.

[202] David M. Smolin, *The Case for Moratoria on Intercountry Adoption*, 30 S. CAL. INTERDISC. L.J. 501, 504–05 (2021).

[203] *Id.* at 504*;* CRC, *supra* note 46, at Preamble.

[204] *See, e.g.*, Albert & Mulzer, *supra* note 29, at 560.

[205] CRC, *supra* note 46, at art. 8.

[206] *Id.* at art. 29.

[207] Joseph M. Isanga, *Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards*, 27 BYU J. PUB. L. 229, 240–41, 253 (2012); CRC, supra note 46, at art. 29.

[208] Hague Convention, *supra* note 49, at 1134.

[209] *Id.* at Preamble.

international adoption practices out of Romania after the fall of Ceausescu.[210] The number of foreign adoptions skyrocketed between 1990 and 1991, just after the end of the Ceausescu regime, with more than 10,000 adoptions to foreigners registered by Romanian NGOs.[211] "In those early days, Bucharest had little control, let alone oversight, of the adoption process, much of which was conducted underground on what would become a thriving black market."[212] These incidents highlighted the need for adoption regulations, especially in countries that are destabilized after armed conflicts. [213]

By the 1990s, intercountry[214] adoption had become a controversial issue for many States who had a stake in the outcome of emerging law.[215] Many of the States involved in the convention drafting process were States such as Mexico, Brazil, and Romania, whose children were frequently made available for intercountry adoption.[216] Many States held serious reservations about the implications of the Hague Convention, whether attributable to first-hand knowledge of abusive adoption practices, beliefs that children's best interests were served by adoptions within the local community and culture, concerns over exploitation by wealthier nations, or all of the above.[217]

Ultimately, the Hague Convention drew on the underlying principles that Convention States *did* agree upon in their understanding of adoptions – that protections were needed for children, the birth parents, and the adoptive parents involved in intercountry adoptions.[218] The Hague Convention

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[210] Holly C. Kennard, Comment, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of International Adoptions*, 14 U. PA. J. INT'L BUS. L. 623, 631 (1994); Sara Dillon, *Making Legal Regimes for Inter-country Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Inter-country Adoption*, 21 B. U. INT'L L.J. 179, 248 (2003) (discussing how former president of Romania Ceaucescu's actions led to many unwanted children and overflowing orphanages).

[211] Anna Maria Ciobanu, *'I Was Definitely Trafficked': Romanians Adopted as Kids Now Seek Justice, Answers as Adults*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 7, 2023), https://www.rferl.org/a/32213639.html.

[212] *Id.*

[213] Kennard, *supra* note 210, at 631.

[214] There is no difference between the terms "intercountry" and "international" adoptions. The terms can be used interchangeably. *See International Adoption*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/immigrantrefugeehealth/adoption/index.html (last visited Oct. 30, 2023).

[215] Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 55 (2010).

[216] Hague Convention, *supra* note 49, at 1134.

[217] Estin, *supra* note 215 (discussing how controversy surrounding the Hague Convention arose due to the fear that poorer nations would lose their children to wealthier nations).

[218] Hague Convention, *supra* note 49, at 1134–35; Proceedings of the Seventeenth Session 10 to 29 May 1993; J.H.A. van Loon, *Note on the Desirability of Preparing a New Convention on International Co-operation in Respect of Intercountry Adoption in* HCCH, PROCEEDINGS OF THE SIXTEENTH SESSION, MISCELLANEOUS MATTERS, TOME I 165 (1987).

reinforced the shared belief that children "should grow up in an atmosphere of happiness, love, and understanding."[219] In doing so, the Hague Convention encompasses parts of the CRC, such as Article 21, which expresses that suitable care in a child's country of origin is preferable to international adoptions.[220]

The Hague Convention's provisions are largely procedural in nature rather than taking a holistic stance or providing factors of consideration for each international adoption being facilitated.[221] Chapter I of the Hague Convention states that to ensure a child's fundamental rights – mainly those outlined in the CRC – are protected, the *best interest of the child* standard must be applied to all transactions involving the transfer of children.[222] The rest of the Hague Convention outlines requirements for sending and receiving States in intercountry adoptions, essentially distributing responsibility between the two States to ensure oversight of such transactions.[223] Most of the requirements are largely procedural, such as establishing central authorities to regulate relevant transactions.[224] The Hague Convention also includes a general prohibition on "improper financial or other gain" from adoptions and activities related to adoptions.[225] Article 14 explicitly requires States to facilitate an intercountry adoption through an accredited body so that all international adoptions can have Central Authority oversight, ensuring the facilitated agreements meet the Hague Convention requirements.[226]

Furthermore, although Chapter VI of the Hague Convention mainly contains provisions of general application, these provisions have an enormous impact on the child.[227] For example, Article 29 prohibits any contact between prospective adoptive parents and the child's biological

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[219] Hague Convention*, supra* note 49, at 1134–35.

[220] Estin, *supra* note 215, at 56; *see* Hague Convention, *supra* note 49, 1134–35 (citing CRC, *supra* note 46, at art. 3) (affirming that a child, "for the full and harmonious development of [their] personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding," and by doing so indicated that adoption is preferential to institutional care even if it requires that a child be taken out of their home country because it may provide a more permanent family solution).

[221] *See generally* Estin, *supra* note 215 (providing a historical overview of the Hague Conferences on international family law and the largely procedural conventions that arose from those debates and discussions).

[222] Hague Convention, *supra* note 49, at 1135.

[223] Kristina Wilken, *Controlling Improper Financial Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL'Y 85, 89 (1995).

[224] *See id.* at 89–90.

[225] Hague Convention*, supra* note 49, at 1140, 1143.

[226] *See id.* at 1135–36.

[227] *See* Stein *supra* note 1, at 73.

parents or any person who has care over the child.[228] Articles 30 and 31 also preserve information concerning the child's origin, parents, and medical history, which may provide the child with information they need to trace their origins in the future.[229] While some of these provisions have a positive impact, others, like the discretion to permit payment for "reasonable professional fees" in Article 32(2), have negative consequences.[230]

Although the Hague Convention provides a framework to help the international community reduce baby selling, its provisions are not strong enough to end it.[231] Notably, the Hague Convention does not require countries to ban baby selling, and, worse, it does not punish baby sellers.[232] Furthermore, while the Hague Convention outlines the procedures that States must comply with to be approved as member States, there is nothing that induces or encourages States to comply with such safeguards.[233]

The lack of an enforcement mechanism in the Hague Convention is especially problematic when it comes to private parties who have been accredited[234] by an *authority*.[235] Private professionals involved in international adoptions, including lawyers, facilitators, doctors, and social

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[228] Hague Convention, *supra* note 49, at 1136.

[229] *Id*.

[230] *See infra* Section IV.A.

[231] Stein, *supra* note 1, at 73.

[232] *Id.* at 76.

[233] *See* Hague Convention, *supra* note 49; Stein, *supra* note 1, at 76.

[234] Hague Convention Articles 10–12 provide that "[a]ccreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted. Hague Convention, *supra* note 49. Articles 11–12 state that an accredited body shall (a) pursue non-profit objectives, (b) be managed and staffed by persons with training of ethical standards, and (c) be under State supervision; it shall also only be permitted to act in another Contracting State, if both the sending and receiving state authorize it to do so. *Id.*

[235] A CRC Contracting State is obligated to designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. Hague Convention *supra* note 49, art. 9. The Central Authorities' jobs are to:

> (a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
> (b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
> (c) promote the development of adoption counselling and post-adoption services in their States;
> (d) provide each other with general evaluation reports about experience with intercountry adoption;
> (e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Id.

welfare employees, "can easily hide illegal payments because it is difficult to distinguish a legitimate payment for professional services from a questionable payment" to induce mothers into selling their babies.[236] Even if a questionable payment is discovered, there are no punishment mechanisms in the Hague Convention that would incentivize States to take strong measures to ensure transactions are not repeated by the next private professional.[237] Hence, why the United States' intercountry adoptions have historically been and continue to be overlooked today.[238]

IV. ADDRESSING THE PROBLEMS THAT HAVE LED TO THE EXPLOITATION OF THE INTERNATIONAL ADOPTION SYSTEM

Most of the estimated one million intercountry adoptions completed since the rise in this practice in 1950 represent chronic violations of basic ethical principles codified in international law.[239] Intercountry adoption is a multifaceted process which requires the cooperation of numerous jurisdictions and agencies.[240] Thus, understanding how adoption practices between the United States and the RMI have conjured issues of exploitation requires understanding the United States' attitude toward adoptions generally, its practices in intercountry placements, and the pertinent international law governing the dynamic.

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[236] Stein, *supra* note 1, at 76–77.

[237] *See* Hague Convention, *supra* note 49.

[238] *See generally* GONDA VAN STEEN, ADOPTION, MEMORY, AND COLD WAR GREECE: KID PRO QUO? (2019) (revealing the hidden history of post-Cold War intercountry adoptions and how adoptions of Greek children to the United States far outpaced even those of Korean children on a per capita basis). Van Steen's book highlights how even individual intercountry adoption cases contribute to an emerging "collective subjectivity among Greek adoptees" that is also prevalent among adoptees from other countries because of the congruity in the black-market adoption structure. *Id.* at 239.

[239] Nicola Smith et al., *Lies, Love and Deception: Inside the Cut-throat World of International Adoption*, THE TELEGRAPH, (Dec. 6, 2022) https://www.telegraph.co.uk/global-health/climate-and-people/international-adoption-scandal/; *see* U.N. Hum. Rts. Special Proc. Joint Statement on Illegal Intercountry Adoptions, 1–2, (Sept. 29, 2022) https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/2022-09-29/JointstatementICA_HR_28September2022.pdf

[240] The Hague Convention was created at the international level precisely to address this issue. *See The Hague Convention & Why it Matters*, FIRST LEGAL (Sept. 27, 2023), https://www.firstlegal.com/the-hague-convention-why-it-matters/ ("The Hague Service Convention stands as a beacon of international legal cooperation, uniting 83 member countries under its guiding principles.").

A. *The United States' Attitude Toward International Adoptions: Finding Children for Homes, Not Homes for Children*

While domestic adoptions have existed within the United States since the nineteenth century,[241] international adoptions are a relatively new practice in the United States.[242] International adoptions gained popularity only after World War II, as a result of the first modern humanitarian crisis of mass amounts of parentless children in war-torn regions.[243] For many years, domestic adoptions developed alongside a "black market" of adoptions outside of the limited domestic family law framework.[244] "In 1851, Massachusetts passed the Adoption of Children Act, the first law in the United States acknowledging that the needs of children should take precedence in the adoption process."[245] The Act "instructed judges to ensure that adoption arrangements were handled appropriately."[246] However, "appropriately" was just as vague as it sounds; the Act did not give parameters of what was considered an "appropriate" adoption arrangement.[247]

As a result of such a vague law, "the first black market babies appeared in the United States in the 1920s" when a shortage of state-run orphanages led to an overcrowding dilemma.[248] Even though some adoption laws considering the welfare of children existed,[249] "state regulations to prevent baby selling were non-existent," which led to greater numbers of babies

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[241] *See Uniform Adoption Act of 1994,* ENCYCLOPEDIA.COM, https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/uniform-adoption-act-1994 (last visited Nov. 20, 2023) [hereinafter *Uniform Adoption Act*] ("In 1851, Massachusetts passed the Adoption of Children Act, the first law [in the United States] acknowledging that the needs of children should take precedence in the adoption process. The law instructed judges to ensure that adoption arrangements were handled appropriately.").

[242] WINSLOW, *supra* note 26, at 24 ("[I]n 1948, Child Welfare League members admitted that 'adoption as a professional service is still very young,' indicating the novel nature of the adoption procedures and structures in the postwar era.").

[243] *Id.* at 18–19.

[244] *Id.*

[245] *Uniform Adoption Act*, *supra* note 241.

[246] *Id.*

[247] *See id*.

[248] Stein, *supra* note 1, at 50 (discussing how in the 1920s, social changes and the absence of state-run orphanages provided fertile ground for the emergence of black market adoption as a means to place babies with adoptive parents); M. Haviland, *Black Market Adoption*, https://www.angelfire.com/fl2/colebaby/story.html (last visited Sept. 24, 2023). ("In the early 1900s, private secular and religious groups began the permanent residential care of orphaned children, but were ill equipped to handle the multitude of America's orphans.").

[249] *See Uniform Adoption Act*, *supra* note 241.

being sold.[250] At the time, baby selling began domestically.[251] However, within less than a decade, the problem was exacerbated when babies started to also be trafficked and sold across international borders with Canada.[252] Babies were sold largely by doctors and lawyers to parents who did not want to go through the "complex domestic regulations"[253] or stay on a long waiting list for a child to become available.[254] This practice was seen across the United States at the time, especially in Tennessee, Florida, and the Northeast.[255] This domestic trend slowly dwindled as adoption consent laws began to emerge[256] and made the practice between states more difficult.[257] Meanwhile, war abroad simultaneously created the perfect solution for obtaining new children to feed the adoption machine amid the United States' tightening of adoption laws.[258]

Formal adoption agencies were first created during the early twentieth century, offering support to adoptive parents and working to make the process easier for those wishing to give up a child for adoption.[259] Historically, adoptions were facilitated through individuals, and even as agencies began to emerge, many adoptions were still completed through

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[250] Stein, *supra* note 1, at 50; Wilken, *supra* note 223, at 87 ("U.S. adoption laws devote insufficient attention to improper profiting from international adoptions. In particular, they fail to regulate payments made by the adoptive parents of a child to the child's birth parent or to an adoption intermediary.").

[251] Stein, *supra* note 1, at 50.

[252] BALCOM, *supra* note 22, at 3–4.

[253] Stein, *supra* note 1, at 50–51. As children's welfare was brought to the forefront of the American consciousness, states began to require agencies to vet potential adoptive parents' histories and socioeconomic statuses. *Id.* at 49.

[254] *Id.* at 50–51, 64 ("Prospective adoptive parents may wait up to ten years for a domestic adoption . . . [while] couples adopting internationally generally only wait approximately six months to two years.").

[255] *Id.* at 51–52.

[256] *Id.* at 49–50 (detailing the four state consent statutes that emerged requiring birth parent consent to the adoption and allowed for revocation).

> The first kind of consent statute allows revocation at any time before the adoption is finalized . . . . The second type of consent statute permits revocation at any time as long as revocation furthers the best interest of the child. The third type of statute provides only a limited time to revoke consent. Finally, the last type of statute prohibits revocation, without regard to any time limit, unless there is a showing of fraud or duress in obtaining consent.

Id.

[257] *Id.* at 52.

[258] *See supra* Section II.A.

[259] *Uniform Adoption Act*, *supra* note 241.

private placements – birth mothers and their families arranging adoptions directly with the families which the children would be placed with.[260] Before 1950, adoptive parents, often childless and wealthy,[261] "requested children of their own race and without major health problems."[262] However, "a 1958 initiative[263] encouraged adoption of Native American orphans,[264] and in 1961 Congress [amended] [the Immigration and Nationality Act][265] specifically setting conditions for the adoption of international children by U.S. citizens."[266] The Urban League and other domestic agencies began promoting adoption for children of color and attempted to encourage adoptions of children with physical or mental disabilities.[267] Even though previous adoptions were severely discriminatory against children with disabilities and children of color, the Vietnam War in the 1960s opened the hearts of Americans to help the perceived war-torn children abroad, thereby cultivating extensive efforts to expand placement options for other children.[268] This rhetoric in the U.S. was merely an absorption of the international rhetoric surrounding warn-torn children in Europe post-World War II.[269] What is evident is that the false *savior industrial complex*[270] has been and continues to be at the core of many foreign adoption placements in

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[260] *Id*.

[261] WINSLOW, *supra* note 26, at 21–22.

[262] *Uniform Adoption Act*, *supra* note 241.

[263] Albert & Mulzer, *supra* note 29, at 574–75. In 1958, the federal Bureau of Indian Affairs worked with the Child Welfare League of America – a national organization of child welfare and adoption agencies – to create the Indian Adoption Project, designed to place Native children from sixteen western states into homes with white families in the East. *Id.*

[264] *Id.* Forced Native American adoptions led to similar culture erasure as with Marshallese adoptions. *See id.* The history of the United States' treatment of Native Americans is beyond the scope of this manuscript.

[265] Pub. L. No. 87-301, 75 Stat. 2237; *see The Origins of Adoption in America*, PBS, https://www.pbs.org/wgbh/americanexperience/features/daughter-origins-adoption-america/ (last visited Sept. 24, 2023) ("The Immigration and Nationality Act incorporates provisions for orphans adopted from foreign countries by American citizens."); Albert & Mulzer, *supra* note 29, at 575–76 ("Around the same time, in the early 1960s, as the Civil Rights Movement began to make inroads against de jure segregation," the complex racial momentum paved an expansion of rights for people of color in the United States).

[266] Uniform Adoption Act, *supra* note 241.

[267] Albert & Mulzer, *supra* note 29, at 575–76. Prior to the National Urban League's push, Black families were prohibited from adopting children through agencies. *Id.* Because there were no Black adoptive families in the agencies' systems, Black birth mothers were also prohibited from using agencies to relinquish their children to adoptive parents. *Id.*

[268] *See generally* Nguyen Da Yen v. Kissinger 528 F.2d 1194, (9th Cir. 1975) (concerning air-lifting children out of Vietnam).

[269] *See supra* Section II.A.

[270] *See generally* Mutua, *supra* note 118.

the United States.[271] To this end, the Western American adoption system prioritizes finding children for childless parents rather than finding homes for parentless children, all while disguising American adoption as a heroic humanitarian effort.[272] With the United States seeing roughly 6,500 adoptions of children from abroad in 1992, the dubious practices[273] that continually popped up in these adoptions illuminated the considerable work required to reform the United States' adoption laws.[274] By 1994, as many as 10,000 adoptions involved foreign children adopted by American families.[275] While it was apparent from the volume of adoption cases in the United States that the adoption process "had made great strides, both in terms of its [social] acceptance and in the number of children being helped, numerous legal headaches still plagued the process."[276] One such legal headache was the vast array of varying state laws.[277]

The increased number of adoptions and the differences in adoption laws from state to state made the adoption procedure for intercountry and domestic adoptions difficult and remarkably cumbersome.[278] In an effort to integrate divergent standards and encourage adoption, the National Conference of Commissioners on Uniform State Laws, a century-old agency dedicated to integrating state laws across the nation, proposed the Uniform Adoption Act

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[271] Kate O'Keeffe, The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and Its Meager Effect on International Adoption, 40 VAND. J. TRANSNAT'L L. 1611, 1612–13 (2007). In 2004, an earthquake off the coast of Indonesia caused a tsunami tidal wave that devastated countries across Southeast Asia. Id. There were an estimated 216,000 deaths and "the U.S. Department and international adoption organizations fielded calls pouring in from U.S. families interested in providing homes to orphaned children." Id. However, "the need to identify and reunite [children with] family members [and] the variance in adoption procedures in different countries" led "many of the countries to shut down their borders to international adoptions altogether." *Id.*

[272] Kennard, *supra* note 210, at 625–26. "In the United States and Western Europe, declining birth rates and the largest number of infertile couples in history have created a situation where the demand for children exceeds the supply. *Id.* As a result, childless couples have turned to intercountry adoptions [in] impoverished, war-torn countries" to provide western parents with the children they desire. *Id.*

[273] *Id*. at 627 (explaining that prospective adoptive parents often choose "independent agents over licensed agencies because of the independent agents' ability to circumvent bureaucratic channels).

[274] Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 THE FUTURE OF CHILDREN 89, 91 (1993).

[275] *Uniform Adoption Act*, supra note 241.

[276] *Id*.

[277] *Id.*

[278] *Id*.

of 1994 ("UAA").[279] Inspired by the Hague Convention, the drafters highlighted the need to protect the child's best interest.[280]

One of the main ways that the UAA's drafters attempted to prioritize the child's best interest was by creating consent requirements for individuals placing a child up for adoption.[281] As ambitious and idealistic as the UAA was, a huge problem existed – none of the states incorporated the UAA into its laws and it eventually died.[282] Legislators went back to the drawing board and by 2000, it was much easier to get consensus because the United States now had an obligation to ratify and incorporate the Hague Convention.[283] As such, the Intercountry Adoption Act of 2000 ("IAA") was passed.[284]

Throughout the process of building the new international family law, the United States continually showed its support and even participated in the Hague Conference.[285] In March 1994, the United States signed the Hague Convention, demonstrating its intent to become a party member.[286] Many of the concerns that resonated in the drafting of the Hague Convention pertained to issues and testimonies of coerced or induced consent to adoptions, abductions, and an unregulated adoption system that created an incentive for

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[279] Joel D. Tenenbaum, *Introducing the Uniform Adoption Act*, 30 FAM. L.Q. 333, 333–34 (1996) [hereinafter UAA].

[280] Stein, *supra* note 1, at 53.

[281] *Id*. at 53–55.

[282] By 2006, only the state of Vermont had adopted the UAA. *Uniform Adoption Act*, *supra* note 241.

[283] By signing the Hague Convention, the United States consented to uphold its principles. *See* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 41 (2007) (States enter into binding agreements in the form of treaties). The United States is a dualist country when it comes to international law. *See* Giuseppe Sperduti, *Dualism and Monism: A Confrontation to be Overcome*, 3 ITALIAN Y.B. INT'L L. 31, 38 (1977). As a dualist country, the United States is not bound by a treaty upon signing. Instead, after signing a treaty, Congress must adopt new legislation which incorporates the principles of the treaty into domestic law. *Id.* Only after such legislation becomes law is a treaty or convention considered to be ratified by the United States. *Id.* Yet, the Vienna Convention on the Law of Treaties obligates States to refrain from acts which would defeat the object and purpose of a treaty when they have become signatories but have not ratified the treaty. Vienna Convention on the Law of Treaties art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331.

[284] Intercountry Adoption Act of 2000, Pub. L. No. 106–279, 114 Stat. 825 (codified as 42 U.S.C. § 14901).

[285] Scheduling Proposal from Melanne Verveer, Assistant to the President, to Stephanie Streett, Assistant to the President (Jan. 20, 2000) NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/24494037 (last visited Sept. 25, 2023) ("On May 29, 1993 the United States and 65 other countries came together to negotiate and sign the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption."); *see* GLOBALIZATION OF CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS VII-IX (Sharon Detrick & Paul Vlaardingerbroek eds., 1999).

[286] *See Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, U.N. Treaty Collection, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ac2f9&clang=en (last visited Nov. 20, 2023).

significant financial gain.[287] Thus, when drafting the IAA, U.S. Congress sought to address these concerns.[288] Testimony before the House International Relations Committee and the Senate Foreign Relations Committee focused on problems that U.S. citizens encountered during the international adoption process.[289] One of these problems included the large number of children with undiagnosed medical conditions and psychological disabilities coming into the country through adoption.[290] Testimony also highlighted the exorbitant fees paid to facilitators, [291] and the lack of recourse

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[287] Trish Maskew, *The Failure of Promise: the U.S. Regulations on Intercountry Adoption Under the Hague Convention*, 60 ADMIN. L. REV. 487, 491 (2008) (listing improper financial gain as one of the issues that prompted the establishment of the Hague Convention on Intercountry Adoption); *see* Elisabeth J. Ryan, *For the Best Interests of the Children: Why the Hague Convention on Intercountry Adoption Needs to Go Farther, As Evidenced by Implementation in Romania and the United States*, 29 B.C. INT'L & COMP. L. REV. 353, 355 (2006) (highlighting that in November 2004, undercover investigators in Romania found parents willing to sell their babies outright for as little as 500 Euros, or approximately $663, within minutes).

[288] *See* Intercountry Adoption Act of 2000, Pub. L. No. 106–279, 114 Stat. 825 § 2(b)(2).

[289] *See* Implementation of the Hague Convention on International Adoption: Hearing Before the H. Comm. on Int'l Rel., 106th Cong. 35 (1999).

[290] *See id.* (providing testimony that the American Academy of Pediatrics' most significant concerns include inadequate or unavailable information released to parents about the health and well-being of children being considered for adoption). Before international adoptions became common place in the United States, white American families sought to adopt white children with no disabilities or other developmental issues. *See, e.g.*, Devon Brooks, Sigrid James & Richard P. Barth, *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 SOC. SERV. REV. 575, 578–79 (2002). The current international adoption system, which places orphans with health or psychological concerns with American families, illustrates the lack of information provided to prospective parents about the health and well-being of the child they are adopting. *See* Implementation of the Hague Convention on International Adoption: Hearing Before the H. Comm. on Int'l Rel., 106th Cong. 35 (1999). In fact, there are numerous instances of adoptive parents killing their adopted children due to undisclosed behavioral or developmental issues. Theresa Vargas, *N.C. Woman Admits Killing Adopted Russian Daughter Death of Russian Child Could Imperil Future Adoptions*, WASH. POST, (Mar. 2, 2006), https://www.washingtonpost.com/archive/local/2006/03/02/nc-woman-admits-killing-adopted-russian-daughter-span-classbankheaddeath-of-russian-child-could-imperil-future-adoptionsspan/a22d4bb5-4661-447f-b2a2-05613c504485/ ("Adoptive parents . . . are given little preparation for what to expect [when children they have adopted have behavioral and developmental problems.]").

[291] *See* 146 CONG. REC. H6395 (July 18, 2000) (statement of Rep. William Delahunt) ("Documented abuses [in international adoptions] range from the charging of exorbitant fees by . . . 'facilitators' . . . to child kidnapping, baby smuggling and [coercing birth parent consent].").

against adoption agencies and facilitators who abuse the system.[292] The signing of the IAA, which came into effect October 6, 2000, solidified the United States' commitment to addressing these problems by upholding the Hague Convention's principles[293]

Upon completion of the IAA, the stated purposes turned out to be a compromise of competing private and public interests. As such, the IAA states that its purpose is:

> (1) to provide for implementation by the United States of the [Hague] Convention;
>
> (2) to protect the rights of, and prevent abuses to adoptions subject to the birth families, and adoptive parents involved in adoptions subject to the Convention, and to ensure that such adoptions are in the children's best interests; and
>
> (3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad[.][294]

Working together, the Hague Convention and the IAA seek to guard against the abduction, sale, and trafficking of children by establishing procedural norms that allow different national legal systems to work

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[292] *See id.* (describing the problem of information being "improperly held from adoptive families with regards to the child's medical and psychological condition"); David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113, 194 (2006) (discussing how agencies "are known to include broad waivers of liability in their contracts with parents . . . designed to allow . . . agencies to avoid accountability for their failures.") [hereinafter Smolin, *Child Laundering*]; Smolin, *Intercountry Adoption and Poverty*, *supra* note 120, at 118. ("The person at the top of this criminal conspiracy may receive [up to] $20,000 for each child who is placed for adoption overseas, with funds coming from purportedly legitimate adoption fees and 'orphanage donations.'").

[293] Intercountry Adoption Act of 2000, 42 U.S.C. § 14901(a). Congress recognizes:

> (1) the international character of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at The Hague on May 29, 1993); and
>
> (2) the need for uniform interpretation and implementation of the Convention in the United States and abroad, and therefore finds that enactment of a Federal law governing adoptions and prospective adoptions subject to the Convention involving United States residents is essential.

Id.; O'Keeffe, *supra* note 271, at 1629.

[294] *Id.* at § 14901(b)(1)-(3).

collaboratively to facilitate intercountry adoptions.[295] However, the IAA includes problematic terms and definitions, specifically pertaining to who can facilitate intercountry adoptions.[296] Given the United States' historic exploitation of the RMI, the U.S. Department of State's ("State Department") supplemental regulations[297] and the IAA further exacerbate the intercountry adoption system's flaws in the context of the United States-RMI adoptions.[298]

The Hague Convention requires a central authority be designated in each country to oversee cooperation and compliance with the convention regulations, and therefore, the U.S. Congress designated the State Department as the central authority.[299] As the central authority, the U.S. State Department oversees the accreditation of organizations and people designated to facilitate adoptions and sometimes issues reporting guidelines when required by the sending country.[300] Notwithstanding the undoubted importance of international conventions and each State's work to implement

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[295] *See* 42 U.S.C. § 14901(b)(3) (listing the purpose of the Act, including improving the government's ability to assist citizens of contracting parties seeking to adopt from abroad); Hague Convention, *supra* note 49, art. 1(b) (declaring the establishment of a system of cooperation among contracting states as an objective of the Convention). Hague Convention party members are subject to the same procedures and recognition of other countries' adoption systems. *See Understanding the Hague Convention*, U.S. DEP'T. OF STATE, https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/understanding-the-hague-convention.html#:~:text=The%20Convention%20establishes%20a%20framework,best%20interests%20of%20the%20child (last visited Oct. 30, 2023).

[296] *See* H.R. 2909, 106th Cong. (1999). As introduced, the term ''qualified entity'' meant only "a nonprofit private entity that has expertise in developing and administering standards for entities providing child welfare services and that meets such other criteria as the Secretary may by regulation establish . . . .". *Id.* The Senate however, also added to this definition, "a public entity (other than a Federal entity), including an agency or instrumentality of State government having responsibility for licensing adoption agencies," thereby expanding the scope of who is qualified to perform intercountry adoptions. *Id.* While both are still subject to the approval by the central authority, the public entity may collect profits from the facilitation of adoptions. *Id.*

[297] *See infra* note 307.

[298] *See supra*, Section II.B.

[299] *See* 42 U.S.C. § 14911(a)(1) (designating the U.S. Department of State as the central authority, pursuant to art. 6(1) of the Hague Convention). The State Department did not publish its final regulations until 2006, which meant that the IAA and the Hague Convention were not implemented in the United States until 2006. 22 C.F.R. §§ 96.1–111 (2011). The Department of Homeland Security also released regulations concerning the immigration aspects of the Hague Convention on October 4, 2007. Maskew, *supra* note 287, at 488.

[300] 42 U.S.C. § 14925; 22 C.F.R. §§ 96.51, 96.14 (2006).

them into domestic law,[301] the IAA is based on the Hague Convention's *minimum* standards for regulating intercountry adoptions and therefore does not provide sufficient protection for families of color.[302]

Because virtually all U.S. adoption placement agencies and private individuals contract with independent adoption facilitators abroad,[303] facilitators stand at the core of the problem with intercountry adoptions.[304] In regulating these facilitators, the IAA requires that:

> Except as otherwise provided in this title, no person may offer or provide adoption services in connection with a Convention adoption in the United States unless that person—
>
> (1) is accredited or approved in accordance with this title; or
>
> (2) is providing such services through or under the supervision and responsibility of an accredited agency or approved person.

This language requires that anyone performing adoptions either be accredited or work under the supervision of an accredited entity.[305] Although

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[301] DETERMINING THE BEST INTERESTS OF THE CHILD, CHILD WELFARE INFORMATION GATEWAY 1 (2020) (stating that "all States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes" requiring that the *child's best interests* be considered whenever specified types of decisions are made regarding a child's custody, placement, or other critical life issues).

[302] *See* Leslie Doty Hollingsworth, *Does the Hague Convention on Intercountry Adoption Address the Protection of Adoptees' Cultural Identity? And Should It?*, 53 SOC. WORK J. 377, 377–78 (2008) (discussing that while the Hague Convention calls for preservation and access to an adoptee's origin and background, and "preparation of a report by receiving countries [on the] potential adoptive parents' identities, [family] . . . suitability to adopt, [and] background," cultural identity is not mentioned specifically in the IAA. Attention to it in decisions, counseling, and training appears left to the discretion of adoption agencies) (internal quotation marks omitted).

[303] *See, e.g.*, D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U.L. REV. 349, 355–75 (2005) (discussing "baby buying" scams through facilitators or "baby recruiters" whot have been uncovered in Cambodia, India, and Guatemala, among many other countries). Although difficult to statistically calculate due to the nature of criminality involved with adoption facilitators, numerous instances of baby selling that have been brought to light all involved foreign facilitators. *See id.*; O'Keeffe, *supra* note 271, at 1620. In a story involving the nomadic Lambada tribe in India, women were induced by facilitators to relinquish their babies for fifteen to forty-five dollars. O'Keeffe, *supra* note 271, at 1620. Facilitators then sold the babies to orphanages "for between $220 and $440, and the orphanages would receive anywhere between $2000 and $3000 when those children were placed with foreign adoptive parents." *Id.*

[304] *See infra* Section IV.B.

[305] 42 U.S.C. § 14921 (a)–(b).

this language seemingly offers legal safeguards for children in adoptions processes, exceptions to the IAA diminish its protectionary significance.

The State Department regulations require accredited U.S. adoption providers to take legal responsibility for the actions of their overseas facilitators or agents.[306] However, the State Department created an *exception* and didn't require agency supervision over foreign providers that obtain consent from a birth parent.[307] Instead, the State Department regulations allow the adoption service provider to decide *if* they will supervise their foreign contact who obtains consent directly from the birth parents.[308] Rather than explicitly requiring that the adoption service provider be legally responsible for *all* agents, the final rules merely threaten to revoke accreditation if the U.S. adoption service provider engages in unethical or illegal activity.[309] This is the largest loophole within the IAA because obtaining consent from a birth parent represents the stage with the greatest opportunity for birth parent exploitation, and where human trafficking is more likely to occur due to the misrepresentation of the Western adoption system.[310]

Because intercountry adoptions deal with the permanent relocation of a child from one country to the jurisdiction of another, immigration laws are typically coupled with family or adoption laws.[311] Accordingly, the U.S. Immigration and Nationality Act[312] is also a key facet of the intercountry adoption dilemma. The INA currently allows adoptive parents to make reasonable payments to the child's parents for "necessary" activities.[313] While the INA explicitly prohibits adoptive parents giving money to a child's

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[306] Intercountry Adoption Accreditation of Agencies and Approval of Persons, 22 C.F.R. §96 (2024); Preservation of Convention Records, 22 C.F.R. § 98.2.

[307] *See* 22 C.F.R. § 96.14(c)(3) (2015).

[308] *See* 22 C.F.R. § 96.

[309] *Id.*

[310] *See* Maskew, *supra* note 287, at 503–04. Numerous stories indicate that birth parents are told lies about the adoption process and Western legal systems, such as: parents still having legal rights to their child, that parents could visit their child, that the wealthy families their children were being placed with would continuously send the parents money, and that the adoptee, upon the age of majority, could petition for their birth parents to join them in their receiving country. *See, e.g.*, *id.* at 502–04; Blair, *supra* note 303, at 357.

[311] *See, e.g.*, Stephanie Zeppa, "*Let Me In, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT'L & COMP. L. REV. 161 (discussing the growth of intercountry adoption within the context of the United States' immigration legal regime).

[312] Immigration and Nationality Act 8 U.S.C.A Ch. 12 (2023).

[313] 8 C.F.R. § 204.3(i) (2023) (stating that child-buying is a ground for denial in a petition for adoption). However, § 204.3(i) also states that nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities. *Id.*

birth parents, either directly or indirectly, as payment for relinquishing the child, the term "necessary" has been read broadly due to the Department of State's regulations that expanded the categories of allowable expenses.[314] These categories include reasonable payments that may be necessary to compensate "activities related to adoption proceedings," months of parental care, and even payment for the mother's care directly preceding and following the birth of the child.[315] Thus, while these regulations state that money must not be exchanged as a payment for the relinquishment of a child, they offer no specific standard that would distinguish between what payments are truly reasonable in light of procedural aspects of adoptions versus payments that are prohibited due to their potential to be coercive in inducing relinquishment of the birth parent's parental rights.[316]

Because payment has become commonplace in adoptions between the United States and the RMI, it is virtually impossible to adequately control and monitor such transactions.[317] The current system, therefore, not only incentivizes facilitators to find adoptive families for a child, but also incentivizes mothers to "conceiv[e] children for the purpose of placing them for adoption."[318] As a result of the provisions regulating intercountry adoption and the lack of agency oversight, facilitators and birth parents are practically guaranteed to receive a "reasonable" amount of money upon relinquishing a child.[319] Without an improvement to this system, individual facilitators will keep finding creative loopholes, as they have, to continue the profitable practice of baby selling.[320]

The hasty facilitation of international adoptions being prioritized over the subsidiarity principle's assurance of safeguarding a child's identity leads to

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[314] 22 C.F.R. § 96.36 (2023).

[315] 22 C.F.R. § 96.36(a).

> If permitted or required by the child's country of origin, an agency or person may remit reasonable payments or activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following birth of the child, or the provision of child welfare and child protection services generally.

Id.

[316] *See* 8 C.F.R. § 204.3(i).

[317] *See Comparing the Costs of Domestic, International and Foster Care Adoption*, AM. ADOPTIONS, https://www.americanadoptions.com/adopt/the_costs_of_adopting (last visited Oct. 30, 2023) (providing an estimated cost breakdown of intercountry adoption costs by country).

[318] Maskew, *supra* note 287, at 505.

[319] *Id.*

[320] *See id.* at 505–06.

devastating consequences.[321] The implications of this are not only violations of the United States' international treaty obligations,[322] but also the potential harm to the child involved.[323] In the United States, when intercountry adoptions are prioritized over a sending State's domestic options for a child, they almost always sever parental rights and deprive the child of their cultural and ethnic identity.[324] As a result, the current system not only preys on vulnerable birth parents, but it does so at the expense of the children involved.[325] Thus, to better protect children from intercountry exploitation and to uphold adoptees' best interests, the United States' focus must shift to keeping children within their origin States, rather than creating weak regulations within the intercountry adoption process that unilaterally serve childless American parents.[326]

B. *How the American Attitude Toward Intercountry Adoptions Contributes to the Hawaiʻi-RMI Adoption Problem*

In late 2016, Hawaiʻi once again saw an influx of Marshallese women being trafficked to the United States to sell their unborn babies to adoptive

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[321] *See supra* Section II.A.

[322] *See supra* Part III. The CRC and the Hague Convention prohibit the abduction, the sale of, or traffic in children. *Id.* Processes that encourage such practice are violations of these international laws. *Id.*

[323] Aurélie Harf et al., *Cultural Identity and Internationally Adopted Children: Qualitative Approach to Parental Representations*, 10 PLOS ONE, Mar. 16, 2015 at 1, 3 ("[S]ome studies have found that ethnic and cultural identity can play an important role in the promotion of self-esteem and positive [coping skills].").

> [C]ultural competence of adoptees in their culture of birth is developed through their participation in cultural activities: learning the language, participating in holidays, in meals where the traditional food of the country of birth is served, developing awareness of traditions, listening to music and seeing films from that country, and becoming conscious of one's physical resemblance to people of the same ethnic and cultural group.

Id. Adoptions that do not prioritize a child's right to their culture leave these children under-served. *Id.*

[324] *See* Hollingsworth, *supra* note 302, at 387; Estin, *supra* note 215, at 56. The IAA has no requirement for adoptive parents to ensure cultural enrichment for their adopted child. *Id.* at 83–84.

[325] Harf et al., *supra* note 323.

[326] Kristen Cheney, *'Giving Children a Better Life?' Reconsidering Social Reproduction, Humanitarianism and Development in Intercountry Adoption*, 26 EUR. J. DEV. RSCH. 247, 248 (2014) ("Rhetoric about 'giving children a better life' thus drives both demand for adoption and relinquishment of children by poor families.").

families.[327] Local physicians noticed that pregnant Marshallese women came to Hawai'i in "small groups assisted by the same Marshallese facilitator, who handle[d] translation and power of attorney services and accompanie[d] them to their medical appointments."[328] The women's medical paperwork listed the same local address for many of them.[329] Additionally, it seemed as though the women were coached on how to "answer questions in ways that would minimize suspicions and circumvent regulations meant to prohibit unethical adoptions."[330]

"'The question is whether these women really understand what they're doing, that the babies may never come back to them,' said Barbara Tom, a retired public health nurse who heads the advocacy committee Nations of Micronesia . . . ."[331] Based on interviews with native Marshallese individuals and anthropological studies conducted in the islands, it is likely that these vulnerable mothers are not giving informed consent.[332] "[T]he social and economic marginalization of [Marshallese] birth parents in the hierarchical and economically dependent nation is a [profound] factor in the relinquish[ment] of [Marshallese] children to American [adoptive] parents."[333]

Most native Marshallese individuals barely speak English.[334] There is not

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[327] Michael Walter, *Unscrupulous Adoption Practices Abuse Marshallese Mothers, Families*, HONOLULU STAR-ADVERTISER (June 4, 2017), https://www.staradvertiser.com/2017/06/04/editorial/island-voices/unscrupulous-adoption-practices-abuse-marshallese-mothers-families.

[328] Rob Perez, *Marshallese Adoptions Raise Some Suspicions*, HONOLULU STAR-ADVERTISER (July 5, 2017), https://www.staradvertiser.com/2017/07/05/hawaii-news/marshallese-adoptions-raise-some-suspicions/.

[329] *Id*.

[330] *Id*.

[331] *Id*.

> The Nations of Micronesia Committee (NOM) was initially formed by Public Health Nurses back in 1997 when they recognized the need to learn about the cultures of our newest migrant group from the Compact of Freely Associated States. The group met to develop a resource manual of cultural information to help nurses in their practice.

History, NATIONS OF MICRONESIA (June 13, 2009, 1:11 AM), https://nationsofmicronesia.wordpress.com/.

[332] Hill & Dugdale, *supra* note 11; Kathryn Joyce, *"Do You Understand That Your Baby Goes Away and Never Comes Back?"*, NEW REPUBLIC (Apr. 21, 2015), https://newrepublic.com/article/121556/do-understand-baby-goes-away-never-comes-back; Walsh, *Adoption and Agency*, *supra* note 15.

[333] Walsh, *Adoption and Agency*, *supra* note 15.

[334] Kajin Aelōñ Kein refers to the Marshallese language and it is the official language of the RMI. REPUBLIC OF THE MARSHALL ISLANDS, MARSHALL ISLAND PUBLIC SCHOOL SYSTEM: LANGUAGE EDUCATION POLICY 2–4 (2015) [hereinafter LANGUAGE EDUCATION POLICY];

a word for adoption in Marshallese,[335] although it is extremely common in Marshallese culture for children to live in homes with extended kin or village elders, not with their birth parents.[336] In 2012, twenty-six percent of children under fifteen years old were adopted by other Marshallese families, and ninety percent of households include someone adopted in or out.[337] It is a common practice in the RMI for women who are able to have children themselves to adopt others' children into their homes.[338] In some instances, cultural practices dictate that parents give away their first-born child to other family members.[339] Typically, the children still regularly interact with their biological family and even return when they are adolescents.[340] Child-sharing

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Robert C. Kiste, *Marshall Islands*, BRITANNICA (Nov. 3, 2023), https://www.britannica.com/place/Marshall-Islands. While the English language was introduced to the islands after the U.S. gained trusteeship following WWII, opportunities to learn English vary across the islands. Ingrid L. Naumann, Addressing the Literacy Needs of Marshallese Adolescents 1–2 (May 2015) (Master thesis, University of Nebraska) (on file with author). As of 2015, Kajin Aelõñ Kein was the medium of learning, at 100 percent, in grades K-6th. LANGUAGE EDUCATION POLICY, *supra* note 334, at 3. It was not until 2015 that the educational language policies shifted to increase English competency. *See generally id*. (developing the language policy of the Marshall Islands to "facilitate the development of functional bilingualism in Kajin Aelõñ Kein and English"). This means that for those old enough to be mothers, fluency in English was not a government priority and many still struggle with the language. Naumann, *supra*, at 2–4.

[335] Perez, *supra* note 328.

[336] Elise Berman, Holding On: Adoption, Kinship Tensions, and Pregnancy in the Marshall Islands, 116 AM. ANTHROPOLOGIST 578, 579 (2014); see also Dejo Olowu, The Legal Regime of Child Adoptions in the South Pacific and the Implications of International Regulatory Standards, 19 SRI LANKA J. INT'L L. 109, 138 (2007) (researching intercountry adoptions in the South Pacific Islands).

> [T]he definition of 'child adoption' was not clear to most respondents as most of the people interviewed tended to confuse child adoption with 'child guardianship' or 'child fostering' which are very common phenomena in most indigenous cultures around the world. [In addition,] the customary laws on child adoption vary greatly from one ethnic community to another (even within the same South Pacific country).

Id.

[337] Berman, *supra* note 336, at 579.

[338] *Id*. at 580.

[339] RMI children are overwhelmingly adopted by kin, often by their birth parents' siblings (aunts and uncles) or parents (grandparents). *Id.* at 579–80. These exchanges of kinship (what we call adoption) are often initiated by a request or demand on the part of kin and thus occur not because parents cannot care for their children, but rather, because other kin want children. *Id*. In contrast to Western adoptions, adopted children maintain connections to their birth family and the adoption process is viewed as additive to the child's network of support, not substitutive. *See id*.

[340] Perez, *supra* note 328.

practices like these are not only common in the RMI, but also across Micronesia.[341] The notion that a mother can sign away her relationship with her child is not a concept that exists within their culture.[342]

The American adoption system, which prioritizes finding a child for a family and not a family for a child, combined with the cultural differences in understandings of adoption practices, leads to the exploitation of vulnerable Marshallese mothers.[343] The gravity of and extent to which Marshallese mothers are relinquishing their parental rights to American adoptive parents differs significantly from the existing cultural norms, emphasizing the importance of *informed* consent.[344] Recognizing the exponential rate at which non-White birth mothers are exploited, both the United States and the RMI implemented adoption regulations that require birth mother consent.[345] For the United States, this was done through the IAA.[346] For the RMI, this was executed in the Adoptions Act of 2002.[347]

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[341] Berman, *supra* note 336, at 579–80.

[342] Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J. L. & FAM. STUD. 303, 304 (2004).

[343] *Id.* at 309–10.

[344] *Id*. at 304 (discussing a Marshallese mother who "'voluntarily' relinquished all parental rights in her children") ("Had she known that adoption meant something entirely different in the Western world from her own knowledge of adoption, she may not have considered it an option. In fact, the notion that a mother can sign away her relationship with her children had never been a concept in her culture."); Perez, *supra* note 328.

[345] Roby, *supra* note 342, at 310.

[346] 42 U.S.C.A. § 14902 (stating that adoption service providers must secure "necessary consent to termination of parental rights and to adoption"). Section 14944 imposes civil penalties on a person who

> makes a false or fraudulent statement, or misrepresentation, with respect to a material fact, or offers, gives, solicits, or accepts inducement by way of compensation, intended to influence or affect in the United States or a foreign country . . . [in] the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child in a case subject to the [Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption].

42 U.S.C.A. § 14944.

[347] Adoptions Act 2002 § 813.

> (1) Unless consent is specified as unnecessary under respective subsections hereof, a petition to adopt a child may be granted only if the following consents have been obtained. (a) consent of the natural parents(s); (b) if the child to be adopted is not in the custody or care of either parent, consent of the person(s) who have primary guardianship or custody of the child pursuant to a court Order or to Marshallese culture.

Id.

The RMI Adoption Act states:

> §814. Duty to Advise natural parents/guardians.
>
> (1) The Court shall ensure that the person(s) whose consent is required, *fully understand(s) the consequences of the adoption*.
>
> (2) In all phases of the adoption process, the natural parent(s) or guardian(s) shall be entitled to the services of the Central Adoption Authority.
>
> (3) The Central Adoption Authority may however recommend legal representation for the natural parent(s) or guardians(s) of the child depending on the circumstances of each case.
>
> (4) *In all phases of representation the natural parent(s) or guardian(s) of a child shall have interpretation of the proceedings into their primary language.*
>
> (5) All documents presented to the natural parent(s) or guardian(s) shall be *translated into their primary language*. If the natural parent(s) or guardian(s) are illiterate, they shall have a thorough explanation of the contents of the documents, *including the consent documents*, by an officer of the Central Adoption Authority or an attorney, prior to signing any such document. The Head of the Central Adoption Authority or his designee, shall attest to this fact in the affidavit referred to in section 812 (3) (d) above.[348]

In fact, the language of the RMI Adoptions Act is much stronger than the consent provisions of the IAA, which simply refer to the need for consent.[349] However, the reoccurrences of baby selling over the past four decades make it clear that even the RMI Adoptions Act is insufficient, especially when facing private facilitators, who act as interpreters to gain the birth mothers' consent to relinquish their children forever.[350] Under Marshallese law, a child

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[348] *Id.* § 814 (emphasis added).
[349] *Compare* Adoptions Act 2002 §§ 813–814 *with* 42 U.S.C.A. § 14902.
[350] *See supra* Section IV.A.

born in the RMI may only be placed for adoption through a Marshallese court.[351] To avoid this, baby sellers transport pregnant mothers internationally to give birth abroad.[352] As a result, Marshallese babies born in the United States may be adopted in any U.S. court, while normally these babies, if born in the RMI, would fall within the cooperative jurisdiction of both countries.[353] Private facilitators[354] are bypassing the RMI court system by bringing Marshallese mothers to the United States to give birth.[355]

The excessive ease with which facilitators are bringing Marshallese women to the United States with passports as their sole form of documentation is alarming. The story of Kookie Gideon is just one of hundreds that highlight this issue.[356] She boarded a plane from Majuro, the capital of the RMI, nine months pregnant and with her newly printed passport in hand.[357] She was unaware that she was embarking on an illegal journey[358] to give up her parental rights to her soon-to-be newborn child to an American

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[351] Adoptions Act 2002 § 804.

[352] Dugdale & Hill, *supra* note 58.

[353] *Id*.

[354] Private facilitators often "prey on low-income women facing unplanned pregnancies and in dire financial situations, often through online advertising." Jeremy Loudenback, *California Bans 'Adoption Facilitators' Known to Engage in Questionable Practices*, IMPRINT (July 27, 2023, 3:29 PM), https://shorturl.at/hpKNX. These facilitators use enticement and pressure tactics to push doubtful birth parents to go through with adoptions. Tik Root, *The Baby Brokers: Inside America's Murky Private-Adoption Industry*, TIME (June 3, 2021, 6:00 AM), https://time.com/6051811/private-adoption-america/. Adoption entities may obligate birth parents to repay adoption-related expenses if a match fails. *Id*. Generally speaking, private facilitators come from lower-income neighborhoods and might know of pregnant womenwho, at the outset of pregnancy, express a desire to give the baby away. *Id.* Living in the working-class neighborhoods where most mothers who relinquish children reside, facilitators sit in a unique position to not only furnish useful information to mainland agents, but also to know which conditions will likely convince mothers to relinquish their babies. *Id.* In the context of the RMI, facilitators have been both male and female Marshallese citizens of similar profile. *Id.*

[355] The RMI Adoptions Act does not allow adoptions through private facilitators. Adoptions Act 2002 §806. Thus, the legal process of intercountry adoption between the U.S. and RMI would require the use of the RMI Central Adoption Authority and judicial approval of the adoption petition itself. *See id.*

[356] Dugdale & Hill, *supra* note 58.

[357] *Id.*

[358] Adoptions Act 2002 §808 ("The adoption of children in any manner other than as provided for under this Chapter [through the use of the RMI Central Adoption Authority or an adoption taking place within the Marshallese community under customary law], shall not be valid."). This type of human trafficking is also a violation of the United Nations Convention against Transnational Organized Crime and the Protocols. *See* Convention Against Transnational Organized Crime and the Protocols Thereto, G.A. Res. 55/25, Annex I, art. 3(a) (Nov. 15, 2000).

family.[359] She spoke no English.[360] Passing easily through the airport immigration checkpoint in Honolulu, she made her way to Arkansas where she gave birth to her baby just a few weeks later.[361] The Marshallese mother's parental and legal rights were then passed on with the infant in a secluded Arkansas field – "without [her] ever speaking to a lawyer, judge, or a social worker."[362]

For these types of adoptions, the RMI Adoption Act of 2002 provisions do not apply because the child's birth certificate is issued in the United States.[363] Therefore, the RMI court never has jurisdiction over the child in these cases.[364] U.S. customs officials and adoptive parents alike are either failing to notice the red flags pervading how these adoptions are facilitated or actively turning a blind eye to their suspicions.[365] Because there is – rightfully – no immigration red tape constraining Marshallese individuals' movement in United States, Marshallese birth parents remain vulnerable to strong coercion by facilitators, who likely misrepresent the western adoption system to gain consent,thereby sidestepping the supervision provisions under the IAA.[366] The U.S. adoption professionals' use of foreign facilitators to carry out Marshallese baby selling is but another iteration of the United States' exploitation of the RMI as the facilitators cunningly induce Marshallese mothers to permanently relinquish their parental rights.[367]

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[359] Dugdale & Hill, *supra* note 58.

[360] *Id*.

[361] *Id.*

[362] *Id*.

[363] *See* Adoptions Act 2002 §804. ("The High Court of the Republic of Marshall Islands shall have original and exclusive jurisdiction to grant adoption pursuant to this Chapter."). Therefore, adoptions that bypass the RMI court system undermine the RMI's jurisdictional authority over its citizens. *See id*.

[364] According to the U.S. Constitution, all persons born in the United States are U.S. citizens. U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."). This is the case regardless of the tax or immigration status of a person's parents. *See id*. Although the RMI's citizens are birthing children, RMI loses jurisdiction over these children when they are U.S. born, effectuating a gap in regulating international adoptions. *See id.*

[365] "Airport immigration agents could have stopped the three women — or the man escorting them. But they didn't. Instead, Gideon passed easily through the checkpoint." Dugdale & Hill, *supra* note 58.

[366] *See* Accreditation of Agencies; Approval of Persons, *supra* note 303. The State Department's exception for foreign providers that obtain consent from a birth parent undermines the agency's supervisory role. *See supra* Section IV.A.

[367] Similar to how the post WWII nuclear testing was conducted by the United States without consent, let alone informed consent of the impacts and consequences, the U.S.-RMI adoption pipeline continues to be along this vein. *See supra* Section II.B.

The vastly different cultural understandings of adoptions and increasing economic pressures entice Marshallese mothers to sell their children for financial gain.[368] The average GDP per capita in the Marshall Islands for 2022 was roughly $6,000 per year[369] compared to $10,000–$40,000 for a single adoptive placement.[370] It is therefore easy to see why Marshallese mothers, who already feel ill-prepared economically to raise a child, feel that their best choice is to give their baby up in exchange for what is considered a small fortune in comparison to the average lifestyle in the RMI.[371]

Furthermore, many agree that poverty is the major determining factor in a sending country's intercountry adoption policies.[372] Historically, child welfare practices have mirrored the trends of the State's economy.[373] Additionally, Western culture has historically viewed parents in "poverty" as

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[368] Smolin, *Child Laundering*, *supra* note 292, at 127.

> A significant cause of child abandonment or relinquishment is often extreme poverty. . . [T]he ethics of intercountry adoption becomes problematic where poverty induces the family to give up their child. Under such circumstances, even the cost of transporting the child from sending to receiving nation, if spent instead to aid the family, could have kept the family intact. It is ethically questionable to spend thousands of dollars (or tens of thousands of dollars) to arrange an intercountry adoption, when aid of less than a thousand dollars would have kept the child with their birth family.

Id.

[369] *Marshall Islands*, WORLD BANK GROUP, https://data.worldbank.org/country/marshall-islands (last visited Apr. 17, 2022). "A third of Micronesians live below the basic needs poverty line and poverty has increased in three out of four states in the past decade. Inequality varies greatly between the states. FSM's economy is aid dependent . . . ." *Federated States of Micronesia*, UNITED NATIONS, https://micronesia.un.org/en/about/federated-states-micronesia (last visited Sept. 26, 2023).

[370] Hosia & Doherty, *supra* note 10.

[371] In 2002, member countries of the Pacific Islands Forum (of which the RMI is a part) stated before the UN General Assembly that:

> We agree that chronic poverty remains the single biggest obstacle to meeting the needs, and protecting and promoting the rights of children. To a certain extent poverty exists in the Pacific and is on the increase in many countries. Children bear the brunt of poverty. Poor families cannot afford basic needs such as adequate nutrition, education or health care. The cycle of poverty, where it is replicated from one generation to the next, is becoming apparent, creating an underclass of disadvantaged people and exacerbating social and economic divisions.

Olowu, *supra* note 336, at 119.

[372] Roby, *supra* note 342, at 316.

[373] *Id*.

synonymous with parents who are "ill-fit".[374] However, while some Marshallese citizens may feel economic pressures, there is nothing to suggest that the RMI as a whole, is ill-equipped to raise its children despite its history of political and economic exploitation by other States.[375]

The decreased standard of living in the RMI is due to the United States' trusteeship.[376] Even though COFA provided reparations for the United States' post-World War II actions, the islands have been unsuccessful in holding the United States to its complete fulfillment of that promise.[377] The Department of the Interior's Office of Insular Affairs gave roughly $34 million dollars in COFA funds for the 2022 fiscal year.[378] However, much of the funding earmarked for infrastructure does not stay within the islands; foreign contractors are hired as a more specialized workforce.[379] The economic challenges facing the RMI community are felt by all, especially when the possibility of a new mouth to feed comes into play.[380] Examining

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[374] *Id.* at 307.

> In 1974, during the peak of the Indian Child Welfare Act, large numbers of Indian children were being placed, either permanently or temporarily, in non-Indian homes. In many states two-thirds of Indian child placements were in non-Indian homes and the risk for Indian children of being involuntarily separated from their parents was up to one thousand times greater than for non-Indian children. The reasons for the removal of high numbers of Indian children were listed as high rates of alcoholism, poverty, perceived neglect or mistreatment of Indian children, and even religious zealotry to "save" these children from a dismal future. All of these "reasons" were reported from a non-Indian perspectives.

Id.

[375] *See supra* Section II.B.

[376] ISLAND SOLDIER (Meerkat Media 2017), https://www.islandsoldiermovie.com/ (last visited Nov. 12, 2023); *see also supra* Section II.B.

[377] The U.S. Congress must authorize the disbursement of COFA funds through the setting of the fiscal budget each year. ISLAND SOLDIER, *supra* note 376. However, since COFA's creation, the Micronesian islands have had to fight to receive the funds they were promised. *See id*.; Emily Sauget, *Guam Official Fight for Missing COFA Funds*, PASQUINES (Aug. 23, 2023), https://pasquines.us/2023/08/23/guam-officials-fight-for-missing-cofa-funds/.

[378] *Interior Announces $34 Million in Compact Funding for FY 2022 Government Operations in the Republic of the Marshall Islands*, U.S. DEP'T INTERIOR (Nov. 12, 2021), https://www.doi.gov/oia/press/Interior-Announces-%2434-Million-in-Compact-Funding-for-FY-2022-Government-Operations-in-the-Republic-of-the-Marshall-Islands.

[379] ISLAND SOLDIER, *supra* note 376.

[380] Kathy Jetñil-Kijiner & Hilda Heine, *Displacement and Out-Migration: The Marshall Islands Experience*, WILSON CTR. (Sept. 30, 2020), https://www.wilsoncenter.org/article/displacement-and-out-migration-marshall-islands-experience; Mina Kim, *Facts About Poverty in the Marshall Islands*, BORGEN PROJECT (Oct. 31, 2020), https://borgenproject.org/facts-about-poverty-in-the-marshall-islands/.

and amending dynamics in the U.S.-RMI relationship requires a renewal of existing agreements.

C. *Restructuring the U.S.-RMI Relationship to Include International Best Practices of Subsidiary Means*

Much of the international conversation about children focuses on their ability to grow up in a safe and enriching environment.[381] Discussions focus on equipping parents in countries with the resources to strengthen families.[382] Many scholars have argued that the lack of humanitarian and social justice[383] approaches to adoption ultimately results in the exploitation of families and the neglect of children.[384] The international community has recognized that because the family is the "fundamental group of society and the natural environment for the growth, well-being, and protection of children, efforts should be primarily directed to enabling the child to remain in or return to the care of [their] parents, or when appropriate, other close family members."[385] Additionally, many scholars have highlighted the importance of keeping children with their families in order to promote a child's right to preservation of their culture. [386] However, in order to do so would require a

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[381] "Every child has the right to health, education and protection, and every society has a stake in expanding children's opportunities in life." *Global Issues: Children*, UNITED NATIONS, https://www.un.org/en/global-issues/children (last visited Sept. 25, 2023).

[382] U.N. Secretary-General, *Status of the Convention on the Rights of the Child*, ¶77, U.N. Doc. A/75/307 (Aug. 12, 2020).

> States should invest in nationally appropriate and universal social protection systems, intensifying efforts to improve the standard of living of all children as a matter of priority, paying particular attention to the most vulnerable. In addition, States should promote inclusive and responsive family-oriented policies, including those designed to strengthen parents' and caregivers' ability to care for children.

Id.; *see also* Committee on Enforced Disappearances, *Joint Statement on Illegal Intercountry Adoptions*, U.N. Doc. CED/C/9 (Oct. 16, 2015), https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/2022-09-29/JointstatementICA_HR_28September2022.pdf.

[383] A social justice approach would focus more on the conditions that have bred the need for or the exploitation of the current systems, such as considerations of historical injustice and the unequal distribution of resources. *See* Hollingsworth, *supra* note 80, at 211.

[384] *Id.*

[385] G.A. Res. 64/142, annex (II)(A)(3), Guidelines for the Alternative Care of Children (Feb. 24, 2010).

[386] *See generally* Barbara Bennett Woodhouse, *"Are You My Mother?": Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107 (1995) (exploring "the tensions between preserving children's individual and group identities"); Albert & Mulzer, *supra* note 29 (arguing that the "practice of permanently severing the legal bonds between a parent and child and 'replacing' them with new ones via formalized adoption" must be abolished).

true humanitarian perspective[387]

Since, the intercountry adoption system has tainted and exploited true humanitarianism,[388] an argument can be made for the need to shift away from humanitarianism altogether and instead focus on a human rights perspective.[389] Appropaching adoptions from a human rights or social justice perspective is not only significant in the context of exploitive colonial history, which continues to have lingering effects in certain countries, but would also protect the child's right to identity.[390] Thus, one important approach to international adoptions between the United States and the RMI is to incorporate the international recognition of a child's right to identity – a fundamental human right – within a social justice framework.[391]

To maintain a child's right to identity and to prevent the large-scale trafficking of children, the United States must adopt the CRC's subsidiarity principle.[392] Although the United States is not a party to the CRC, it has signed the conventions and ratified and incorporated the Optional Protocol into its laws, and therefore has a responsibility to not violate the object and

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[387] A true humanitarian approach to intercountry adoptions is "ideally about finding families for children who *need* them" and a shift away from self-righteousness. *See* Cheney, *supra* note 326, at 255.

[388] "The international adoption industry has become a market driven by its customers." Katherine Herrmann, Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children, 44 FAM. L. QUARTERLY 409, 416–17 (2010).

[389] Many adoptive parents in the economic north see adoption as a means of saving children from poverty and therefore, are less likely to be concerned by illegal or exploitive intercountry adoption processes. Robin Shura et al., *Children for Sale? The Blurred Boundary Between Intercountry Adoption and Sale of Children in the United States*, 36 INT'L J. SOC. & SOC. POL. 319, 321 (2016). The "economic" or "global" north does not refer to a traditional geographic region but instead to the "relative power and wealth of countries in distinct parts of the world," such as North America, Europe, and Australia. Lara Braff & Katie Nelson, *Chapter 15: The Global North: Introducing the Region, in* GENDERED LIVES: GLOBAL ISSUES 501, 501 (Nadine T. Fenandez & Katie Nelson eds., 2021). "Modern adoption has long been framed as a humanitarian practice, but it also has roots in social engineering. British policy from the 1870s to the 1960s advocated moving orphaned children to the colonies as a means of social reform." Cheney, *supra* note 326, at 249. Additionally, according to UNICEF, the use of intercountry adoptions should only be used as a solution when a local family-based one is not available. *Id.* at 255–56.

[390] CRC, *supra* note 46, art. 8; *see supra* Section III.B.

[391] *See* Hollingsworth, *supra* note 80, at 214–15.

[392] *See* Kimberly Svevo-Cianci & Sonia C. Velazquez, *Companion Piece: Convention on the Rights of the Child Special Protection Measures: Overview of Implications and Value for Children in the United States*, 89 CHILD WELFARE 139, 148–49 (2010).

purpose of the CRC.[393] By incorporating the CRC subsidiarity principle, the United States can prohibit adoptions in which sending States have not exhausted all domestic possibilities first, thereby upholding its international duty.[394] This approach to adoptions prioritizes a child's right to their identity by allowing children to remain within their communities as much as possible.[395] Several of the international conventions on adoption reference this concept.[396] Because of the unique relationship that the United States has as a former trustee over the RMI, the United States can incorporate the subsidiarity principle into the adoption system by amending the current

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[393] *Id*. at 152; G.A. Res. 66/138, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Dec. 19, 2022); Vienna Convention on the Law of Treaties art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331.

[394] *See generally* Svevo-Cianci & Velazquez, *supra* note 392, at 148–49 (discussing why the United States should ratify the CRC to help stop human trafficking).

[395] This approach has been utilized by Indonesia following the 2004 Indian Ocean tsunami and proven to be effective. *Children and the 2004 Indian Ocean Tsunami: An Evaluation of UNICEF's Response in Indonesia (2005 - 2008)*, Rep. of the UNICEF Evaluation Office, Sec. 1.2 (August 2009), https://www.cpcnetwork.org/wp-content/uploads/2014/04/20.-Ager-et-al.-Thailand-Tsunami-UNICEF-Evaluation-2009.pdf. In February of 2005, the government of Indonesia adopted the "Indonesian Government Policy on Separated Children, Unaccompanied Children and Children Left with One Parent in Emergency Situations." MINISTRY OF SOC. AFFS. OF THE REPUBLIC OF INDONESIA, INDONESIAN GOVERNMENT POLICY ON SEPARATED CHILDREN, UNACCOMPANIED CHILDREN AND CHILDREN LEFT WITH ONE PARENT IN EMERGENCY SITUATIONS (2005), https://bettercarenetwork.org/sites/default/files/attachments/Indonesian%20Government%20Policy%20on%20Separated%20Children.pdf. In addition to this policy, "the government placed a moratorium on adoptions of Acehnese children to allow for community-based solutions to take precedence . . . promot[ing] family and community-based solutions for separated children." *Children and the 2004 Indian Ocean Tsunami, supra*, at Sec. 4.3.

[396] *E.g.*, CRC, *supra* note 46, art. 21.

> The principle of subsidiarity was introduced in 1986, in [article 17 of] the UN "Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement Nationally and Internationally." . . . In 1989, Article 21(b) of the United Nations Convention on the Rights of the Child stated, "Intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."
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> In 1993, a text regarding the principle of subsidiarity was included in the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption.

International Adoption and the Principle of Subsidiarity, INT'L SOC. SERVICE USA, https://www.iss-usa.org/international-adoption-and-the-principle-of-subsidiarity/ (last visited Sept. 25, 2023).

agreements under COFA.[397]

The COFA renewal between the United States and RMI was finalized in 2023.[398] While COFA renegotiations nearing Congressional passage seem fairly final, the countries still need to update the current immigration policies to prohibit children and Marshallese citizens from being trafficked into the United States.[399] Future policies or COFA re-negotiations should include the subsidiarity means principle by denying adoptions without verification that all resources were exhausted before the child was considered for placement.[400] Such immigration policies would prevent pregnant mothers from giving birth to their babies in the United States[401] and U.S. courts from signing off on adoptions merely because the mother "consented" to an American adoptive placement.[402] Consequently, United States judges would not be able to sign off on adoptions that do not have proof of efforts to comply with the subsidiarity principle, even if RMI adoption facilitators attempt to circumvent accreditation from their central authority and relevant immigration policies.[403] Ultimately, the application of the subsidiarity

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[397] *See generally* Shannon Marcoux, *Trust Issues: Militarization, Destruction, and the Search for a Remedy in the Marshall Islands*, 5 HRLR ONLINE 98, 105 (2021) (discussing the trustee relationship between the United States and the Marshall Islands); *see also* Sarah-Vaughan Brakman, *The Principle of Subsidiary in the Hague Convention on Intercountry Adoption: A Philosophical Analysis*, 33 ETHICS & INT'L AFF. 207, 208, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/D6332108BEACA445FD033A82A8448597/S0892679419000170a.pdf/the-principle-of-subsidiarity-in-the-hague-convention-on-intercountry-adoption-a-philosophical-analysis.pdf.

[398] THE COMPACTS OF FREE ASSOCIATION, CONG. RSH. SERVICE, (Aug. 25, 2023), https://crsreports.congress.gov/product/pdf/IF/IF12194#:~:text=Compact%20Negotiations&text=In%20January%20and%20February%20of,Palau%20on%20extending%20economic%20assistanc.

[399] *See* Kim, *supra* note 380. On October 16, 2023, the United States and the RMI signed three newly negotiated agreements relating to COFA. *Office of the Spokesperson: The United States and the Republic of the Marshall Islands Sign Three Compact of Free Association-Related Agreement*, U.S. DEP'T STATE (Oct. 17, 2023), https://www.state.gov/the-united-states-and-the-republic-of-the-marshall-islands-sign-three-compact-of-free-association-related-agreement/. While the agreement reflects a historic cooperation, the focus of the agreements address financial support for the legacy of nuclear testing and pacific defense operations, therefore failing to address adoption, immigration, and human trafficking. *See* David Brunnstrom & Michael Martina, *Exclusive: US Negotiator Signs New Deal With Strategic Marshall Islands*, REUTERS (Oct. 16, 2023), https://www.reuters.com/world/us-negotiator-expects-sign-new-deal-with-strategic-marshall-islands-monday-2023-10-16/.

[400] Brakman, *supra* note 397, at 208.

[401] *See supra* Section IV.B.

[402] *See supra* Section IV.B (discussing how there is essentially no oversight for how consent is obtained because of the exception within State Department regulations).

[403] *See supra* Section IV. B (discussing how facilitators try to circumvent the requirements of the adoption process).

principle to adoptions would lead to the best outcome for a child because it prioritizes keeping them attached to their community and identity over an intercountry placement.[404] This is but one solution of the many available and likely required to completely eradicate intercountry baby selling.[405]

Significant international scholarship has also advocated for reparations for most treaty and human rights violations.[406] However, monetary reparations in this context should not be the sole focus for addressing the current exploitive system because they would not necessarily prevent or discourage baby selling and they fail to address the child's best interest.[407] Thus, any solutions proposed to prevent or compensate for abuses in the adoption system must ensure comprehensive redress for victims, and not just financial

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[404] Brakman, *supra* note 397, at 208; *International Adoption and the Principle of Subsidiarity*, *supra* note 396.

[405] *E.g.*, van Loon, *supra* note 218, at 169–71 (describing an International Social Services report recommending controls based on the best interest standard in safeguards for children, cooperation among social workers, an international social welfare agency, a system of licensing or of accrediting agencies for intercountry adoption, and offering parents skilled counseling services); Walsh, *Adoption and Agency*, *supra* note 15, at 17. The RMI Ministry of International Affairs Task Force

> [r]ecommended a special division within Foreign Affairs be established with the responsibility for coordinating and overseeing all adoption related activities including: reviewing and verifying case studies of potential adoptive families, coordinating counseling services and conducting home studies of Marshallese families involved in an international adoption, making recommendations to the Court based on their findings in each case, compiling a list of adoption agencies complete with an ongoing review of their activities, providing information regarding adoption in the RMI, ensuring that Marshallese families have proper representation throughout the adoption process, assisting in monitoring the adopted children, establishing and maintaining guidelines for international adoptions.

Walsh, *Adoption and Agency*, *supra* note 15, at 17.

[406] *See, e.g.*, Thomas Craemer, *International Reparations for Slavery and the Slave Trade*, 49 J. BLACK STUD. 694 (2018) (proposing slave-trade reparations for use in Africa and the New World to "indemnify the descendants of the formerly enslaved"); G.A. Res. 55/25, annex II art. 6(6), Convention Against Transnational Organized Crime and the Protocols Thereto (Nov. 15, 2000) ("Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered."); *id*. art. 25(2) (requiring that that at least some "appropriate procedures" are established to provide access to compensation or restitution).

[407] Irene Salvo Agoglia & Karen Alfaro Monsalve, *'Irregular Adoptions' in Chile: New Political Narratives About the Right to Know One's Origins*, 33 CHILD. & SOC'Y 201, 209 (2019) (discussing how victims of irregular or illegal intercountry adoptions have demanded the restitution of the right to know one's origins).

compensation.[408] Transitional justice is a better solution. In a report to the UN Security Council, the UN Secretary-General defined transitional justice as:

> [T]he full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[409]

Solutions to the RMI intercountry adoption dilemma should therefore deploy truth seeking and institutional reform by changing the intercountry adoption laws to prioritize subsidiarity principles.[410]

D. *With the Continuation of Marshallese Adoptions, Hawai'i Legislators Must Amend the Family Court Adoption Procedures to Reflect the 2004 Family Court Judges' Recommendations for Consent Hearings*

The issue of consent is of huge consequence to the United States and RMI relationship, not only historically, but also in the present adoption context.[411] Most of the world, including the RMI, understands child rearing to involve collective efforts among trusted adults within the community.[412] As discussed above, to many, the U.S. adoption process which severs the birth parent's rights to their child is inconceivable.[413] Thus, the RMI's unique culture

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[408] *Id.*; Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L Aff. 17, 25 (2006) ("The provisions of reparations without the documentation and acknowledgment of truth can be interpreted as insincere, or worse, the payment of blood money.").

[409] U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, (III)(8), U.N. Doc. S/2004/616 (Aug. 23, 2004).

[410] *See* CRC, *supra* note 46, art. 29; Smolin, *Child Laundering*, *supra* note 292, at 511–12; *see also supra* Section III.B.

[411] In the post-WWII context, the RMI did not consent to becoming the United State's testing grounds nor test subjects. *See supra* Section II.B. Yet, the RMI was exploited for the "greater good." *See supra* Section II.B. This exploitation continues to exist in other contexts of the U.S.-RMI relationship. *See supra* Section IV.B.

[412] *See generally* Berman, *supra* note 336 (analyzing kinship bonds that extend beyond biological ties).

[413] Smolin, *Child Laundering*, *supra* note 292, at 509; Roby, *supra* note 342, at 309–10.

affects ongoing confusion about lost legal rights in the U.S. adoption system.[414]

In 2017, the Minister of Cultural and Internal Affairs of the RMI confirmed that the RMI does not entertain or practice intercountry private adoptions arranged directly between birth parents in the RMI and adoptive parents in another country who plan to take the child outside of the RMI.[415] Indeed, the issue of private adoption facilitators has been an ongoing factor in Marshallese exploitation.[416] Therefore, further regulations around facilitators seem insufficient for addressing the underlying factors that incentivize such practices.[417] The solution to illegal baby selling is not stricter prohibitions against private facilitators and the inducement of birth parents to relinquish their children.[418] Rather, the solution requires clearly defining consent and ensuring judicial oversight in its enforcement within existing adoption procedures.[419]

Hawai'i acts as a central point of contact between the RMI and the United States and can therefore effectuate laws that tighten the consent requirements for adoptions out of the RMI.[420] In 2004, the senior Hawai'i Family Court judges drafted a memorandum to discuss just that.[421] In this memorandum, they stated that birth mothers must appear in a separate proceeding before the judge presiding over the adoption petition, prior to the final adoption hearing.[422] Additionally, unless the birth parents' first language is English, an interpreter, found to be qualified by the presiding judge, must be present with the birth mother at the separate proceeding.[423]

Requiring a separate consent hearing gives the judge the opportunity to engage in conversation with and question the birth mother to confirm that she fully consents to and waives the consequences of her consent to the adoption proceedings and understands the United States' practices regarding adoptions.[424] It also allows the Hawai'i family courts to thoroughly check that the RMI government or central authority sponsored the adoption after

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[414] *See supra* Section IV.B.

[415] Letter to Hon. Judge Remigio, *supra* note 60.

[416] *See supra* Part I.

[417] *See supra* Part I.

[418] One social justice approach, argued here, is to address the underlying unequal power dynamics and economic disenfranchisement. *See* Hollingsworth, *supra* note 80, at 211.

[419] Perez, *supra* note 328; *see* Smolin, *Child Laundering*, *supra* note 292, at 509–10.

[420] *See supra* Part I.

[421] Memorandum from the Hawai'i Senior Family Court Judges on Marshallese Adoptions to Hawai'i Family Law Practitioners, Attorney General, Director of Health, & Director of Department of Human Services 1 (June 14, 2004) (on file with author) [hereinafter Hawai'i Senior Family Court Judges Memorandum].

[422] *Id.*

[423] *Id.*

[424] *Id*. at 2.

first taking all steps to keep the child within the islands.[425] International best adoption practices, as established in the Hague Convention, would therefore be incorporated because requiring consent hearings ensures there is no inducement of consent, that the mother fully understands that she will be relinquishing her child forever, and that the child does not have a suitable placement option in the RMI.[426] Therefore, the focus of the adoption process would align with the *best interest of the child* standard, rather than the interests of adoptive parents.[427] This memorandum, although insightful, is currently not formally incorporated into adoption practices because bench bar memoranda do not create legal precedent.[428]

E. *Falling Through the Cracks: The Potential Downsides of the Hawaiʻi Family Court Recommendations*

Hawaiʻi is a stop for many travelers on their way to the contiguous United States.[429] Without a consent hearing, Hawaiʻi courts could never have jurisdiction over the adoption proceeding and would not be able to thoroughly check the consent of the birth mothers traveling from the RMI to the contiguous United States.[430] Thus, it is essential that the United States implement the subsidiarity principle, which will ensure that the *best interest of the child* is incorporated.[431]

However, as easy as it is to incorporate the *best interest of the child* language into domestic laws, it is harder to ensure that the laws are truly creating the most ideal outcomes for children. Incorporating the subsidiarity principle, thereby requiring states to exhaust all local placement options first,

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[425] *Id*.

[426] *See supra* Section III.B (discussing how the subsidiarity principles operates in practice).

[427] *See supra* Section III.B; CRC, *supra* note 46, art. 3(1); Hague Convention, *supra* note 49 (describing the best interests of the child).

[428] *See* Hawaiʻi Senior Family Court Judges Memorandum, *supra* note 421; Zoom Interview with Dina Shek, Professor of Law, William S. Richardson School of Law (Feb. 13, 2023). Dina Shek is a licensed attorney in the state of Hawaiʻi. *Meet Our Staff*, MED. LEGAL P'SHIP FOR CHILDREN IN HAW., https://www.mlpchawaii.org/meet-our-staff (last visited Feb. 8, 2024). She is a proud graduate of the William S. Richardson School of Law where she serves as the Legal Director for the Medical-Legal Partnership for Children, a program she co-founded in 2009. *Id.* Dina Shek has received awards for her social justice work, including that of the National Asian Pacific American Bar Association Law Foundation Scholarship for her work with Marshallese communities. *Id.*

[429] *See* U.S. FACT SHEET, HAWAIʻI TOURSIM AUTHORITY 1 (2023), https://www.hawaiitourismauthority.org/media/11846/usa-fact-sheet-with-september-2023-data-final.pdf (showing average length of visitor stays).

[430] *See* Dugdale & Hill, *supra* note 58.

[431] *See* International Adoption and the Principle of Subsidiarity, *supra* note 396.

could lead to the child in the State's care for longer periods of time.[432] The longer the child is not with a family, the less stability and support they have.[433] Thus, it may be argued that leaving children in the State's care for prolonged periods of time undermines the *best interest* standard.[434] However, this concern is not likely of consequence in the case of Marshallese children because they are not adopted out of the RMI's welfare system and instead are taken directly from their mother or other family members.[435] Therefore, Marshallese children do not spend any time in the State's care.

Furthermore, an additional hearing within the adoptive process might place more strain on the judicial system and invoke issues of personal jurisdiction.[436] Marshallese birth mothers would have to consent to the family court's jurisdiction[437] and then further consent in that hearing to the adoption,[438] and it is unclear how this would be perceived by Marshallese citizens. However, by consenting to a U.S. adoption, mothers already consent to U.S. court's jurisdiction and therefore the main consideration is the cost of travel from the RMI to Hawai'i.[439]

Lastly, the Hawai'i family court recommendations do not address how to stop savy adoption facillitators who keenly assist Marshallese women in slipping past other adoptions-related safeguards when entering the United

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[432] Brakman, *supra* note 397, at 210.

[433] *Id*. *See generally,* BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN (2010) (exploring "jurisdictional and substantive disagreements between Indian tribal courts and state courts in litigation over the placement of Indian children" based on the children's welfare interests).

[434] Brakman, *supra* note 397, at 210. Indeed, this argument has been a part of the discourse around the use of the United States Indian Child Welfare Act, which requires the state to look for placements for a Native American child within the same tribe as the child before they are considered for other placements. *See* Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AMER. INDIAN L. REV. 1, 32–33 (1998).

[435] *See supra* Section IV.C.

[436] Dyan M. Medeiros, Judge, District Family Court of the First Circuit & Courtney N. Naso, Judge, District Family Court of the First Circuit Question and Answer Session at the Family Law Bench Bar Conference, Honolulu, Hawai'i (Aug. 8, 2023). At the Hawaii Family Court 2023 Bench Bar Conference, judges reminded attorneys that increased litigation results in judicial strain leading to judges only having roughly thirty minutes to hear the matters in each case. *Id.*

[437] HAW. REV. STAT. § 578-1 (2024); HAW. REV. STAT. § 571-11(4).

[438] HAW. REV. STAT. § 578-2(a)(1) (2024).

[439] Washington, A. & G.R. Co. v. Brown, 84 U.S. 445 (1873).

States.[440] To prevent the reoccurrence of these harms,[441] it may be worth considering more robust screening procedures at U.S. airports.[442] Pulling aside pregnant Marshallese women traveling from the RMI to the contiguous United States for secondary questioning could help ensure stricter compliance with adoption and immigration laws.[443] While this could be a slow down for RMI women traveling, it may be effective in preventing Marshallese mothers in unknowingly relinquishing their rights to their children.[444]

V. CONCLUSION

The U.S.-RMI relationship is founded on exploitation.[445] World War II nuclear testing and present-day baby selling taint the possibility of a robust

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[440] *See e.g.*, Hosia & Doherty, *supra* note 10 (describing how a Marshallese woman who served as an adoption facilitator admitted that she would "befriend [poor Marshallese women and those with little education] with offers of assistance and money. She would organize identity documents and passports for the women - often within days - and travel with them to the US"). It is illegal to travel to the U.S. for the purpose of adoption without first obtaining a special visa. Hill & Dugdale, *supra* note 11. "That's true whether a Marshallese woman travels while pregnant or after the baby is born. Nor does it matter if the birth mother plans to stay in the U.S. after the adoption, [said Claudia] Lokeijak[,]" director of the central authority. *Id.*

[441] *See* Livia Ottisova et al., *Psychological Consequences of Human Trafficking: Complex Posttraumatic Stress Disorder in Trafficked Children*, 44 BEHAVIORAL MEDICINE 234, 239 (2018) (analyzing the prevalence of PTSD in trafficked children).

[442] *See, e.g.,* United States v. Ramsey, 431 U.S. 606, 617 (1977) ("Th[e] interpretation, that border searches [are] not subject to the warrant provisions of the Fourth Amendment and [are] 'reasonable' within the meaning of that Amendment, has been faithfully adhered to by this Court."). All persons arriving at a port-of-entry to the United States are subject to inspection by U.S. Customs and Border Protection (CBP) officers. Inspection of Persons Applying for Admission, 8 C.F.R. 235 (2024). CBP officers will conduct the Immigration, Customs and Agriculture components of the Inspections process. *Id.*

[443] While this suggestion could decrease human trafficking, it is imperative to weigh the benefit with the potential risk it has of increasing discrimination. *See, e.g.,* Yvonne D. Newsome, *Border Patrol: The U.S. Customs Service and the Racial Profiling of African American Women*, 7 J. AFR. AM. STUD. 31 (2003); Shaun L. Gabbidon et al., *The Influence of Race/Ethnicity on the Perceived Prevalence and Support for Racial Profiling at Airports*, 20 CRIM. JUST. POL'Y REV. 344 (2009).

[444] *See* Dugdale & Hill, *supra* note 58 (discussing the opportunity for intervention by U.S. Customers and Border Protection agents); *see, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980) (holding that federal agents stopping and posing a few questions to a traveler in a U.S. airport did not amount to a seizure).

[445] *See The Legacy of U.S. Nuclear Testing and Radiation Exposure in the Marshall Islands*, *supra* note 38.

United States and RMI partnership.[446] And while the United States continues to atone for the irreparable harm it caused to the RMI during World War II, the United States can and must make greater strides to prohibit future harm from occurring.[447] With continued U.S.-RMI relations,[448] this Comment offers proposals to limit the chances of that relationship continuing or ending with exploitation. The current international adoption conventions offer guidance that the United States should utilize to curb the practices of human trafficking and baby selling.[449] Additionally, Hawai'i can contribute to the solution by implementing consent hearings that birth mothers are required to attend before the state will approve the adoption.[450]

However, more research needs to be conducted to provide insight into how these recommendations could be implemented in all United States international adoptions and not just in adoptions where the RMI is the sending country.[451] States have an obligation to the well-being of these children, and need to act more effectively in seeing that the protection of children is realized.[452] Until stronger efforts are made to keep children within their community networks, children of color will continue to suffer for the sake of completing a home.[453]

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[446] *See* Jessica Stone, *US Pacific Security Deal with Marshall Islands at Risk Over Nuclear Payments Description*, VOICE OF AMERICA (Sept. 29, 2023, 2:42 PM), https://www.voanews.com/a/7290553.html; Hosia & Doherty, *supra* note 10 ("After years of abuse of the system, in 2003, the compact was amended to specifically forbid women from traveling for the purposes of adoption.").

[447] *See The Legacy of U.S. Nuclear Testing*, *supra* note 445.

[448] THE COMPACTS OF FREE ASSOCIATION, *supra* note 398.

[449] CRC, *supra* note 46.

[450] Letter to Hon. Judge Remigio, *supra* note 60.

[451] *See, e.g.*, Charles M. Kunz, *Compendium of Law Review Articles on International Adoption*, CENTER FOR ADOPTION POLICY (Sept. 2014), http://www.adoptionpolicy.org/pdf/Compendium%20of%20Law%20Review%20Articles%20on%20International%20Adoption.pdf.

[452] MARTIN GUGGENHEIM, GENERAL OVERVIEW OF CHILD PROTECTION LAWS IN THE UNITED STATES 1, https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/224751148/Excerpt%20from%20Chapter%201.pdf (last visited Nov. 21, 2023) ("Every state has laws that protect children from harm.").

[453] *See, e.g.*, Dugdale & Hill, *supra* note 58 ("For American parents adopting Marshallese babies, legal niceties can take a back seat to the promise of getting a newborn far more quickly than they would going through the official route.").