

# A SOCIAL HEALING APPROACH TO NATIVE HAWAIIAN CLAIMS: LAW AND RESISTANCE AT MAUNAKEA

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## I. INTRODUCTION

Mauna a Wākea, Hawai‘i’s tallest mountain, is known to Kānaka Maoli<sup>1</sup> as the realm of the gods.<sup>2</sup> It is the piko—the umbilical cord—that “ties the

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1. This essay uses Native Hawaiian, native Hawaiian, Hawaiian, Kānaka Maoli, and Maoli interchangeably. Kānaka Maoli or Maoli is the Indigenous Hawaiian name for the population inhabiting Hawai‘i at the time of the first western contact. See MARY KAWENA PUKUI & SAMUEL H. ELBERT, *HAW. DICTIONARY* 127 (6th ed. 1986).

2. See Leon No‘eau Peralto, *Mauna a Wākea: Hānau Ka Mauna, the Piko of Our Ea*, in *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* 233, 234 (Noelani Goodyear-Ka‘ōpua et al. eds., 2014); see also Terina Kamailauli‘i Fa‘agau, *Reclaiming the Past for Mauna a Wākea’s Future: The Battle Over Collective Memory and Hawai‘i’s Most Sacred Mountain*, 22 *ASIAN-PAC. L. & POL’Y J.* 1, 20 (2021).

earth to the heavens.”<sup>3</sup> And it is the site of lasting struggle against the construction of the massive Thirty Meter Telescope (TMT) atop its sacred summit. But the battle on the mountain is about much more than a single telescope. It shines a bright light on the “contested meanings of land, scientific progress, and meaningful ‘consultation’ with Indigenous communities.”<sup>4</sup> And it is emblematic of the longstanding damage of U.S. colonization and unrealized reparative justice for Kānaka Maoli.

After years of protest, contested case hearings, and appeals, a split Hawai‘i Supreme Court in *Mauna Kea II*<sup>5</sup> allowed the telescope’s construction to proceed. In so doing, the court upheld the state Board of Land and Natural Resources’ conclusion that no Native Hawaiian traditional and customary rights were exercised in the relevant area.<sup>6</sup> Hawai‘i’s agencies are constitutionally mandated to protect Native Hawaiian rights “customarily and traditionally exercised for subsistence, cultural and religious purposes.”<sup>7</sup> This obligation is part of the edifice of Hawai‘i’s 1978 constitutional convention amendments steeped in reparative justice principles.<sup>8</sup> Convention delegates saw the damaging impacts of land confiscation, cultural destruction, and loss of self-governance on Kānaka Maoli life and crafted amendments as reparative measures aimed at preserving “the small remaining vestiges of a quickly disappearing culture.”<sup>9</sup> Together, the amendments “enshrine resource protection, Native Hawaiian practices, and the Public Land Trust as constitutional mandates.”<sup>10</sup>

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3. N. Mahina Tuteur, *Reframing Kānāwai: Towards a Restorative Justice Framework for Indigenous Peoples*, 7 INDIGENOUS PEOPLES’ J. OF L., CULTURE & RESISTANCE 59, 81 (2022).

4. *Id.*

5. *In re* Contested Case Hearing Re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, 431 P.3d 752, 782 (Haw. 2018) (as amended Nov. 30, 2018) [hereinafter *Mauna Kea II*].

6. *Id.* at 770.

7. HAW. CONST. art. XII, § 7 (obligating the state to “protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians”).

8. *See id.* art. XII, §§ 5–6 (creating the state Office of Hawaiian Affairs (OHA) to hold certain property in trust for Native Hawaiians and Hawaiians, and directing income and proceeds from a pro rata portion of the trust lands to OHA for Native Hawaiians); *see also* HAW. REV. STAT. § 10-3(6) (2014) (describing the purposes of OHA to promote Native Hawaiian self-determination through programs and advocacy efforts, and to serve as a “receptacle for reparations”); 1 STATE OF HAW., *Committee of the Whole Report No. 13*, in PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1017-18 (1980) [hereinafter CONVENTION PROCEEDINGS].

9. CONVENTION PROCEEDINGS, *supra* note 8, at 640.

10. D. Kapua‘ala Sproat & MJ Palau-McDonald, *The Duty to Aloha ‘Āina: Indigenous Values as a Legal Foundation for Hawai‘i’s Public Trust*, 57 HARV. CR-CL L. REV. 525, 538 (2022).

Hawai‘i case law reaffirms these reparative justice values.<sup>11</sup> For example, in *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission*, the Hawai‘i Supreme Court articulated an analytical framework for state and county agencies to operationalize their obligation to protect Native Hawaiian rights.<sup>12</sup> In short, when considering a proposed action, agencies are required to identify cultural practices and resources in the petition area, assess the proposed action’s impact on those practices and resources, and determine the feasible action that must be taken to reasonably protect them.<sup>13</sup> But when decision makers and courts misemploy these legal frameworks as perfunctory administrative procedures without attention to relevant context, they hinder reparative justice for Native Hawaiians. Such mechanistic approaches to Native Peoples’ claims often fail to recognize lived group experiences and, as a result, fall far short of repairing group harms and restoring communities.<sup>14</sup>

In *Healing the Persisting Wounds*, a culmination of years of work and scholarship,<sup>15</sup> Eric K. Yamamoto powerfully elaborates upon and refines his *Social Healing Through Justice* “4R” framework to offer workable concepts and practical guidance for shaping, assessing, and recalibrating these kinds of messy and shifting reparative justice initiatives.<sup>16</sup> His conceptual and

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11. See, e.g., *Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm’n (PASH)*, 903 P.2d 1246 (Haw. 1995) (holding that the state is obligated to protect the reasonable exercise of traditional and customary rights to the extent feasible under Hawai‘i law).

12. See *Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n (Ka Pa‘akai)*, 7 P.3d 1068, 1083-84 (Haw. 2000).

13. See *id.*

14. See D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 155-56 (2011); see also Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 731-32 (2009) (describing formalist approaches to legal decision-making as “objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics”) (quoting WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 187 (1988)).

15. See, e.g., ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999); ERIC K. YAMAMOTO ET AL., *RACE RIGHTS, AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION* (3rd ed. 2021); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. THIRD WORLD L.J. 477 (1998); Eric K. Yamamoto & Ashley Kaiāo Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5 (2009); Eric K. Yamamoto & Sara Lee, *Korean “Comfort Women” Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences*, 11 J. KOREAN L. 123 (2012); Eric K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 UCLA ASIAN PAC. AM. L.J. 71 (2012-13); Eric K. Yamamoto et al., *Bridging the Chasm: Reconciliation’s Needed Implementation Fourth Step*, 15 SEATTLE J. SOC. JUST. 109 (2016).

16. See ERIC K. YAMAMOTO, *HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY* 72 (2021).

pragmatic framework provides “starting points of inquiry for engaging diverse stakeholders and interested observers in a dynamic process aimed at fostering the kind of reparative justice that heals—both in launching initiatives and in later recalibrating them with an eye on comprehensive and enduring *social healing through justice*.”<sup>17</sup> In doing so, the framework “strategically aim[s] for a converging [of] interests that is attentive to words, actions and realpolitik influences”<sup>18</sup> so that the participants work to both heal the wounds of communities and repair the damage to society reflected in persisting ill-will, social divisions, and dampened productivity.

*Healing the Persisting Wounds* centers on the South Korea Jeju 4.3 Tragedy—the “peacetime” military destruction of Jeju islander lives and villages—and the United States’ pivotal role in underlying events and its ongoing obligation to engage in social healing. The book’s central theory, though, is far-reaching and illuminating, laying the foundation for guiding and assessing a wide array of domestic and international reparative initiatives.

This essay employs Yamamoto’s *Social Healing Through Justice* framework to briefly assess the court’s missed opportunity in *Mauna Kea II* to contextually deploy Hawai‘i’s laws in ways that foster reparative justice for Kānaka Maoli. In doing so, it also points a way forward for engaging the laws’ inquiries to address restorative justice more resonantly for Native Hawaiians. Yamamoto’s 4Rs are illustrative. Recognition and responsibility entail “identify[ing] disabling constraints—the social structures of oppression and their justifications—imposed by one group upon another”<sup>19</sup> and accepting responsibility for repairing the damage.<sup>20</sup> Reconstruction and reparation involve remaking institutions and relationships and repairing the material harms of injustice through capacity-building for those harmed.<sup>21</sup>

In the context of *Mauna Kea II*, these inquiries counsel Hawai‘i’s decision makers and courts to employ Hawai‘i’s laws to repair, restore, and transform, by recognizing and promoting Native Hawaiians’ living, cultural practices,<sup>22</sup> and by expansively and contextually addressing the impacts to

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17. *Id.* at 91.

18. *Id.*

19. *Id.* at 75.

20. *See id.* at 79.

21. *Id.* at 84-88.

22. *See* Brief for Kua‘āina Ulu ‘Auamo et al. as Amici Curiae at 6, *Mauna Kea Anaina Hou v. Bd. of Land and Nat. Res.*, 363 P.3d 224 (2015) (No. 16-002) (criticizing the majority’s original *Mauna Kea* decision for embracing a false distinction between “contemporary” and “traditional” Native Hawaiian cultural practices).

those practices in ways that enliven the laws' reparatory goals.<sup>23</sup> Such an approach seeks to repair the damage, not just to individuals, but to communities—culturally and environmentally—and endeavors to foster true social healing through justice for Kānaka Maoli.

## II. SOCIAL HEALING THROUGH JUSTICE

In *Healing the Persisting Wounds*, Yamamoto expertly distills six working principles<sup>24</sup> of social healing from several disciplines, including law, theology, social psychology, political theory, economics, and Indigenous healing. He integrates those working principles into his *Social Healing Through Justice* framework of recognition, responsibility, reconstruction, and reparation.<sup>25</sup> These 4Rs “stand as shorthand for the analytical inquiries generated by a *social healing through justice* framework that aims to shape, assess and recalibrate social healing initiatives to foster the kind of reparative justice that heals.”<sup>26</sup>

In short, recognition “acknowledges the particulars and context of the injustice.”<sup>27</sup> It asks those participating in social healing endeavors to “acknowledge and empathize with the anger, suffering and hopes of those harmed . . . [by] recognizing [both] . . . the immediate harm . . . [and] the pain buried in collective memories of group exclusion or subjugation.”<sup>28</sup> Recognition also aims to “identify disabling constraints—the social structures of oppression and their justifications—imposed by one group upon another.”<sup>29</sup>

For Yamamoto, “[r]ecognition of the historical roots of present-day grievances and the localized context of specific conflicts”<sup>30</sup> involves “critically unraveling ‘stock stories’ about events and group cultural attributes that ostensibly legitimated past abuses and that heighten current

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23. See *id.* at 9 (critiquing the majority’s suggestion that agencies can artificially limit their analysis of impacts on Native Hawaiian rights to a project’s specific footprint, while disregarding broader harms).

24. See YAMAMOTO, *supra* note 16, at 62-71 (describing the six working principles generally as mutual engagement; healing on both individual and societal levels; healing beyond legal justice through the generations; generating economic justice through capacity building; fostering a “real world” collective sense of “justice done;” and the recognition of the “darkside” of the reparative justice process).

25. See *id.* at 72.

26. *Id.*

27. *Id.* at 73.

28. *Id.* at 74.

29. *Id.* at 75.

30. *Id.* at 76.

tensions.”<sup>31</sup> “Stock stories are narratives shaped and told by groups (especially governments) to justify abuse of others[.]”<sup>32</sup> Unraveling those stories and their consequences “lays a foundation for grappling with new understandings of responsibility and how a group may have imposed disabling constraints upon another, resulting in present-day group grievances.”<sup>33</sup> The goals are to remake those stories to better reflect the perspectives of those harmed and to encourage serious consideration of remedies. Recognition, then, “aims for a newly framed collective memory of the injustice as a foundation for collaborative efforts to repair the damage.”<sup>34</sup>

Responsibility “encompasses both an acknowledgment of the harms generated by the misuse of ‘power over others’ and an acceptance of responsibility for repairing the damage inflicted.”<sup>35</sup> Particularly for individuals or governments that directly participated in the wrongful harming of communities, responsibility “generates an obligation to officially acknowledge the victims’ suffering and participate in repairing the damage.”<sup>36</sup>

Reconstruction entails action: it means interactively and concretely “promot[ing] individual and community healing by rebuilding relationships and remaking institutions.”<sup>37</sup> Institutional restructuring is key; this may involve “changes in the legal system; in political participation; in the government security apparatus; in the accessibility of health care, business opportunities (including financing) and open journalist information-gathering; and in the content and delivery of public education.”<sup>38</sup> The focus of reconstruction is to prevent “the injustice and the social, economic and political conditions giving rise to it – from happening again.”<sup>39</sup>

Reparation, linked to reconstruction, means “transformation.”<sup>40</sup> It involves “acts of repairing damage to the *material conditions* of . . . group life—transferring money and land, building schools and medical clinics, allowing unfettered voting—and of restoring injured human psyches, enabling those harmed to live with, but not in, history.”<sup>41</sup> Reparation thus

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31. *Id.*

32. *Id.*

33. *Id.* at 78.

34. *Id.*

35. *Id.* at 79.

36. *Id.* at 79-80.

37. *Id.* at 82.

38. *Id.* at 84.

39. *Id.*

40. *Id.* at 86.

41. *Id.*

“speaks less to surface exchanges like individual monetary payments and more to promoting social structural repair for individuals and communities” and economic capacity-building opportunities for those injured.<sup>42</sup>

For Yamamoto, “acts of *reparation* (and *reconstruction*) by government or groups must result over time in a restructuring of the institutions and relationships that generated the disabling constraints that produced the underlying justice grievances.”<sup>43</sup> If not, the social healing initiative will not truly address “root problems of power abuses, particularly in the maintenance of oppressive systemic structures.”<sup>44</sup> Importantly, because the restructuring of those institutions “will not flow naturally and inevitably”<sup>45</sup> from apologies or reparations, participants in social healing initiatives must “collaborate with civic organizations, journalists, artists, officials, lawyers, businesses, scholars and community advocates to continue to push for systemic changes so that ‘this will not happen again . . . to anyone.’”<sup>46</sup>

Assessing Jeju 4.3 reparative efforts through the social healing through justice lens, Yamamoto concludes that “[t]he path toward comprehensive and enduring Jeju 4.3 social healing has been marked by significant advances . . . and ragged backsliding,”<sup>47</sup> particularly in the United States’ continued absence from the 4.3 social healing initiative, and South Korea’s laudable yet limited reconstruction efforts.<sup>48</sup> Indicating that efforts to rejuvenate the 4.3 initiative have intensified in the past decade, Yamamoto employs the 4Rs of Social Healing Through Justice and their underlying principles to develop two compelling proposals for fostering comprehensive and enduring social healing for survivors. He explores how centering the next reparative steps on those proposals—a Joint United States and South Korea Implementation and Oversight Jeju 4.3 Task Force and a United States Jeju 4.3 Truth Committee—“might bolster each country’s legitimacy as a democracy” and foster renewed and lasting social healing through justice for those harmed.<sup>49</sup>

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42. *Id.* at 86-87.

43. *Id.* at 90.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 193.

48. *Id.* at 195-96.

49. *Id.* at 196.

III. A PRELIMINARY ANALYSIS OF *MAUNA KEA II*

The looming construction of the TMT in the conservation district<sup>50</sup> of Maunakea galvanized a generation of Native Hawaiian activists who decried the mountain's continued desecration.<sup>51</sup> For Kānaka Maoli, Mauna a Wākea is the mountain-child of Earth Mother, Papahānaumoku, and Sky Father, Wākea, and an elder sibling of Hāloa, the ancestor of the Native Hawaiian people.<sup>52</sup> Maunakea is “considered the piko (umbilicus; convergence)” of Hawai‘i Island, where connections to ancestors and spiritual beings are made.<sup>53</sup> Its sacred summit area is known as Wao Akua, or “realm of the gods,”<sup>54</sup> where ancestral deities take various water forms. For Native Hawaiians, the prolonged desecration of the area harms these spiritual and genealogical relationships.

The controversy over the TMT—a \$1.4 billion, eighteen-story, five-acre observatory<sup>55</sup>—must also be understood in the context of the long history of imperialism and colonialism in Hawai‘i. In short, after the overthrow of Hawaiian Kingdom in 1893 aided by U.S. businessmen, the United States annexed Hawai‘i in 1898 and seized approximately 1.8 million acres of Hawaiian Crown and Government Lands.<sup>56</sup> The original trust purposes of Crown and Government lands were to support the Native Hawaiian people and protect the sovereignty of the Kingdom.<sup>57</sup> When Hawai‘i became a state in 1959, the Admission Act transferred approximately 1.4 million acres of those lands to the State to hold in trust for Native Hawaiians and the general public.<sup>58</sup> It was not until Hawai‘i's 1978 constitutional convention that the state made real that trust obligation via constitutional amendment—now

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50. In 1968, the BLNR leased 11,288 acres of public trust land in the Mauna Kea Science Reserve to the University of Hawai‘i (UH). See *Mauna Kea II*, 431 P.3d 752, 782 (Haw. 2018) (as amended Nov. 30, 2018); see also Guillermo Molero, *On A Stunning Hawaiian Mountain, the Fight Over Telescopes is Nearing a Peaceful End*, NPR (Jul. 31, 2020, 5:00 AM), <https://www.npr.org/2022/07/31/1114314076/hawaii-mauna-kea-telescope-space-observatory> [<https://perma.cc/6Q8G-PD6N>] (noting that now there are thirteen observatories atop the mountain, including some not in operation that were slated to be decommissioned).

51. See Tuteur, *supra* note 3, at 81-82.

52. See Fa‘agau, *supra* note 2, at 17-18.

53. Tuteur, *supra* note 3, at 81, 84.

54. *Id.* at 81.

55. See Molly Solomon, *Construction of Giant Telescope in Hawaii Draws Natives' Ire*, NPR (Apr. 21, 2015, 3:58 AM), <https://www.npr.org/2015/04/21/400390724/construction-of-giant-telescope-in-hawaii-draws-natives-ire> [<https://perma.cc/HRA9-UPLD>].

56. See Melody Kapilialoha MacKenzie, *Public Land Trust*, in *NATIVE HAWAIIAN LAW: A TREATISE* 79 (Melody Kapilialoha MacKenzie et al. eds., 2015).

57. *Id.*

58. *Id.*



known as the Public Land Trust.<sup>59</sup> As Maoli legal scholars D. Kapua‘ala Sproat and MJ Palau MacDonald underscore, the Public Land Trust has reparative justice underpinnings and “is meant to be the foundation of reconciliation efforts between the State of Hawai‘i and Native Hawaiians.”<sup>60</sup> Maunakea is part of this “‘public land trust’ corpus.”<sup>61</sup>

The lands at issue on Maunakea are also public trust resources—“held in trust . . . for the benefit of the people.”<sup>62</sup> As part of the 1978 constitutional convention, Hawai‘i established a comprehensive legal regime for the public trust grounded in Native Hawaiian precepts and in part to further reparative justice goals.<sup>63</sup> Hawai‘i’s comprehensive public trust legal regime requires the state and counties to protect natural resources for “the benefit of present and future generations,”<sup>65</sup> and “imposes duties of actively caring for a resource to preserve the health of our natural world.”<sup>66</sup> Traditional and customary Native Hawaiian rights are specifically protected as a public trust purpose.<sup>67</sup>

But, for fifty years, the state and University of Hawai‘i mismanaged the Mauna Kea Science Reserve area.<sup>68</sup> The Hawaiian community’s lingering pain and mistrust of state institutions are palpable.<sup>69</sup> Thus, in many ways, this long-standing struggle over Maunakea embodies the lack of repair of historical wounds to Native Hawaiians. It is in this context that the Hawai‘i Supreme Court in 2018 issued its split decision upholding the state Board of Land and Natural Resources’ issuance of a Conservation District Use Permit, paving the way for the TMT.<sup>70</sup>

59. See HAW. CONST. art. XII, § 4.

60. Sproat & Palau-McDonald, *supra* note 10, at 549 (citing Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. (HCDC), 177 P.3d 884, 901-02, 926 (Haw. 2008), *rev’d and remanded sub nom.* Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163 (2009)).

61. See Tuteur, *supra* note 3, at 87.

62. HAW. CONST. art. XI, § 1.

63. Sproat & Palau-McDonald, *supra* note 10, at 539-40.

65. See HAW. CONST. art. XI, § 1.

66. Sproat & Palau-McDonald, *supra* note 10, at 12.

67. *In re* Water Use Permit Applications (*Waiāhole*), 9 P.3d 409, 448-50 (Haw. 2000).

68. See Chad Blair, *OHA Sues State, UH Over ‘Longstanding Mismanagement’ of Mauna Kea*, HONOLULU CIV. BEAT (Nov. 8, 2017), <https://www.civilbeat.org/2017/11/oha-sues-state-uh-over-longstanding-mismanagement-of-mauna-kea/> [<https://perma.cc/95R3-YYTU>]; see also H.R. 2024, 31st Leg., Reg. Sess. (Haw. 2022) (establishing a Mauna Kea Stewardship and Oversight Authority to jointly oversee and manage state lands on Mauna Kea with the University of Hawai‘i for five years and providing for the transfer of University management powers and responsibilities to the Authority in 2028).

69. See Fa‘agau, *supra* note 2, at 38 (contending that Native Hawaiian “justice struggles are inadequately addressed by Hawai‘i’s courts and by state agencies”).

70. *Mauna Kea II*, 431 P.3d 752, 782 (Haw. 2018) (as amended Nov. 30, 2018); Isaac Moriwake, *Hawai‘i High Court Fixes Flawed Footnotes in Mauna Kea Decision, but Problems*

A. *Constricted Interpretations of Native Hawaiian Rights*

In *Mauna Kea II*, the court determined that the Board of Land and Natural Resources (BLNR) discharged its constitutional duty to carefully consider the project's impacts on Native Hawaiian practices and upheld the BLNR's finding of "no evidence" of Native Hawaiian cultural resources or traditional or customary practices exercised in the relevant area.<sup>71</sup> In doing so, the BLNR and court failed to fully "acknowledge[] the particulars and context of the injustice."<sup>72</sup> For Yamamoto, "recognition" requires participants in a social healing endeavor to acknowledge "the historical roots of present-day grievances and the localized context of specific conflicts."<sup>73</sup> Otherwise, he contends, "social healing efforts can be undermined from the start because of misunderstandings about the nature of the harms and underlying causes."<sup>74</sup>

The *Ka Pa'akai* framework, mentioned above, operationalizes constitutional protections for traditional and customary Native Hawaiian practices and furthers the state's commitment to reparative justice.<sup>75</sup> This framework makes important headway in recognizing and taking responsibility for repairing the harms. But in employing this framework in a formalistic manner, and by omitting crucial historical context,<sup>76</sup> the BLNR and court narrowly circumscribed the nature of the injury to Native

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*Persist*, EARTHJUSTICE (Dec. 21, 2018), <https://earthjustice.org/from-the-experts/mauna-kea-thirty-meter-telescope-hawaii-supreme-court> [<https://perma.cc/6WQX-8HPM>] (explaining that after cultural practitioner group Kua'āina Ulu 'Auamo filed an amicus curiae brief urging the court to correct critical errors its opinion, the court deleted two problematic footnotes related to Native Hawaiian rights, but did not fully fix its flawed analysis).

71. *Mauna Kea II*, 431 P.3d 752, 769 (Haw. 2018) (as amended Nov. 30, 2018).

72. See YAMAMOTO, *supra* note 16, at 73.

73. *Id.* at 76.

74. *Id.*

75. The *Ka Pa'akai* framework "places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies 'the power to protect these rights and to prevent any interference with the exercise of these rights.'" *Ka Pa'akai O Ka'Aina v. Land Use Comm'n*, 7 P.3d 1068, 1082 (Haw. 2000). Its three parts require state and county agencies to determine: "(1) the identity and scope of valued cultural historical, or natural resources in the petition area, including the extent to which traditional customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the agency to reasonably protect such practices if they are found to exist." *Id.* at 1084.

76. See Fa'agau, *supra* note 2, at 40. Fa'agau contends that the court's description of Maunakea's history was woefully incomplete, mischaracterized Hawaiian belief, failed to acknowledge Native Hawaiians' complex familial, cultural, and spiritual relationships to the mountain, and largely erased Native Hawaiians from the telling. See *id.* at 42-43. In "failing to convey Native Hawaiians' deep-rooted, genealogical connection to Maunakea," Fa'agau asserts that "the majority limited Native Hawaiians' claims of right to the sacred mountain." *Id.* at 40.

Hawaiians. Although the court briefly depicted the deep spiritual and genealogical significance of Maunakea,<sup>77</sup> it framed Native Hawaiians' modern-day cultural practices as “derived from” or “related to” such traditional beliefs.<sup>78</sup> In implying that traditional beliefs are valid, but contemporary ones are not, the BLNR and court minimized present-day Native Hawaiian cultural practices. The court and agency also failed to recognize the historical roots of Hawaiians' present-day claims: that dispossession and displacement have compelled Kānaka Maoli to adapt their cultural practices over time to support a living culture.<sup>79</sup> In doing so, the BLNR and court ignored the lasting “disabling constraints” on Kānaka Maoli that Hawai‘i’s laws sought to remedy in the first place.

The BLNR also narrowly circumscribed the physical area in which it assessed those practices. It defined the “relevant area” as only two specific parts of the project, the TMT Observatory site and Access Way, and found no Native Hawaiian cultural resources or traditional and customary practices in those areas.<sup>80</sup> Although the court indicated that the BLNR did consider areas outside that specific footprint, the BLNR’s and court’s mechanistic approach not only ignored the vast spiritual and cultural significance of the mountain, but also failed to recognize the full scope of the harm to Native Hawaiian cultural practices. Maoli legal scholar Terina Fa‘agau contends that such a “constricted focus on the specific site . . . narrowed the scope so much so that it excluded Native Hawaiians—along with their well-documented cultural traditions and customs—from the analysis.”<sup>81</sup> Moreover, by focusing on the “apparent absence”<sup>82</sup> of Native Hawaiian practices at the site rather than acknowledging the Hawaiian practice of purposefully refraining from entering those sacred areas,<sup>83</sup> the BLNR and

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77. *See id.* (contending that the majority opinion’s one paragraph history of Maunakea “failed to capture the tremendous significance Maunakea holds for Kānaka Maoli”).

78. *Mauna Kea II*, 431 P.3d 752, 758 (Haw. 2018) (as amended Nov. 30, 2018) (emphasizing that “various Native Hawaiian traditional and customary practices are derived from these beliefs, which have also led to related contemporary cultural practices”).

79. *See* Fa‘agau, *supra* note 2, at 55, 62.

80. *Mauna Kea II*, 431 P.3d at 769 (concluding that no practices, artifacts, or altars were found in the “relevant area”).

81. Fa‘agau, *supra* note 2, at 56.

82. *Id.* at 57.

83. *See id.* at 42 (noting that “Native Hawaiians refrain from entering into that sacred space all together as a practice of reverence”); *see also* David M. Forman, *Reoccurring Cultural Insensitivity: Confronting the Abdication of Core Judicial Functions*, 43 U. HAW. L. REV. 341, 342-46 (2021) (observing that the proposed TMT Observatory that intersects a ring of shrines in the summit region will obstruct culturally important view planes emanating from those sites); Tuteur, *supra* note 3, at 85 (noting that evidence points to “potentially affected cultural resources, practices, and rights not only at and near the TMT project site, but throughout the summit region”).

court misconstrued both the immediate harm to Native Hawaiians and the cumulative impacts to Native practices there.

The BLNR and court thus failed to fully recognize the particulars of the injury to Native Hawaiians and their acknowledged relationships to Maunakea. As Maoli legal scholar N. Mahina Tuteur recognized, “[a]lthough the court acknowledged that the summit is the piko through which spiritual and genealogical connections are sustained, it did not ultimately conclude that desecration of the area would result in damage to those relationships.”<sup>84</sup> In this way, the agency’s and court’s “recognition” of harms was incomplete: it failed to “undertake critical interrogation to fully and fairly assess the specific circumstances and larger historical context of the justice grievances undergirding present-day tensions.”<sup>85</sup> Such a narrow framing of the injury justified the denial of the petitioners’ claims and, as some predict, could constrain the scope of Native Hawaiian rights in future controversies.<sup>86</sup>

#### B. *Cursory Analysis of Other Reparative Laws*

The court also neglected to critically interrogate two other legal frameworks rooted in reparative justice for Native Hawaiians, further illuminating the court’s incomplete “recognition” and “repair” of injuries to Kānaka Maoli. First, the court held that the TMT telescope project comports with public trust principles, in part by employing a diluted public trust analysis and overlooking the doctrine’s reparative origins.<sup>87</sup> Second, the court sidestepped the relevance of Maunakea as part of the Public Land Trust corpus, which is “the foundation . . . for reconciliation” between the State and Kānaka Maoli.<sup>88</sup>

As mentioned above, Hawai‘i’s public trust embraces Native Hawaiian precepts: it finds its origin in Hawaiian Kingdom law and today is a “bedrock constitutional principle that protects all natural resources for present and future generations.”<sup>89</sup> Rather than employing a rigorous framework for determining whether the BLNR fulfilled its public trust duties to proactively

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84. Tuteur, *supra* note 3, at 88.

85. YAMAMOTO, *supra* note 16, at 78.

86. Tuteur, *supra* note 3, at 83-84.

87. *See generally* Moriwake, *supra* note 70; *see also* Tuteur, *supra* note 3, at 86.

88. *See* Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. (HCDC), 177 P.3d 884, 902 (Haw. 2008), *rev’d*, 556 U.S. 163 (2009) (anticipating that this reconciliation would include the settlement of Native Hawaiians’ “unrelinquished claims” to land).

89. Moriwake, *supra* note 70.

protect Maunakea’s natural resources,<sup>90</sup> the court declared “only in very general terms that [it] fulfil[led] the requirement of conservation and resource protection.”<sup>91</sup> Instead of describing the grave impacts of well-documented state mismanagement of the area, the court proclaimed that TMT’s use of the land would result in a “substantial community benefits package.”<sup>92</sup> That “package” would include a “commitment to provide \$1 million annually for this program” and “a workforce pipeline program that will lead to a pool of local workers trained in science, engineering, and technical positions available for employment in well paid occupations,” in addition to sublease rent to the University and already-paid grants and scholarships for Science, Technology, Engineering, and Mathematics (STEM) education.<sup>93</sup> Based on these pledges, the court determined that “the use of the land by TMT is consistent with conservation and in furtherance of the self-sufficiency of the State.”<sup>94</sup>

But, while these monetary payments may have public benefits, they do not convert the TMT into a public use.<sup>95</sup> And, in the larger context, as Yamamoto contends, monetary payments, without accompanying social structural repair for individuals and communities, rarely foster social healing.<sup>96</sup> According to Yamamoto, reparation “must result over time in a restructuring of the institutions and relationships that generated the disabling constraints that produced the underlying justice grievances.”<sup>97</sup> While monetary payments and a pipeline program can foster economic justice, they are not a substitute for repair of “environmental and cultural damage to cherished natural and cultural resources.”<sup>98</sup>

As Yamamoto aptly observed in the context of misappropriation of sacred lands from Indigenous peoples, an approach focused on compensation

90. See *Waiāhole*, 9 P.3d at 453 (articulating the state’s “affirmative duty . . . to protect public trust uses whenever feasible”); see also *Mauna Kea II*, 431 P.3d at 773 (expressly holding that state-managed conservation district lands “are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1”).

91. *Mauna Kea II*, 431 P.3d 752, 789 (Haw. 2018) (as amended Nov. 30, 2018) (Wilson, J., dissenting); Moriwake, *supra* note 69 (observing that the court declined to employ the analytical framework that it employs when analyzing water resources); Sproat & Palau-McDonald, *supra* note 10, at 542 (describing the trust’s origin in Hawaiian Kingdom law and its “original intent” of preserving the right of Native tenants).

92. *Mauna Kea II*, 431 P.3d at 775.

93. *Id.*

94. *Id.*

95. *Id.* at 789 (Wilson, J., dissenting).

96. See Tuteur, *supra* note 3, at 88 (noting that most of the funds will be spent outside Hawai‘i in any case).

97. YAMAMOTO, *supra* note 16, at 90.

98. *Mauna Kea II*, 431 P.3d at 795 (Wilson, J., dissenting).

rather than returning or protecting lands “vastly heightens the sense of injustice—partly because of the government’s lack of cultural understanding of the land’s significance and partly because of other long-standing unresolved grievances.”<sup>99</sup> Indeed, a Native group’s “historically rooted grievances against the government over its taking of lands, destruction of culture and denials of self-governance over generations undergirds its contemporary anger at the government’s insistence on monetary payments (‘buy-outs’) as social healing.”<sup>100</sup>

The court also barely acknowledged that Maunakea is part of the Public Land Trust—that the State holds those lands in trust in part for Native Hawaiians.<sup>101</sup> Indeed, Hawai‘i law “makes clear that these specific lands are imbued with a unique history that requires caring for them until they are returned to Kānaka Maoli.”<sup>102</sup> The court fleetingly mentioned this trust duty in a footnote, noting that while the petitioners raised arguments about the lawful uses of Public Land Trust lands, they did not specifically allege a violation of the Trust.<sup>103</sup> By declining to critically interrogate the state’s duty to properly care for and eventually return these lands and by omitting the broader historical context and reconciliatory foundation of Hawai‘i’s laws, the court neglected to recognize both the immediate harm and the “pain buried in the collective memories” of Native Hawaiian land confiscation, cultural destruction, and loss of self-governance.

### C. *The Broader Context: “Progress” Versus “Culture”*

The court’s approach thus did little to quell lingering mistrust between Native Hawaiians and the state.<sup>104</sup> This failure to repair relationships is seen in the state and TMT’s broader framing of the struggle as a clash between out-of-date Native Hawaiian spirituality and rigorous, modern science.<sup>105</sup> According to Yamamoto, “[i]dentifying the justice grievance . . . would likely also mean critically unraveling ‘stock stories’ about events and group cultural attributes that ostensibly legitimated past abuses and that heighten

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99. YAMAMOTO, *supra* note 16, at 75.

100. *Id.* at 75-76.

101. *See Mauna Kea II*, 431 P.3d at 775; *see also* Tuteur, *supra* note 3, at 87.

102. Tuteur, *supra* note 3, at 87.

103. *See Mauna Kea II*, 431 P.3d at 774 n.24; *see also* Tuteur, *supra* note 3, at 87.

104. Tuteur, *supra* note 3, at 88 (observing that the court’s decision “reinforced the Maoli community’s distrust of state government”).

105. *See* Rosie Alegado, *Opponents of the Thirty Meter Telescope Fight the Process, Not Science*, NATURE (July 26, 2019), <https://www.nature.com/articles/d41586-019-02304-1> [<https://perma.cc/LA8C-L5CY>].

current tensions.”<sup>106</sup> In this way, Native Hawaiians are portrayed as “relics”—“mere vestiges of a quickly fading and increasingly irrelevant past.”<sup>107</sup> As Tuteur argues, such characterizations can “normalize continued appropriation of ancestral lands and waters.”<sup>108</sup>

But Native Hawaiians vigorously contest this framing and critically unravel the “stock stories” about Kānaka Maoli. Native Hawaiian scientists contest the false dichotomy between Maoli culture and science, and highlight Hawaiians’ longstanding evidence-based sustainable agriculture and aquaculture practices.<sup>109</sup> Native Hawaiian activists call themselves “‘protectors, not protestors’ or *kia‘i mauna* (guardians of the mountain).”<sup>110</sup> These *kia‘i* led the massive resistance movement, cultural resurgence, and extraordinary community building at the foot of the mountain, guided by the notion of “*kapu aloha*,” an approach to civil disobedience and direct action rooted in Hawaiian cultural practice.<sup>111</sup> And in protecting their sacred mountain, they actively reshaped the narrative and “the collective memory of injustice” by testifying about the mountain’s cultural, spiritual, familial, and historical importance, the historical context of U.S. colonization, and the “decades of [physical, spiritual, and psychological] harm caused by already-

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106. YAMAMOTO, *supra* note 16, at 76.

107. Noelani Goodyear-Ka‘ōpua, *Protectors of the Future, Not Protestors of the Past: Indigenous Pacific Activism and Mauna a Wākea*, 166 S. ATL. Q. 184, 184 (2017) (calling this framing “a tired colonial trope”).

108. Tuteur, *supra* note 3, at 84.

109. See Alegado, *supra* note 105 (describing Native Hawaiians’ sustainable and evidence-based agriculture and aquaculture practices).

110. Goodyear-Ka‘ōpua, *supra* note 107, at 188.

111. See Tuteur, *supra* note 3, at 83 (explaining that the term *kapu aloha* “comes from the merging of two foundational Hawaiian words: *kapu* (to set apart; to prohibit; to make sacred or holy) and *aloha* (to love; show mercy; to have compassion upon)”). When the TMT project was set to begin in summer 2019, state police swept in and arrested thirty-three *kūpuna* (elders) who formed the front line to block heavy equipment from reaching the summit. See Kēhau Lyons, *Everything You Need To Know About the Mauna Kea Protests in Hawaii*, MTV NEWS (Aug. 6, 2019), <http://www.mtv.com/news/3133883/hawaii-protests-mauna-kea-telescope/> [<https://perma.cc/7DXJ-MVTK>]. Alongside the elders, a generation of young Native Hawaiian activists—in large part women and nonbinary folx—led the historic movement to block the access road at the foot of the mountain. See Noelani Goodyear-Ka‘ōpua & Yvonne Mahelona, *Protecting Maunakea is a Mission Grounded in Tradition*, ZORA BY MEDIUM (Sept. 5, 2019), <https://zora.medium.com/protecting-maunakea-is-a-mission-grounded-in-tradition-38a62df57086> [<https://perma.cc/5ECY-8PAA>]. That community became the center of “a cultural resurgence and the rebuilding of a nation, caring for thousands of Kānaka and their supporters over several months,” providing food, medical care, and university classes to the community, and sparking movements to protect natural and cultural resources across Hawai‘i and worldwide. See Tuteur, *supra* note 3, at 82; see also Jennifer Sinco Kelleher, *Telescope Protest Inspires More Native Hawaiian Activism*, AP NEWS (Nov. 16, 2019), <https://apnews.com/article/f51647e646e34573a18bf045f824f631> [<https://perma.cc/W56Y-TMXJ>].

existing and poorly-managed observatories on Maunakea.”<sup>112</sup> The activists’ reframing of “stock stories” about Maunakea, and Native Hawaiians’ relationship to it, sparked the movement support on an international scale.<sup>113</sup>

Others described Native Hawaiian activists on the mountain as “law-makers” (rather than “law-breakers”) who are shifting the legal landscape toward justice.<sup>114</sup> The Native Hawaiian community’s law-making may indeed result over time in a restructuring of the institutions and relationships that contribute to meaningful social healing. Indeed, “Kānaka Maoli and settler allies [are working] together to unmake relations of settler colonialism and imperialism, protecting Indigenous relationships between human and nonhumans through direct action and compassionate engagement with settler-state law enforcement.”<sup>115</sup> But the state—including its agencies and courts—also needs to take responsibility for meaningful reconstruction and reparation to dismantle lasting “oppressive systemic structures”<sup>116</sup> that undergird justice grievances to collaboratively foster social healing for Kānaka Maoli. Whether such repair will materialize—particularly in light of the impending transfer of management authority from the University to a new oversight authority, alongside the state’s efforts to bolster community consultation<sup>117</sup>—is still uncertain.

#### IV. CONCLUSION

Eric Yamamoto’s renewed *Social Healing Through Justice* framework coalesces working principles into “grounded and workable means for tackling messy, conflictual yet significant, social healing initiatives.”<sup>118</sup>

112. Fa’agau, *supra* note 2, at 45, 68. For an extensive discussion on the state’s mismanagement of Maunakea, see *id.* at 45-49; see also Jonathan Kay Kamakawiwo’ole Osorio, *Written Direct Testimony* (Oct. 10, 2016), <https://dlnr.hawaii.gov/mk/files/2016/10/B.07a-Osorio-WDT.pdf> [<https://perma.cc/Z765-8N7E>] (asserting that the Mauna Kea controversy must be viewed in the context of U.S. colonization).

113. See, e.g. Michelle Broder Van Dyke, ‘A New Hawaiian Renaissance’: How a Telescope Protest Became a Movement, *GUARDIAN* (Aug. 17, 2019), <https://www.theguardian.com/us-news/2019/aug/16/hawaii-telescope-protest-mauna-kea> [<https://perma.cc/5W2S-DVVS>] (discussing the protests opposing the building of the telescope on Mauna Kea).

114. See Charles Lawrence & Mari Matsuda, *Column: Civil Disobedience Has Changed the Law*, *STAR ADVERTISER* (Aug. 18, 2019), <https://www.staradvertiser.com/2019/08/18/editorial/island-voices/civil-disobedience-has-changed-the-law/> [<https://perma.cc/U9CB-JSMJ>].

115. Goodyear-Ka’ōpua, *supra* note 107, at 185.

116. YAMAMOTO, *supra* note 16, at 90.

117. H.R. 2024, 31st Leg. Reg. Sess. (Haw. 2022); UH News, *UH Proposes Orderly Transition to New Maunakea Authority*, *UNIV. HAWAII NEWS* (June 7, 2022), <https://www.hawaii.edu/news/2022/06/07/uh-proposes-orderly-transition-maunakea/> [<https://perma.cc/ZX53-5H2K>].

118. YAMAMOTO, *supra* note 16, at 73.



Briefly assessing the Hawai‘i Supreme Court’s decision through this lens suggests that complete recognition and responsibility, meaningful reconstruction, and comprehensive reparation that genuinely heals Native Hawaiian communities are still works in progress. Of course, one court decision alone will not restructure institutions and relationships in ways that fully repair lingering harms. But when the court contextually employs reparative laws in ways that recognize historic injustice—alongside policymakers, agencies, and communities advancing concrete acts of reparative justice—transformation is possible. And Yamamoto’s *Social Healing Through Justice* 4Rs framework powerfully offers the language, concepts, and approach for articulating, assessing, organizing around, and guiding that kind of transformative justice and social healing that both heals the wounds of communities and repairs the damage to society.