

A New Narrative: *Native Hawaiian Law*

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I. COMEBACK

John Ralston Saul's landmark book *The Comeback*¹ traces the resurgence over the last 100 years of the Aboriginal peoples of Canada.² Saul says this:

The situation is simple. Aboriginals have and will continue to make a remarkable comeback. They cannot be stopped. Non-Aboriginals have a choice to make. We can continue to stand in the way so that the comeback is slowed and surrounded by bitterness. Or we can be supportive and part of a new narrative.³

Yet we need not limit what Saul says merely to Canada. The notion of a “comeback” not only aptly summarizes similar strides made by Aboriginal peoples⁴ of former European colonies the world over,⁵ but also, and more importantly, it points to the significant work that remains to be done in order to build upon what has already been accomplished. As Saul explicitly identifies, an important part of what remains to be done involves what non-Aboriginal peoples can and must do. At the very least, it means not standing in the way.⁶ But at its most hopeful, non-Aboriginal peoples will join Saul in saying that:

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¹ JOHN RALSTON SAUL, *THE COMEBACK* (2014).

² *See id.* at 6.

³ *Id.*

⁴ In this review essay, I use “Aboriginal peoples” to refer to those peoples of the world who refer to themselves as Aboriginal, Indigenous and/or Native peoples.

⁵ *See, e.g.*, BRUCE PASCOE, *DARK EMU BLACK SEEDS: AGRICULTURE OR ACCIDENT* (2014); ATHOLL ANDERSON ET AL., *TANGATA WHENUA: AN ILLUSTRATED HISTORY* (2014).

⁶ “Standing in the way” can take many forms. Consider just these few examples, drawn from media and press during the writing of this essay: negative press in relation to Metis and Non-Status Indians in Canada, Jeffrey Simpson, *Confusion Reigns on Aboriginal Rights When Court Rulings Meet Reality*, *GLOBE & MAIL*, July 11, 2015, at F2 (referring to the Supreme Court of Canada decision in *Tsilhqot'in Nation v British Columbia* [2014] 2 S.C.R. 256); Editorial, *The Supreme Court Goes Back to 1763*, *GLOBE & MAIL*, Oct 13, 2015, at A12 (referring to the Supreme Court decision in *Daniels v. Canada*, [2016] S.C.R. 99 (Can.)), attempts of Indigenous and Aboriginal peoples worldwide to rescind the Doctrine of Christian Discovery and to obtain an apology from the Roman Catholic Church for its racist implementation and for its pernicious and ruinous consequences, @chantlaca, *Mexico*:

To free ourselves, two things must happen. We must reinstall a national narrative built upon the centrality of the Aboriginal peoples' past, present and future. And the policies of the country must reflect that centrality, both conceptually and financially.⁷

A new narrative forming part of a comeback must, then, involve all people, Aboriginal and non-Aboriginal, in a joint effort of creating a new national narrative, one that challenges the neo-liberal narrative that is today so common.⁸ That task also involves the law and legal order of a nation, for law represents one of the ways in which a country or a jurisdiction can both reinstall such a narrative in former colonial systems, as well a means of adjusting its policies accordingly. One of the most obvious ways in which law can contribute to a new narrative and so adjust policies, to take but one example (and it is by no means the only way it can do this) involves the method by which a society allocates resources, especially the land resource. Today, some form of the concept of private property typically comprises the means by which resources are allocated. But that need not be the only prism through which a society looks at its resources. As recently as 200 years ago (a mere drop in the bucket of time in the course of human history) much of the world was allocated according to various alternatives to private property: common ownership in aboriginal societies (as found in most parts of the world, such as Australia, Canada, New Zealand, or the United States);⁹ peasantry and serfdom in feudal land-holding societies (as found in much of Europe);¹⁰ autocratic forms of landownership that combined serfdom with absolutism (as found in pre-Revolutionary Russia);¹¹ the distribution of land so as to achieve an equilibrium between promoting harmony within and

Indigenous Peoples Demand That Pope Francis Rescind the "Doctrine of Discovery", RED: CONTINENTAL COMUNICACIONES—COMMUNICATIONS: MEDIOS—MEDIA ABYA YALA (Feb. 5, 2016, 12:20 PM), <http://redabyayala.blogspot.com.au/2016/02/mexico-indigenous-peoples-demand-that.html>; @yotlacuila, *El Papa, los Indígenas y la Doctrina del Descubrimiento*, ANIMAL POLITICO (Feb. 11, 2016 11:43 PM), <http://www.animalpolitico.com/blogueros-codices-geek/2016/02/11/el-papa-los-indigenas-y-la-doctrina-del-descubrimiento/>; ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* (2010), and the ongoing disadvantage suffered by Indigenous Australians, Sara Hudson, *PM's Closing the Gap Statement on Repeat*, CENTRE FOR INDEP. STUD. (Feb. 5, 2016), <https://www.cis.org.au/commentary/articles/pms-closing-the-gap-statement-on-repeat>.

⁷ SAUL, *supra* note 1, at 14.

⁸ DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

⁹ See generally ANDRO LINKLATER, *OWNING THE EARTH: THE TRANSFORMING HISTORY OF LAND OWNERSHIP* 5 (2014).

¹⁰ See generally *id.* at 93–130.

¹¹ See generally *id.* at 131–49.

control over a large population (as found in China).¹² Private property disrupted the patterns of these alternative forms of land ownership, constituting a great revolution running the span of the last 200 years.¹³ The point is not to focus on the alternative forms of land distribution, but on the fact that there are other ways of looking at the world around us, and that we can draw upon our own past, in the sense of a common human history, for alternatives to the narrative that we find today.

At a higher level of generality, though, what might a new legal narrative of the sort described by Saul look like? What trends or phenomena might we look for and expect to see in a society's legal and political order suggesting the emergence of a new narrative? Looking at the global evidence available to us today, at the very least, we might expect to see three such trends or phenomena.

First, we would expect to see the dominant legal culture recognizing, and perhaps adopting, even if in small ways, the place of Aboriginal peoples and legal structures within the broader dominant structure. This we might call recognition by the legal order.¹⁴ Second, the political order of a dominant society might recognize, again, even in small ways, the place of Aboriginal peoples and political-legal structures within the broader order of the dominant society. We might call this recognition by the political order.¹⁵

¹² See generally *id.* at 150–66.

¹³ See generally *id.* at 169–214.

¹⁴ As found in various jurisdictions, such as, in Canada, *Calder v. British Columbia*, [1973] S.C.R. 313, New Zealand, *New Zealand Maori Council v. Attorney-General* (1987) 1 NZLR 641 (CA), and in Australia, *Mabo v Queensland [No. 2]* (1992) 175 CLR 1.

¹⁵ There have been numerous attempts at Aboriginal self-government within existing nations. For example, in 1993, Canada passed the Nunavut Act the Nunavut Act, establishing the Nunavut Territory of Canada. See Nunavut Act, S.C. 1993, c. 28. There are provisions of national and intra-national constitutions. See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, ch. 11, § 25 (U.K.) (acknowledging aboriginal rights and freedoms pertaining to aboriginal peoples of Canada); Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11, § 35 (U.K.) (recognizing and affirming existing aboriginal and treaty rights of aboriginal peoples of Canada including Indian, Inuit, and Métis peoples); HAW. CONST. art XII, § 7 (reaffirming protection of traditional and customary rights of native Hawaiians who are descendants of those who inhabited the Hawaiian Islands prior to 1778). There are also public lands trusts, such as the Hawaiian Crown Lands Trust, Haw. Rev. Stat. § 171-18 (2013) (appropriating funds from the sale or lease of certain public lands). In addition, there are treaties, such as the Treaty of Waitangi Between the Government of England and Certain Aboriginal Peoples of New Zealand [1840], *reprinted in* Treaty of Waitangi Act 1975, sch. 1 (N.Z.), the modern British Columbia treaty process, managed by the British Columbia Treaty Commission and established pursuant to the Treaty Commission Act, R.S.B.C. 1996, c 461, and the efforts to recognize Aboriginal peoples in the Australian Constitution, see generally ANN TWOMEY, SYDNEY LAW SCH., CONSTITUTIONAL REFORM UNIT, CONSTITUTIONAL

Finally, and perhaps most importantly, we would expect to find the scholarship of Aboriginal experts writing about the way in which dominant law can recognize Aboriginal peoples and legal and political structures as part of the broader political-legal order of a society. This growing body of literature provides structure and, above all, content to the emergent recognition in the legal and political orders. Indeed, today one finds such scholarship in many parts of the modern world.¹⁶

Why does it matter that we look for these three phenomena as pointing to an Aboriginal legal narrative? Because it comprises part of the plurality of legal forms that exists, imbricated and interacting at a global level. To fail to recognize and understand any part of this plural legal order is to misunderstand the nature of law itself. This point cannot be overstated; the global legal order today, if limited merely to the recognized positive law of a nation, excludes, as Twining writes:

(i) . . . other levels of supranational, sub-national and trans-national levels of legal relations: public international law, European Community law, Islamic law, Maori law, and *lex mercatoria* for example. (ii) . . . some of the major legal traditions in which law is not conceptually or politically tied to the idea of the state. For example, it leaves out Islamic law or confines it to countries in which Islamic law is formally recognized as a source of municipal law. But it is obvious that this distorts the extent, scope, and nature of shari'a. (iii) However, if we decide to include major religious and customary normative orderings, and perhaps other examples of non-state law, we run into major conceptual problems. First, we have to adopt a conception of law that includes at least some examples of "non-state law". That re-opens the Pandora's box of the problem of the definition of law and all its attendant controversies. Second, there is the problem of individuating legal orders. What counts as one legal order or system or unit for the purposes of mapping? How does one deal with vaguely constituted agglomerations of norms, which may be more like waves or clouds than billiard balls? (iv) If one decouples the notion of law and state, one is confronted with another set of problems. If one moves away from the idea of one kind of institution having a legitimate claim to monopoly of authority and force, one has to accept the idea of legal and normative

RECOGNITION OF INDIGENOUS AUSTRALIANS IN A PREAMBLE (2011), https://sydney.edu.au/law/cru/documents/2011/Report_2_2011.pdf.

¹⁶ See, for example, in the United States, FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2d ed. 2012), Australia, RICHARD H. BARTLETT, NATIVE TITLE IN AUSTRALIA (3d ed. 2014), Canada, JOHN BORROWS, CANADA'S INDIGENOUS CONSTITUTION (2010), and New Zealand, PAUL G. MCHUGH, THE MĀORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI (1991).

pluralism—i.e. the co-existence of more than one legal order in the same time-space context—and all the difficulties that entails.¹⁷

It is important, then, that we understand the new legal narrative emerging globally around Aboriginal law—it is part of supranational, sub-national, and trans-national legal relations. To ignore it is to ignore the nature of law in our modern world. The true task, as Twining points out, is to see it in what is already there, before our very eyes.

And such a narrative is emerging in Hawai‘i, among the kānaka ‘ōiwi, kānaka maoli, and Hawai‘i maoli, the Indigenous Polynesian people of the Hawaiian Islands and their descendants, who trace their ancestry back to the original Polynesian settlers of Hawai‘i. It is not always easy to see. When they think about it, most people associate Hawai‘i more with Waikīkī, Elvis and pineapple than with a Polynesian Indigenous culture rich in its abundance. Sadly, visitors to the Hawaiian Islands may at best spend an evening at a lū‘au or an hour at a lei-making session; but that is usually the sum total of a visitor’s cultural exposure, retreating all too quickly to the seeming “safety” of the endless luxury goods stores that line the main tourist streets, or the man-made white sand beaches of Waikīkī.¹⁸ Yet the narrative, hard though it may be to see, is there. Three events of 2015 reveal its emergence, and its force, driven by the power of the ongoing political struggles of Native Hawaiians to emerge from the hegemony of colonialism and thereby gain greater recognition of customary and traditional rights though Native Hawaiian law.¹⁹ These events, examined in Part II, brought

¹⁷ WILLIAM TWINING, LAW, JUSTICE AND RIGHTS: SOME IMPLICATIONS OF A GLOBAL PERSPECTIVE 5 (2007), https://www.researchgate.net/publication/242143434_Law_Justice_and_Rights_Some_Implications_of_a_Global_Perspective (citations omitted); see generally WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (2009).

¹⁸ See HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I 17 (1993) (describing commodification of Hawaiian culture in Hawaii tourism industry); Haunani-Kay Trask, *Hawaiians, American Colonization, and the Quest for Independence*, 31 SOC. PROCESS IN HAW. 101, 118 (1984) (same); Haunani Kay Trask, *Tourism and the Prostitution of Hawaiian Culture*, CULTURAL SURVIVAL Q., Mar. 2000 (same); see also Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Commodification of Culture*, 48 HOW. L.J. 737, 754–56 (discussing impact of cultural commodification on health, environment, and sustainability); Gregory K. Schlais, *The Patenting of Sacred Biological Resources, the Taro Patent Controversy in Hawai‘i: A Soft Law Proposal*, 29 U. HAW. L. REV. 590–91 (2007) (noting the deleterious impact of cultural products, traditional knowledge, and cultural expressions on native peoples).

¹⁹ On these struggles worldwide, see CLARE LAND, DECOLONIZING SOLIDARITY: DILEMMAS AND DIRECTIONS FOR SUPPORTERS OF INDIGENOUS STRUGGLES (2015).

squarely to public attention the choice faced by non-Aboriginals between either standing in the way or supporting the new narrative emerging in Hawai‘i.

Two of the events—one involving the legal order and the other largely the political—dealt with disputes between Native Hawaiians and the descendants of European and American colonizers. The first involved an attempt to build a new telescope on Mauna Kea on the Island of Hawai‘i, a place sacred to Native Hawaiians. The second event involved the proposed election (‘Aha) of Native Hawaiian delegates to a proposed convention to discuss, and perhaps to organize, a “Native Hawaiian governing entity.” While the former was largely a matter of legal interpretation of conflicting rights, and the latter largely a political issue, both ultimately became legal disputes finding their way into the courts, the former into the State system, the latter into the Federal. The third phenomena, scholarship, came with the publication of Melody Kapilialoha MacKenzie’s second edition of *Native Hawaiian Law: A Treatise*.²⁰

This essay considers each of these three events, the legal, political and scholarly recognition of Native Hawaiians and their law as part of the wider Hawaiian legal-political-scholarly order. Its primary focus is on the structure and content that *Native Hawaiian Law* provides for understanding the first two events. While neither of those two events directly involved the interpretation or application of Native Hawaiian law, the disputes behind those events allowed for a recognition, in law and in politics, of the place of Native Hawaiians in the broader legal and political order of Hawai‘i. And the publication and public reception of *Native Hawaiian Law* in the midst of those disputes made clear that the cause of Native Hawaiians and Native Hawaiian law are a part of the new narrative, a narrative with which non-Native Hawaiians are free to engage and in doing so join the political and cultural struggles of Native Hawaiians, rather than stand in their way.

The magisterial work collected in *Native Hawaiian Law* joins the rich, diverse, and growing international body of law and literature leading a new narrative guiding the Aboriginal comeback taking place globally. With that in mind, Part III offers brief concluding reflections suggesting that the three events of 2015 are, indeed, signs of an emerging narrative in which non-Native Hawaiians can either stand in the way, surrounded by bitterness, or support, becoming part of that new narrative. The hope, which I hope this essay expresses, is that non-Native Hawaiians, indeed, all non-Aboriginal people the world over, will support a new narrative surrounding the emerging world comeback of all Aboriginal peoples. And that support starts with law.

²⁰ NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter NATIVE HAWAIIAN LAW].

II. HAWAI‘I 2015: THREE PHENOMENA CONVERGE

A. *Legal Order: Mauna Kea Anaina Hou v. Board of Land and Natural Resources*

*Mauna Kea Anaina Hou v. Board of Land and Natural Resources*²¹ involved an application by the University of Hawai‘i at Hilo (UHH) to the State Board of Land and Natural Resources (BLNR) for approval to construct a Thirty Meter Telescope (TMT) on Mauna Kea on the Island of Hawai‘i.²² The BLNR held two public hearings in respect of the application, at which proponents asserted that the TMT would facilitate cutting-edge scientific research that could not be conducted as effectively anywhere else.²³ Opponents included Native Hawaiian Appellants who stated that the construction of the TMT constituted a desecration of the summit area, considered sacred in Native Hawaiian culture.²⁴ The BLNR scheduled the application for action at a public board meeting in February 2011, at which various opponents spoke, requesting that the BLNR delay action on the permit until it could conduct a contested case hearing,²⁵ to which Native Hawaiians are entitled pursuant to Article XII, Section 7, of the Hawai‘i Constitution:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.²⁶

In relation to the customary and traditional rights claimed in relation to Mauna Kea, the Hawai‘i Supreme Court noted that:

Appellants have argued throughout this case that the project will have significant negative effects on their Native Hawaiian cultural practices on Mauna Kea. For example, Appellant Neves testified that “development in my sacred temple of religious practice will seriously interfere with my ability to adore Mauna Kea.” And in a jointly submitted letter, Appellant[s] . . . wrote, “Mauna Kea is considered the Temple of the Supreme Being[,] the home of

²¹ 136 Hawai‘i 376; 363 P.3d 224 (2015).

²² *Id.* at 379, 363 P.3d at 227.

²³ *Id.* at 379–80, 363 P.3d at 227–28.

²⁴ *Id.* at 380, 363 P.3d at 228.

²⁵ *Id.*

²⁶ *Id.* at 390, 363 P.3d at 238 (quoting HAW CONST. art. XII, § 7).

N[ā] Akua (the Divine Deities), N[ā] ‘Aum[ā]kua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and W[ā]kea ([S]ky Father).”²⁷

Despite the objections of the Appellants, the BLNR voted to approve the permit at the meeting, subject to a number of conditions, before the contested case hearing occurred, which resulted in “put[ting] the cart before the horse.”²⁸ The Court explained, “[o]nce the permit was granted, Appellants were denied the most basic element of procedural due process—an opportunity to be heard at a meaningful time and in a meaningful manner. Our Constitution demands more.”²⁹

The BLNR also directed that a contested case hearing be conducted and imposed a condition in the permit that no construction could be undertaken until the contested case hearing was resolved.³⁰ The Chair of the BLNR appointed a hearing officer to conduct the hearing, which took place in 2011.³¹ In 2012, the hearing officer issued a recommendation that the BLNR approve the permit, subject to essentially the same conditions as originally imposed by the BLNR at the 2011 meeting.³² In 2013, the BLNR adopted the hearing officer’s recommendation, and the Third Circuit Court affirmed the BLNR’s action.³³

In the Supreme Court of Hawai‘i, the Appellants argued that the approval of the permit before the contested case hearing violated the Hawai‘i Constitution’s guarantee of due process, which provides that “No person shall be deprived of life, liberty or property without due process of law. . . .”³⁴ Finding the arguments of the respondents unpersuasive, the Supreme Court of Hawai‘i held that the due process provisions of the Hawai‘i Constitution had been violated by the failure to provide the Appellants with a meaningful opportunity to be heard in both reality and appearance.³⁵ As such, as a matter of due process pursuant to the Hawai‘i Constitution:

Given the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the

²⁷ *Id.*

²⁸ *Id.* at 391, 363 P.3d at 239.

²⁹ *Id.*

³⁰ *Id.* at 380, 363 P.3d at 228.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* (quoting HAW CONST. art. I, § 5). Justice Pollack, in a concurring opinion in which Justice Wilson joined, and in which Justice McKenna joined as to Part IV, held that the actions of the Board also violated the public trust doctrine enshrined in the Article XI, Section 7 of the Hawai‘i Constitution. *Id.* at 403–09, 413–15, 363 P.3d at 251–572, 261–63.

³⁵ *Id.* at 393, 363 P.3d at 241.

protections provided by a contested case hearing, and the lack of undue burden on the government in affording Appellants a contested case hearing, a contested case hearing was “required by law” regardless of whether BLNR had voted to approve one on its own motion at the February 25, 2011 meeting.³⁶

Importantly, in a concurring opinion, Justice summarized the recognition and accommodation of Native Hawaiian cultural practices in Hawaiian law:

[The Hawai‘i Supreme Court]’s evolving jurisprudence concerning Native Hawaiian traditional and customary rights has conceived of a system in which the State and its agencies bear an affirmative constitutional obligation to engage in a meaningful and heightened inquiry into the interrelationship between the area involved, the Native Hawaiian practices exercised in that area, the effect of a proposed action on those practices, and feasible measures that can be implemented to safeguard the vitality of those practices. When an individual of Native Hawaiian descent asserts that a traditionally exercised cultural, religious, or gathering practice in an undeveloped or not fully developed area would be curtailed by the proposed project, the State or the applicable agency is “obligated to address” this adverse impact in its findings and conclusions pursuant to the [framework established in *Ka Pa‘akai o Ka ‘ina v. Land Use Commission*, 94 Hawai‘i 31, 7 P.3d 1068 (2000)].

Consequently, if customary and traditional Native Hawaiian practices are to be meaningfully safeguarded, “findings on the extent of their exercise, their impairment, and the feasibility of their protection are paramount.” To effectively render such findings, it is imperative for the agency to receive evidence and then make “[a] determination . . . supported by the evidence in the record.”³⁷

Thus, the agency must act as a factfinder—to evaluate the evidence presented by the parties—in order to determine whether the exercise of Native Hawaiian rights will be limited to some extent. “To fulfill this duty and to permit such findings to be made, the agency is obligated to conduct a contested case hearing before the legal rights of the parties are decided.”³⁸

Reading the majority and concurring opinions together, and based upon the evolving recognition of Native Hawaiian customary and traditional rights in Hawaiian law, the Hawai‘i Supreme Court found that:

[the] constitutional right of Native Hawaiians to exercise their customs and traditions, [in which] the guarantees of Article XII, § 7 [of the Hawai‘i Constitution], the public trust obligations of the State under Article XI, § 7, and the due process protections encompassed by Article I, § 5 [are] all triggered to

³⁶ *Id.* at 390, 363 P.3d at 238 (citation omitted).

³⁷ *Id.* at 402, 363 P.3d at 250 (Pollack, J., concurring) (internal citations omitted).

³⁸ *Id.* (Pollack, J., concurring) (internal citations omitted).

constitutionally safeguard the continued practice of Native Hawaiian customs and traditions.³⁹

The larger issue here is the extent to which *Mauna Kea Anaina Hou* contributes to the ongoing evolution of Native Hawaiian law, and thus to the new narrative surrounding Native Hawaiians within Hawai'i, and of Aboriginal peoples globally. The key to this is the sacredness of Mauna Kea to Native Hawaiians; therein one finds the heart of the narrative as embodied in Hawai'i's legal order. For it is in that dispute, the stand-off between the UHH's claim of scientific advances possible only through the construction of the TMT and the Native Hawaiian claim of the sacredness of Mauna Kea, as embodied in the law of the dominant legal order, that we see the potential for non-Aboriginal peoples either to stand in the way or to support that evolution.

The mere recounting of the facts and the outcome of the litigation, though, fails fully to capture the tension between standing in the way and support. Certainly, the outcome in *Mauna Kea Anaina Hou* represents a supportive stance taken to the evolving narrative, one which incorporates the Native Hawaiian worldview and its protection. But what happened at the base of Mauna Kea during the course of the dispute suggests the work still to be done, not only by Native Hawaiians, but also, and much more importantly, by non-Native Hawaiians. What happened at the base reveals the tension between these two potentialities: standing in the way or support. The front page headline of the Honolulu Star Advertiser of 25 June summarized it this way: *Mauna Kea Standoff: Blocked Again* followed by *Twelve Protesters are Arrested as Construction Vehicles Attempt to Make their way to the Summit* and *The Thirty Meter Telescope is on Hold Once More to Allow for the Removal of Boulders on the Road*.⁴⁰ In other words, standing between the \$1.4 billion project were boulders placed along the road to the summit of Moana Kea by the Native Hawaiian protesters.⁴¹ At that point, the standoff had already lasted 96 days.⁴² While the Governor of Hawai'i claimed that the "[e]ffort to block the roadway [at Mauna Kea was] not lawful or acceptable,"⁴³ the dispute emboldened other Native Hawaiians in their

³⁹ *Id.* at 415, 363 P.3d at 263 (Pollack, J., concurring) (internal citation omitted).

⁴⁰ Timothy Hurley, HONOLULU STAR-ADVERTISER, June 25, 2015, at A1.

⁴¹ See *Telescope Protesters Pile Rocks in Road*, HONOLULU STAR-ADVERTISER, June 24, 2015, at B1.

⁴² *Id.*

⁴³ See Timothy Hurley, *Showdown Over Telescope Looms Anew*, HONOLULU STAR-ADVERTISER, June 22, 2015 at A7. Other negative commentary, prizing 'serious science' over the sacredness of the site to Native Hawaiians is found in Richard Borreca, *Turmoil atop Mauna Kea stymies Ige Administration*, HONOLULU STAR ADVERTISER, June 28, 2015.

struggle against these legal and political vestiges of colonialism, including Kako‘o Haleakala, to mount their own protest to new astronomy projects atop Haleakala on Maui.⁴⁴

By October 2015, “an uneasy but needed truce ha[d] occurred where just months [earlier], there had been protests and late-night arrests, human blockades and rocks perilously toppled as summit roadblocks.”⁴⁵ “Stewardship,” in the form of decommissioning some of the existing telescopes on Mauna Kea in favor of newer ones, such as TMT, had become the catchword. Yet the opinion of one protester at Mauna Kea, Kaho‘okahi Kanuha, summarized the ongoing attitude of political and cultural struggle amongst the Native Hawaiians: “[w]e’re bracing ourselves mentally, spiritually for the battle ahead. I don’t mean a physical battle. It’s brain against brain.”⁴⁶ In short, truce or not, the government’s standing in the way was and is being met with Native Hawaiian resistance in order to protect the cultural and spiritual significance of a place, Mauna Kea. And it seems unlikely that the Supreme Court of Hawai‘i’s decision in *Mauna Kea Anaina Hou*, on the narrow technical grounds of State Constitutional due process involving the BLNR, is likely to resolve this standing in the way in the long term. That will require a much wider adoption of its holding as part of the broader socio-political order, with which the second event of 2015 dealt more directly.

B. Political Order: The Native Hawaiian ‘Aha

*Akina v. Hawaii*⁴⁷ involved a dispute surrounding the proposed election (known as an ‘Aha) of Native Hawaiian delegates to a proposed convention to discuss, and perhaps to organize, a ‘Native Hawaiian governing entity’.⁴⁸ The election was to be conducted from 1 until 30 November 2015 by the Defendant, Na‘i Aupuni,⁴⁹ a Hawai‘i non-profit corporation that supports efforts to achieve Native Hawaiian self-determination.⁵⁰ Voters and

⁴⁴ Timothy Hurley, *Protesters Target Maui Telescope*, HONOLULU STAR-ADVERTISER, June 27, 2015, at B1, B3.

⁴⁵ *Better Care of Mauna Kea is Necessary*, HONOLULU STAR-ADVERTISER, Oct. 21, 2015, at A8.

⁴⁶ See Hurley, *supra* note 40, at A1, A7.

⁴⁷ 141 F. Supp. 3d 1106 (D. Haw.), *aff’d*, 136 S. Ct. 581 (2015) (mem.); *see also* *Akina v. Hawaii*, 136 S. Ct. 922 (2016) (mem.) (denying motion of applicants Keli‘i Akina, et al. for civil contempt).

⁴⁸ *Akina*, 141 F. Supp. 3d at 1111.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1117.

delegates were to be based on a roll of qualified Native Hawaiians as set forth in Hawaiian state legislation (the “Roll”).⁵¹

Pursuant to Hawai‘i state legislation, a “qualified Native Hawaiian” was defined as:

an individual, age eighteen or older, who certifies that they (1) are “a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii,” and (2) have “maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity.”⁵²

The Native Hawaiian Roll Commission (the “Commission”), the entity responsible for registering participants, asked or required prospective registrants to the Roll to make the following three declarations:

- Declaration One. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance;
- Declaration Two. I have a significant cultural, social or civic connection to the Native Hawaiian community; and
- Declaration Three. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian Islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person.⁵³

The Roll also included “as qualified Native Hawaiians ‘all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the office of Hawaiian affairs [(“OHA”)] as demonstrated by the production of relevant [OHA] records[.]’”⁵⁴ Native Hawaiians included in the Roll through an OHA registry were not required to affirm Declarations One or Two.⁵⁵

On 13 August 2015, the Plaintiffs filed a Motion for a Preliminary Injunction, seeking, among other relief, an “Order preventing the Defendants ‘from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians,’” alleging that the “restrictions on registering for the Roll” found in the Declarations violated

⁵¹ *Id.* at 1111–12.

⁵² *Id.* at 1112 (quoting Haw. Rev. Stat. §§ 10H-3(a)(2)(A)–(B)).

⁵³ *Id.* at 1112.

⁵⁴ *Id.* (quoting Haw. Rev. Stat. § 10H-3(a)(4)).

⁵⁵ *Id.*

the Fifteenth Amendment, the Equal Protection and the Due Process clauses of the Fourteenth Amendment, and the First Amendment of the United States Constitution, the Voting Rights Act of 1965, that Na‘i Aupuni was “acting ‘under color of state law’ for the purposes of 42 U.S.C. § 1983[,]” and “acting jointly with other state actors.”⁵⁶ The Plaintiffs therefore sought to enjoin the Defendants “from requiring prospective applicants for any voter roll to affirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry” and to enjoin “the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll.”⁵⁷ In short, the Plaintiffs sought to stop the election of delegates, and thereby halt the proposed convention.

District Judge J. Michael Seabright heard the Plaintiffs’ Motion for Preliminary Injunction on 20 October 2015, and delivered an oral ruling denying the Motion on 23 October 2015,⁵⁸ followed by a written ruling on 29 October 2015.⁵⁹ Judge Seabright found that while the Plaintiffs had standing to seek an Order, at least at the preliminary injunction stage, they had not shown a likelihood of success in respect of any of their claims: (i) the Fifteenth Amendment and Voting Rights Act claims, because the election would not result in any new state officials or law or change in state government;⁶⁰ (ii) the Fourteenth Amendment claim, because the Plaintiffs failed to show that any deprivation of a constitutional right would occur “under color of any statute, ordinance, regulation, custom, or usage of any State,” as required by Section 1983, Title 42, United States Code;⁶¹ and (iii) the First Amendment claim, because any claim on that basis, in relation to the burdens imposed by the declarations to be placed on the Roll would only apply in the context of a public election, whereas Na‘i Aupuni’s election was private.⁶²

In reaching this conclusion, however, Judge Seabright was clear that the Court was not addressing four significant issues: (i) an assessment of the election process itself; (ii) whether the election would result in an entity that reflects “the will of the native Hawaiian community” or whether it would be “fair and inclusive”; (iii) whether the relevant legislation reflected wise public policy; and (iv) whether the Hawaiian Department of the Interior even has the Congressional authorization to facilitate the “reestablishment” of a

⁵⁶ *Id.* (internal citations omitted).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1113.

⁵⁹ *See id.* at 1106.

⁶⁰ *Id.* at 1125.

⁶¹ *Id.* at 1127.

⁶² *Id.* at 1133.

government-to-government relationship with the Native Hawaiian community.⁶³

As one might expect, this decision was met with extensive public reaction.⁶⁴ The Plaintiffs appealed the ruling to the Ninth Circuit Court of Appeals, which ultimately upheld the District Court holding that the Plaintiffs had not established, as required by *Winter v. Natural Resources Defense Council, Inc.*,⁶⁵ (i) a likelihood of the success on the merits of the appeal; (ii) that they were likely to be irreparably harmed if the vote counting was not enjoined pending disposition of the appeal; (iii) that the balance of the equities tipped in their favor; and (iv) that it was in the public interest to issue an injunction pending disposition of the appeal.⁶⁶ However, on 2 December 2015, prior to the Ninth Circuit's decision, the United States Supreme Court granted an application for injunction pending appellate review and enjoined the Defendants from counting the ballots cast in, and certifying the winners of, the election, pending final disposition of the appeal by the Ninth Circuit Court of Appeals.⁶⁷

The injunction had the desired effect, for on 15 December 2015, Na'i Aupuni announced the termination of the Native Hawaiian election process.⁶⁸ It simultaneously announced, however, that it would nonetheless go forward with a four-week 'Aha in February 2016, with all 196 Native Hawaiians who had run as candidates being offered a seat as a delegate in order "to learn about, discuss and hopefully reach a consensus on a process to achieve self-governance."⁶⁹ The confirmation deadline to participate in the 'Aha was 22 December;⁷⁰ on 23 December 2015 Na'i Aupuni posted the list of delegates on its website.⁷¹ On 26 February 2016, having met, the 'Aha adopted a

⁶³ *Id.* at 1136.

⁶⁴ See, e.g., Richard Borreca, *For Hawaiians, Sovereignty Comes With a Few Deadlines*, HONOLULU STAR-ADVERTISER, Oct. 27, 2015, at A11; *Rejecting Call to Stop "'Aha" Was Right Call*, HONOLULU STAR-ADVERTISER, Oct. 25, 2015, at E2; .

⁶⁵ 555 U.S. 7, 20 (2008); see also *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

⁶⁶ *Akina v. Hawaii*, 835 F.3d 1003, 1010–11 (2016).

⁶⁷ *Akina v. Hawaii*, 136 S. Ct. 581 (2015) (mem.).

⁶⁸ Press Release, Na'i Aupuni, Na'i Aupuni Terminates Election Process (Dec. 15, 2015), <http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf>.

⁶⁹ *Id.* at 1.

⁷⁰ *Id.* at 2.

⁷¹ See Na'i Aupuni, *Na'i Aupuni List of 154 Participants for February 'Aha* (Jan. 6, 2016), <http://www.naiaupuni.org/docs/NaiAupuniListOf154Participants-010616.pdf>; see also Na'i Aupuni, *February 2016 'Aha Participant Guide* (2016), http://www.naiaupuni.org/docs/NA%20Participant%20Guide-p1A_v2.pdf.

Constitution⁷² which established a framework ultimately to provide for Native Hawaiian self-determination.⁷³ The Preamble of the Constitution of the Native Hawaiian Nation reads:

We, the indigenous peoples of Hawai‘i, descendants of our ancestral lands from time immemorial, share a common national identity, culture, language, traditions, history, and ancestry. We are a people who Aloha Akua, Aloha ‘Āina, and Aloha each other. We mālama all generations, from keiki to kupuna, including those who have passed on and those yet to come. We mālama our ‘Āina and affirm our ancestral rights and Kuleana to all lands, waters, and resources of our islands and surrounding seas. We are united in our desire to cultivate the full expression of our traditions, customs, innovations, and beliefs of our living culture, while fostering the revitalization of ‘Ōlelo Hawai‘i, for we are a Nation that seeks Pono.

Honoring all those who have steadfastly upheld the self-determination of our people against adversity and injustice, we join together to affirm a government of, by, and for Native Hawaiian people to perpetuate a Pono government and promote the well-being of our people and the ‘Āina that sustains us. We reaffirm the National Sovereignty of the Nation. We reserve all rights to Sovereignty and Self-determination, including the pursuit of independence. Our highest aspirations are set upon the promise of our unity and this Constitution.

UA MAU KE EA O KA ‘ĀINA I KA PONO.⁷⁴

To come into force, the Constitution of the Native Hawaiian Nation requires ratification by a vote of all Native Hawaiians,⁷⁵ of which there are about 298,000 living in the State and another 262,000 living in the continental United States.⁷⁶ While all enjoy the right to vote, currently no funding to

⁷² CONSTITUTION OF THE NATIVE HAWAIIAN NATION Feb. 26, 2016, <http://www.aha2016.com/wp-content/uploads/2016/03/Aha2016.FinalConstitution.Approved-022616.pdf>.

⁷³ See Mileka Lincoln, *Native Hawaiian ‘Aha Adopts Constitution for Self-Determination*, HAWAII NEWS NOW, Feb. 27, 2016, <http://www.hawaiinewsnow.com/story/31330094/native-hawaiian-aha-adopts-constitution-for-self-determination>.

⁷⁴ CONST. OF THE NATIVE HAWAIIAN NATION pmbl. The phrase “Ua mau ke ea o ka ‘āina i ka pono,” translated as, “The life of the land is perpetuated in righteousness,” is the official motto of the State of Hawai‘i. Haw. Rev. Stat. § 5-9.

⁷⁵ CONST. OF THE NATIVE HAWAIIAN NATION art. 51.

⁷⁶ See Sara Kehaulani Goo, *Native Hawaiian Population Makes a Comeback After Sharp Decline: Estimates of the Native Hawaiian Population in Hawaii*, PEW RESEARCH CENTER (Apr. 6, 2015), <http://www.pewresearch.org/fact-tank/2015/04/06/native-hawaiian-population>; see also KAMEHAMEHA SCHOOLS, KA HUAKA‘I: NATIVE HAWAIIAN EDUCATIONAL ASSESSMENT 10 (2014), http://www.ksbe.edu/_assets/spi/pdfs/kh/Ka_Huakai_2014.pdf.

hold an election of that scale exists which, it is estimated, could cost at least \$2 million.⁷⁷

Needless to say, as *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*,⁷⁸ the litigation in *Akina v. Hawaii*,⁷⁹ and the events surrounding the 'Aha and the adoption of the Constitution of the Native Hawaiian Nation demonstrate that in Hawai'i a new narrative is emerging, and that popular political protest remains a principle means of expressing its parameters. Indeed, those parameters, through the 'Aha, have been given voice in a document forged through the process of learning about, discussing and ultimately reaching consensus on a constitutional process to achieve self-governance; a clear sign of the desire for a narrative that emerges from the colonial past into a self-determining future. Together, these two events, and many more like them, represent an expression of Native Hawaiian's emancipatory political will. Peter Hallward writes this of such a will:

The active willing of a general or generalizable will. . . . Such a will is at work in the mobilization of any emancipatory collective force—a national liberation struggle, a movement for social justice, an empowering political or economic association, and so on—which strives to formulate, assert and sustain a fully common (and thus fully inclusive and egalitarian) interest.⁸⁰

These Hawaiian events clearly mark the common interest that Hallward identifies. But do they form a part of a new narrative that is enjoying the support of the broader non-Native Hawaiian community? The answer to that question must really come in the form of a choice for the Haole,⁸¹ the non-Native peoples of Hawai'i. It is the choice identified by Saul: one can either stand in the way of, or support a new narrative.⁸² The narrative must take account of the sorts of issues raised in *Mauna Kea Anaina Hou* and *Akina*, and which give rise to the expression of political will contained in the Constitution of the Native Hawaiian Nation. It is only if Haole, too, can join

⁷⁷ Casey Tolan, *Why Some Native Hawaiians Want to Declare Independence From the U.S.*, FUSION, Mar. 10, 2016, <http://fusion.net/story/278126/native-hawaiian-constitution-independence/>.

⁷⁸ See *supra* Part II.A. (discussing *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015)).

⁷⁹ See *supra* Part II.B. (discussing *Akina v. Hawaii*, 141 F. Supp. 3d 1106 (2015), *aff'd* by 835 F.3d 1003 (9th Cir. 2016)).

⁸⁰ Peter Hallward, *Communism of the Intellect, Communism of the Will*, in *THE IDEA OF COMMUNISM* 111–30, 121 (Costas Douzinas and Slavoj Žižek eds., 2010).

⁸¹ Pukui and Elbert define “haole” as “White person, American, Englishman, Caucasian,” by note that the term formerly described “any foreigner.” *Haole*, HAWAIIAN DICTIONARY 58 (Mary Kawena Pukui & Samuel H. Elbert eds., rev. ed. 1986).

⁸² See SAUL, *supra* note 1, at 6.

the emancipatory activity of Native Hawaiians that the truly egalitarian and common interest of all Hawaiians can be achieved.

The choice emerging from the events surrounding the ‘Aha, the new narrative it portends, and the political will of all Hawaiians directs us to the third remarkable event surrounding Native Hawaiian law in 2015, an event which provides us with the language and the content necessary fully to participate in and become a part of this new narrative.

C. *Scholarship: Native Hawaiian Law: A Treatise*

There is something much more important, at a much deeper level, in the *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*⁸³ and *Akina v. Hawaii*⁸⁴ litigation. We can see them in a different way, not so much in terms of the technical legal disputes, but in terms of what they tell us about the emerging place of Native Hawaiian law in the life of all Hawaiians, and of the need to understand the desire for the place of Native Hawaiian law as an expression of a new narrative surrounding Native Hawaiians and their place within the wider Hawaiian legal and political orders.

No doubt due to the unfolding of events surrounding sacred spaces and self-determination throughout 2015, the 23 October 2015 edition of the Honolulu Star-Advertiser contained a full page interview⁸⁵ with Melody Kapilialoha MacKenzie, the Editor-in-Chief of the just-published second edition of *Native Hawaiian Law: A Treatise*.⁸⁶ The interview, appearing in the popular media, opened the potential for Haole to participate, or at least to find the means to participate, in the narrative emerging in the legal and political orders.⁸⁷ The interview identified MacKenzie as an expert in Native Hawaiian law,⁸⁸ having already edited the highly successful first edition of the book, published as the *Native Hawaiian Rights Handbook*⁸⁹ in 1997, and serving as a contributing author of *Cohen's Handbook of Federal Indian Law*.⁹⁰ In the interview, MacKenzie addressed four major issues: the nature of Native Hawaiian law itself, the publication of the book, the most

⁸³ 136 Hawai'i 376, 363 P.3d 224 (2015).

⁸⁴ 141 F. Supp. 3d 1106 (2015), *aff'd* by 835 F.3d 1003 (9th Cir. 2016).

⁸⁵ Mark Coleman, *Melody MacKenzie: The Specialist in Native Hawaiian Law has Seen Much Growth and Progress in the Field Since Starting her Career Several Decades Ago*, HONOLULU STAR-ADVERTISER, Oct. 23, 2015, at A14.

⁸⁶ NATIVE HAWAIIAN LAW, *supra* note 20.

⁸⁷ See Coleman, *supra* note 85, at A14.

⁸⁸ *Id.*

⁸⁹ (Melody Kapilialoha MacKenzie ed., 1991).

⁹⁰ FELIX S. COHEN, *supra* note 17.

significant cases in Native Hawaiian law, and the recognition of Native Hawaiians as Native Americans and their quest for self-determination and land rights, including as part of the 'Aha in 2016.⁹¹ MacKenzie supported the process of self-determination, saying that "what we're moving toward, and the ['A]ha is all about, is really the ability to have more self-determination, to control Native Hawaiian lands and resources."⁹² And as part of that long process of struggle, MacKenzie expressed hope in the existing Anglo-American legal order:

I think, as with probably other areas of law, there are good things that happen and negative things, and things that give you incredible hope. I mean, I have to say, for the most part our Hawai['i] Supreme Court comes out with some very good decisions on Native Hawaiian issues, particularly in relation to natural resources, that certainly gives me hope.⁹³

Both disputes involved technical legal issues, and we cannot ignore the importance of those issues to the resolution of the disputes. And yet, as noted in the previous two sections, the importance of the events lies in their significance as part of a new narrative. In other words, it is the assertion of a collective political will of Native Hawaiians, available for acceptance by the wider legal and political order, that matter most. And the MacKenzie interview, opening a means of engagement with *Native Hawaiian Law*, provides the scholarly structure for an understanding of and support for that will and its recognition and accommodation in the Hawai'i state legal and political order.

At their core, both *Mauna Kea Anaina Hou* and *Akina* can be seen through the lenses of resources, about land, about territory, space, and place within it. If we see them this way, we need to see them through the lens of Native Hawaiian law, and that is where MacKenzie's book contributes to the growing global scholarly literature surrounding the new narrative of comeback.⁹⁴ In this broader, richer, more sociological sense, then, the book

⁹¹ Coleman, *supra* note 85, at A14.

⁹² Coleman, *supra* note 85, at A14–15.

⁹³ *Id.* at A15.

⁹⁴ See, e.g., LARISSA BEHRENDT, *ABORIGINAL DISPUTE RESOLUTION: A STEP TOWARDS SELF-DETERMINATION AND COMMUNITY AUTONOMY* (1995); LARISSA BEHRENDT, *ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA'S FUTURE* (2003); JOHN BORROWS, *FREEDOM AND INDIGENOUS CONSTITUTIONALISM* (2016); JOHN BORROWS, *DRAWING OUT LAW: A SPIRIT'S GUIDE* (2010); PAUL G. MCHUGH, *ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS* (2011); PAUL G. MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW* (2004); PAUL G. MCHUGH, *THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI* (1991); KENT MCNEIL, *COMMON LAW ABORIGINAL*

takes on an added (we might even say much greater) significance than the mere recounting of Native Hawaiian law. The very fact of it tells us of that growing importance—a second, expanded, edition—but more than that, the book provides us with the legal content of a new narrative in Hawai‘i.

The content of Native Hawaiian law encompasses the sum of the “events, cases, statutes, regulations, and actions that form and give substance to a body of law affecting Kānaka Maoli, the Native Hawaiian people.”⁹⁵ Emerging over the course of a millennium, through complex historical and political factors,⁹⁶ the totality of this law allows the Native Hawaiian people to resist the pressures of assimilation and conformity to the goals and values of the majority society surrounding it, so as to allow Native Hawaiians:

to exercise native rights; to pursue a traditional lifestyle; and, most importantly, to exert meaningful control over [their] ‘āina, [their] natural and cultural resources, and [their] own destiny provides Native Hawaiians with a choice: to assimilate or to maintain [their] integrity and values as a distinct and independent native people.⁹⁷

This summarizes the whole of what lies behind the dispute in *Mauna Kea Anaina Hou*, and what made and makes the ‘Aha significant: Native Hawaiian law, above all, concerns self-identification and self-determination which, in turn, depend at the most fundamental level on concepts of place and territory or, put another way, on the nature of the relationship to land and resources. The principle means of self-determination expressed by Indigenous peoples the world over is through the recognition and protection of a relationship to land and water. This has emerged in various ways in former colonial states, including the judicial recognition of a form of Native or Aboriginal Title,⁹⁸ or through treaties.⁹⁹ Land, and the relationship to it,

TITLE (1989); ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* (2010); BENJAMIN J. RICHARDSON AND SHIN IMAI, *INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES* (2009).

⁹⁵ Melody Kapilialoha MacKenzie, *Introduction* to NATIVE HAWAIIAN LAW, *supra* note 20, at xi [hereinafter MacKenzie, *Introduction*].

⁹⁶ *See id.*

⁹⁷ *Id.* at xiii.

⁹⁸ See, for example, in Australia, *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, and in Canada, *St. Catherine’s Milling and Lumber Co. v. The Queen*, [1888] 14 AC 46 (PC); *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313; *R. v. Guerin*, [1984] 2 S.C.R. 335; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

⁹⁹ See, for example, in New Zealand, *Treaty of Waitangi Between the Government of England and Certain Aboriginal Peoples of New Zealand* [1840], *reprinted in* *Treaty of Waitangi Act 1975*, sch. 1, and in Canada, Government of Canada, *Treaties with Aboriginal People in Canada*, INDIGENOUS AND NORTHERN AFFAIRS CANADA (Sept. 15, 2010),

represents one of the fundamental means of Aboriginal self-identification and self-determination. This is perhaps captured best by a statement attributed to Chief Tecumseh, a Native American leader of the Shawnee of North-eastern North America and a large tribal confederacy which opposed the United States during Tecumseh's War and became an ally of Britain in the War of 1812: "When the blood in your veins returns to the sea, and the earth in your bones returns to the ground, perhaps then you will remember that this land does not belong to you, it is you who belongs to this land."¹⁰⁰

At the heart of *Mauna Kea Anaina Hou* and *Akina*, then, stands Native Hawaiian law. And at the heart of that one finds the sense of place and space that the Native Hawaiian people seek to achieve and to defend. It is, simply, about the nature of relationship to place; the character and content of that relationship unifies the whole of *Native Hawaiian Law*. Divided into five Parts—lands and sovereignty (Part I), individual land titles (Part II), natural resource rights (Part III), traditional and customary rights (Part IV), and resources for Native Hawaiians (Part V)—containing 21 chapters written by the leading experts in the full range of issues arising in Native Hawaiian law, the book is a rich and detailed account of the Native Hawaiian relationship to place.

My focus here touches only briefly on those parts of the book that help better understand *Mauna Kea Anaina Hou* and *Akina*: lands and sovereignty (Part I) and traditional and customary rights (Part IV). Together, these Parts provide the structure better to understand the issues raised in *Mauna Kea Anaina Hou* and *Akina* from the perspective of the political and legal order—traditional rights in relation to Mauna Kea and self-determination, the recognition of sovereignty, in respect of the place of Native Hawaiians within the Hawaiian political and legal order. And having provided that structure, *Native Hawaiian Law* also assists with a full understanding of both the content of the traditional and customary rights enjoyed and the self-determination and sovereignty claimed by Native Hawaiians. And for

<http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>, describing various treaties between the Government of Canada and various Aboriginal peoples of Canada.

¹⁰⁰ This is a very difficult quotation for which to find an authoritative reference; in the late 1990's the author saw it attributed to Chief Tecumseh on a plaque placed at the southernmost tip of Point Pelee National Park, Essex County, Ontario, Canada. Several sources attribute the phrase simply as a "Native American quote." See GAIL JENNER, HISTORIC REDWOOD NATIONAL AND STATE PARKS 20 (2016), to the Suquamish Chief Seattle, see, OKLEVUEHA CENTRAL VALLEY NATIVE AMERICAN CHURCH, <http://www.oklevuehacentralvalley.com/> (last visited Jan. 1, 2017), or to a Cherokee Indian, see California-Nevada United Methodist Church, *Minutes of the Annual Conference* 9 (2016), http://www.cnumc.org/files/pdf_documents/annual_conference-session/2016+acs/2016+acs+minutes.pdf.

present purposes, focusing on Parts I and IV provides a representative sample of the whole, useful not only for scholars working in this area, but also, and more importantly, for scholars beyond Hawaiian shores engaged in work that relates to the new global narrative of the Aboriginal comeback.

Consider first the right to self-determination and the sovereignty claimed by Native Hawaiians. Part I of the book, *Lands and Sovereignty*, provides the historical background¹⁰¹ to customary and traditional rights in respect of the public lands trust¹⁰² and the island of Kaho‘olawe,¹⁰³ and the nature and content of the rights created by the Hawaiian Homes Commission Act¹⁰⁴ and by United States¹⁰⁵ and international law.¹⁰⁶ In broad outline, traditional Hawaiian life and culture was intimately connected to land¹⁰⁷ and the development of Native Hawaiian law therefore traces that relationship, from the very first origins of Kānaka Maoli and Polynesian settlement in the Hawaiian Islands¹⁰⁸ (the precise date of this arrival is the subject of ongoing debate) to the land tenure system prior to European contact in 1778,¹⁰⁹ through the colonial and statehood periods,¹¹⁰ to the 1978 amendments to the Hawai‘i Constitution aimed at providing Native Hawaiians with rights to

¹⁰¹ Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 2–74 [hereinafter MacKenzie, *Historical Background*].

¹⁰² Melody Kapilialoha MacKenzie, *Public Land Trust*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 76–146 [hereinafter MacKenzie, *Public Land Trust*].

¹⁰³ Koalani Laura Kaulukukui, *Island of Kaho‘olawe*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 148–75 [hereinafter Kaulukukui, *Island of Kaho‘olawe*].

¹⁰⁴ Paul Nāhoa Lucas, Alan T. Murakami, and Avis Kuuipoleialoha Poai, *Hawaiian Homes Commission Act*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 176–262 [hereinafter Lucas et al., *Hawaiian Homes Commission Act*]. The Hawaiian Home Commission Act set aside certain land for homesteading by Native Hawaiian beneficiaries. *Id.* at 179 (citing Hawaiian Home Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921) (codified as amended at 42 U.S.C. §§ 691–718 (1958)). The Act was omitted from codification in 1959, *id.* at 179 n.1, and became a state constitutional provision in 1978, *see* HAW. CONST. art XII, § 1. *See also* 81 Haw. Op. Att’y Gen. No. 4 (1981) (affirming that the Act is a state constitutional provision; Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 70 (discussing the Act).

¹⁰⁵ Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 264–351 [hereinafter MacKenzie, *Native Hawaiians and U.S. Law*].

¹⁰⁶ Julian Aguon, *Native Hawaiians and International Law*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 352–424 [hereinafter Aguon, *Native Hawaiians and International Law*].

¹⁰⁷ MacKenzie, *Historical Background*, *supra* note 101, at 6 (“Kānaka Maoli trace their ancestry to the ‘āina (land). . . .”).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8–10.

¹¹⁰ *Id.* at 10–33.

resources and to self-determination,¹¹¹ to more recent attempts at federal¹¹² and state¹¹³ recognition of self-determination. MacKenzie summarizes the meaning of sovereignty as:

a matter of governments—formal recognized institutions that, theoretically, are expressions of a people’s deepest value—sovereignty is expressed by native people through relationship to land, environment, family, genealogy, language, and political institutions. Former Comanche tribal chairperson Wallace Coffey and Professor Rebecca Tsosie describe this as cultural sovereignty, “the efforts of Native people and Native nations to exercise their own norms and values in structuring their collective future.” They suggest that cultural sovereignty is “a process of reclaiming culture and of building nations” that first looks inward to a native people’s own values, norms, and traditional systems and then seeks natural expression of those values, norms, and traditional systems in political sovereignty. This cultural sovereignty framework embraces the complexity of the Native Hawaiian experience, integrating culture values, history, socioeconomic power, and collective needs and aspirations.¹¹⁴

Native Hawaiians, as do Aboriginal peoples globally,¹¹⁵ express this cultural and political self-determination and sovereignty in relation to land, natural and cultural resources, and assets in various ways, but typically it means the ability of Native Hawaiians “to be able to make decisions that have real and lasting effects on their lives and environment,”¹¹⁶ including “efforts to reclaim lands, to bring about reconciliation, and to reframe the relationships between them and the United States.”¹¹⁷ Thus, in 1993, the Island of Kaho‘olawe, the smallest of the eight main Hawaiian Islands,¹¹⁸ was designated as a reserve for Native Hawaiian cultural, spiritual, and

¹¹¹ *Id.* at 33; see also HAW. CONST. art. X, § 4 (providing for a Hawaiian language, culture, and history program in public schools), art. XII, §§ 4–7 (relating to Hawaiian Affairs), art. XV, § 4 (establishing English and Hawaiian (‘Ōlelo Hawai‘i) as official languages).

¹¹² MacKenzie, *Historical Background*, *supra* note 101, at 35–37 (describing the “Akaka Bill,” federal legislation recognizing the right of Native Hawaiians to self-determination).

¹¹³ *Id.* at 37–38 (describing Act of July 6, 2011, No. 195, 2011 Haw. Sess. Laws 646 (codified at HAW. REV. STAT. ch. 10H (2013)), state legislation recognizing Native Hawaiians as the “only indigenous, aboriginal, maoli population” of Hawai‘i, HAW. REV. STAT. § 10H-1).

¹¹⁴ *Id.* at 38 (citing Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 191, 196 (2001)) (emphasis in original).

¹¹⁵ MacKenzie, *Historical Background*, *supra* note 101, at 45.

¹¹⁶ MacKenzie, *Native Hawaiians and U.S. Law*, *supra* note 105, at 323.

¹¹⁷ MacKenzie, *Historical Background*, *supra* note 101, at 38.

¹¹⁸ Kaulukukui, *Island of Kaho‘olawe*, *supra* note 103, at 151 (citing Peter MacDonald, *Fixed in Time: A Brief History of Kahoolawe*, 6 HAWAIIAN J. HIST. 69 (1972)).

subsistence purposes.¹¹⁹ In 1993 an Apology Resolution was issued by the United States government, acknowledging the anniversary of the overthrow of the Hawaiian Kingdom, and apologizing for the United States' participation.¹²⁰ Finally, there has been a general use of international law as a means of expressing self-determination.¹²¹

The remainder of Part I adds breadth and depth to each of these expressions of self-determination.¹²² The contributors to this Part explore the nature and content of public trust or "ceded" lands, which were set aside for the benefit of all Hawaiians;¹²³ the Hawaiian Homes Commission Act of 1920,¹²⁴ which withdrew approximately 203,500 acres of the public trust lands and brought them under the authority of a statutory trustee body for the purpose of holding them in trust to be leased to Native Hawaiian beneficiaries for a nominal fee of 99 years, the transfer of authority over both to the state of Hawai'i on its admission to the US federal union in 1959, and ongoing efforts to obtain a full inventory of all such lands so as to allow, ultimately, for self-governance.¹²⁵ And, importantly, in addition to the role played by international law in supporting and furthering the quest for Aboriginal self-determination both in Hawai'i and other parts of the world,¹²⁶ Part I adds detail to an understanding of the relationship between American native peoples, including Native Hawaiians, and the United States government, as well as the ongoing relationship with the Hawai'i state government. Of greatest interest here is the background to the 'Aha process, which began with the 2014 Office of Hawaiian Affairs announcement "committ[ing it] to facilitating the next steps in a governance or 'nation-building' process."¹²⁷

¹¹⁹ *Id.* at 163 (citing HAW. REV. STAT. § 6K-3 (2013)).

¹²⁰ MacKenzie, *Historical Background*, *supra* note 101, at 41 (citing Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on behalf of the United States for the Overthrow of the Kingdom of Hawaii, S.J. Res. 19, 103d Cong., Pub. L. No. 103-150, 107 Stat. 1510 (1993)).

¹²¹ *Id.* at 42–45.

¹²² See MacKenzie, *Historical Background*, *supra* note 101, at 1–74; MacKenzie, *Public Land Trust*, *supra* note 102, at 76–146; Kaulukukui, *Island of Kaho'olawe*, *supra* note 103, at 148–75; Lucas et al., *Hawaiian Homes Commission Act*, *supra* note 104, at 176–262; MacKenzie, *Native Hawaiians and U.S. Law*, *supra* note 105, at 264–351; Aguon, *Native Hawaiians and International Law*, *supra* note 106, at 352–424.

¹²³ See MacKenzie, *Public Land Trust*, *supra* note 102, at 79; see generally JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? (2008); Cheryl Miyahara, Comment, *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101 (1981).

¹²⁴ See *supra* note 104.

¹²⁵ MacKenzie, *Public Land Trust*, *supra* note 102, at 79–82, 123.

¹²⁶ See MacKenzie, *Native Hawaiians and U.S. Law*, *supra* note 105, at 265–351.

¹²⁷ *Id.* at 322 (citing Office of Hawaiian Affairs, OHA Statement of Commitment on

In sum, modern Native Hawaiian self-determination and sovereignty means that

Kānaka Maoli continue to chart their own destiny—reviving language and culture, protecting and caring for their lands and natural resources, and seeking ways to restructure their relationship with the United States. Whether on an international, national or state level, it is clear that . . . expressions of cultural sovereignty as well as the persistent assertion of the inherent right of self-determination are critical for Kānaka Maoli.¹²⁸

Quite apart from, but intimately associated with, self-determination and sovereignty are the existing traditional and customary rights enjoyed by Native Hawaiians—these stood at the heart of the *Mauna Kea Anaina Hou* litigation, in which the Appellants asserted “that the project w[ould] have significant negative effects on their Native Hawaiian cultural practices on Mauna Kea[.]. . . . ‘Mauna Kea is considered the Temple of the Supreme Being[,] the home of N[ā] Akua (the Divine Deities), N[ā] ‘Aum[ā]kua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and W[ā]kea ([S]ky Father).”¹²⁹ As we saw, the Appellants argued that the construction of the TMT would interfere with the pursuit of their cultural practices on Mauna Kea.¹³⁰ What is the content of those practices? In broad terms, they include access and gathering,¹³¹ religious freedom,¹³² iwi kūpuna (burial rights),¹³³ and protections for cultural property¹³⁴ and family relationships.¹³⁵ Part IV of *Native Hawaiian Law* details the content of each of these rights.¹³⁶

Governance, Mar. 6, 2014, http://www.oha.org/nationbuilding/downloads/Statement_of_Commitment_on_Governance.pdf).

¹²⁸ MacKenzie, *Historical Background*, *supra* note 101, at 46.

¹²⁹ *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 390, 363 P.3d, 224, 238 (2015) (footnote omitted).

¹³⁰ *Id.*

¹³¹ See generally David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 776–854 [hereinafter Forman & Serrano, *Traditional and Customary Access and Gathering Rights*].

¹³² See generally Melody Kapilialoha MacKenzie, *Religious Freedom*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 856–905.

¹³³ See generally Natasha L.N. Baldauf, *Iwi Kūpuna: Native Hawaiian Burial Rights*, in MacKenzie et al., *supra* note 13, at 906–1015 [hereinafter Baldauf, *Iwi Kūpuna*].

¹³⁴ See generally Le‘a Malia Kanehe, *Indigenous Cultural Property*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 1016–1124 [hereinafter Kanehe, *Indigenous Cultural Property*].

¹³⁵ See generally N. Kanale Sadowski & K. Ka‘ano‘i Walk, *Pili ‘Ohana: Family Relationships*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 1126–65 [hereinafter Sadowski & Walk, *Pili ‘Ohana*].

¹³⁶ In addition to the traditional and customary rights, there are a broad range of natural

Of ancient origin and well-established at the time of first European contact in 1778, the content of the traditional and customary access and gathering rights have been influenced by western practices, ultimately finding codification through successive iterations of colonial, federal and state control over the course of Hawai‘i’s history.¹³⁷ The key rights—the traditional trail system¹³⁸ and traditional gathering practices—¹³⁹ as currently found in the Hawai‘i Constitution (especially Article XII, Section 7,¹⁴⁰ which was expressly raised and relied upon in the opinions of the Hawai‘i Supreme Court in *Mauna Kea Anaina Hou*¹⁴¹) and state law continue to apply and enjoy broad protection as background to modern private property law.¹⁴² They comprise “a mixture of Hawaiian custom and usage, English common law, and statutory and constitutional provisions.”¹⁴³ As in *Mauna Kea Anaina Hou*, the courts currently apply the traditional and customary rights through a balancing of the rights themselves against a landowner’s private

resource rights—water, fishing and fishponds, access to shorelines and to the Northwestern Hawaiian Islands—enjoyed by, and human resource entitlements—charitable trusts, education, and health—available to Native Hawaiians. See D. Kapua‘ala Sproat, *From Wai to Kānāwai: Water Law in Hawai‘i*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 522–610; Alan T. Murakami & Wayne Chung Tanaka, *Konohiki Fishing Rights*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 612–63; D. Kapua‘ala Sproat & Jodi A. Higuchi, *Loko I‘a: Hawaiian Fishponds*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 664–94; Melody Kapilialoha MacKenzie & Wayne Chung Tanaka, *Papahānaumokuākea: The Northwestern Hawaiian Islands*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 696–734; D. Kapua‘ala Sproat, *Kahakai: Shorelines*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 736–74; Avis Kuuipoleialoha Poi & Susan K. Serrano, *Ali‘i Trusts: Native Hawaiian Charitable Trusts*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 1168–1255; Kamanaonāpalikūhonua Souza & K. Ka‘ano‘i Walk, *‘Ōlelo Hawai‘i and Native Hawaiian Education*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 1256–1307; Amanda Lokelani Donlin Furman & Scott K.D. Shishido, *Native Hawaiian Health*, in NATIVE HAWAIIAN LAW, *supra* note 20, at 1308–48.

¹³⁷ See Forman & Serrano, *Traditional and Customary Access and Gathering Rights*, *supra* note 131, at 779.

¹³⁸ See *id.* at 780–81.

¹³⁹ *Id.* at 781–83.

¹⁴⁰ “The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778[.]” HAW. CONST. art. XII, § 7.

¹⁴¹ *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 390, 363 P.3d, 224, 238 (2015).

¹⁴² See Forman & Serrano, *Traditional and Customary Access and Gathering Rights*, *supra* note 131, at 810–19.

¹⁴³ *Id.* at 821.

property rights in a unique and evolving blend of Western and Native Hawaiian property law.¹⁴⁴

Customary religious rights infuse every aspect of Native Hawaiian life, and these, too, form part of the content of customary rights. Four major akua (gods) governed each aspect of Hawaiian Life¹⁴⁵: Kū, the “male generating power and god of medicine and war,”¹⁴⁶ Kāne, the “procreator, the god of life, fresh water, sunlight, and all natural phenomena occurring in the sky,”¹⁴⁷ Kanaloa, the god of the “ocean and ocean winds,”¹⁴⁸ and Lono, the god of “peace, agriculture, fertility, rain, and medicine.”¹⁴⁹ Together, the four akua “personified the natural forces and were generally referred to with an epithet signifying the particular force being invoked.”¹⁵⁰ Other Native Hawaiian religious concepts were ‘aumākua (family ancestral gods),¹⁵¹ mana (spiritual power),¹⁵² and the kapu system,¹⁵³ which “protected the mana of individuals and places and prevented mana from harming others.”¹⁵⁴

An integral part of the spiritual dimension of customary Native Hawaiian life includes the importance placed upon ancestral remains, iwi kupūna or iwi, which “are a metaphor for the sacred bond of place and family, of mortal strength and sacred power”¹⁵⁵ thus making it a spiritual and cultural responsibility to care for iwi and to ensure that they are not disturbed in their resting places.¹⁵⁶ Closely related to the importance place upon iwi, then, is cultural property, which:

¹⁴⁴ *Id.* at 779, 821.

¹⁴⁵ Mackenzie, *supra* note 132, at 861 (citing VALERIO VALERI, *KINGSHIP AND SACRIFICE: RITUAL AND SOCIETY IN ANCIENT HAWAII* 14–15, tbl. 1, (Paula Wissing trans., 1985)).

¹⁴⁶ *Id.* (citing DONALD D. KILOLANI MITCHELL, *RESOURCE UNITS IN HAWAIIAN CULTURE* 72 (1982)).

¹⁴⁷ *Id.* (citing MITCHELL, *supra* note 146, at 72).

¹⁴⁸ *Id.* at 862 (citing MARTHA WARREN BECKWITH, *HAWAIIAN MYTHOLOGY* 73–74 (1970)).

¹⁴⁹ *Id.* (citing MITCHELL, *supra* note 146, at 72).

¹⁵⁰ *Id.* at 861.

¹⁵¹ *Id.* at 863 (citing SAMUEL MĀNAIAKALANI KAMAKAU, *KA PO‘E KAHIKO: THE PEOPLE OF OLD* 28 (Dorothy B. Barrère ed., Mary Kawena Pukui trans., 1992)).

¹⁵² *Id.* at 863–64.

¹⁵³ *Id.* at 864.

¹⁵⁴ *Id.* (citing JOHN F. MULHOLLAND, *HAWAII’S RELIGIONS* 16 (1970)).

¹⁵⁵ Baldauf, *Iwi Kūpuna*, *supra* note 133, at 911 (citing *Hearing Before the S. Comm. on Indian Affairs to Provide for the Protection of Indian Graves and Burial Grounds and to Provide for the Repatriation of Native American Group or Cultural Patrimony*, 101st Cong. 81, 82 (1990) (testimony of Clarence Ching, Trustee, Office of Hawaiian Affairs)).

¹⁵⁶ *Id.* at 977; see generally Craig W. Jerome, Comment, *Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, Hawai‘i*, 29 U. HAW. L. REV. 163, 172–74 (discussing Hawaiian death and burial customs); Matthew Kekoa Keiley, Comment, *Ensuring our Future by Protecting our Past: An Indigenous Reconciliation Approach to*

embodies all aspects of indigenous peoples' cultural heritage—tangible and intangible, oral and written, ancient and contemporary. Indigenous peoples consider genetic material, traditional medicines, cultigens, seeds, and all associated traditional knowledge about the uses of flora and fauna as cultural property. Indigenous peoples' rights to genetic material are inseparable from rights to traditional territories, lands, and natural resources.¹⁵⁷

So, too, Native Hawaiian culture places great importance on family relationships, as noted by the Hawai'i Supreme Court in *Mauna Kea Anaina Hou*, and eloquently explained by N. Kanale Sadowski and K. Ka'ano'i Walk:

'Ohā, the root or corm of kalo (taro), serves as the "staff of life" in the Hawaiian diet; "ohā" is the root word from which the Hawaiian word "'ohana" (family) is derived, and it is a powerful metaphor for the 'ohana itself. One section of Kumulipo, the Hawaiian creation chant, describes the union of Wākea (sky-father) and Ho'ohōkūkalani, producing their first child, Hāloanaka, who was stillborn and deformed. The buried him, and from his body grew the shoots of the kalo. Their second child, Hāloa, named after his sibling, was the first man. Thus, in the Hawaiian worldview, kalo is an elder brother to be respected and cared for, and humans have the kuleana (responsibility) to maintain pono (spiritual balance) with each other, nature, and the akua (gods). Likewise, members of the 'ohana, having come forth from the same metaphorical root, have a duty to foster a harmonious relationship with each other.¹⁵⁸

There is, in short, a powerful spiritual connection that links every Native Hawaiian not only to the spiritual realm, but also, and equally importantly, to land, to culture, and to one another. This link forms the very basis of Native Hawaiian culture and life and so, it comes as no surprise that the connection is given extensive protection in the Native Hawaiian worldview. And while commensurate protection is not always found in modern Hawaiian law, what Part IV makes clear is that there are nonetheless extensive federal and state constitutional and legislative provisions, complemented in some cases by international law.

Improving Native Hawaiian Burial Protection, 33 U. HAW. L. REV. 321, 323–26 (2010) (same); Matthew J. Petrich, Comment, *Litigating NAGPRA in Hawai'i: Dignity or Debacle?*, 22 U. HAW. L. REV. 545, 545–46 (2000) (same).

¹⁵⁷ Kanehe, *Indigenous Cultural Property*, *supra* note 134, at 1019 (citing U.N. Comm'n on Human Rights, Sub-Comm'n. on Prevention of Discrimination and Prot. of Minorities, *Protection of the Heritage of Indigenous Peoples*, Annex, ¶ 12, U.N. Doc. E/CN.4/Sub.2/1995/26 (June 21, 1995) (prepared by Erica-Irene Daes); Indigenous Research Protection Act § 5.1(k) (2000) (rev. 2006).

¹⁵⁸ Sadowski & Walk, *Pili 'Ohana*, *supra* note 135, at 1129 (internal citations omitted).

Parts I and IV of *Native Hawaiian Law*, as we would expect Aboriginal scholarship to do, provide a framework, first, to consider the claims to spiritual significance raised in relation to Mauna Kea and the self-determination sought in the 'Aha, and second, to provide the content of what those claims might ultimately mean. The disputes in *Mauna Kea Anaina Hou* and *Akina* raise issues found in and dependent upon Native Hawaiian law; they point towards Native Hawaiian law; they provide, one might argue, a degree of hope that the Native Hawaiian worldview is being accepted by the broader legal and political orders. And if the law is beginning to offer that hope, as MacKenzie said it was in her *Star-Advertiser* interview, how can Haole, non-Native Hawaiians, participate in the new narrative?¹⁵⁹ By learning the necessary language and content of the relevant law, which is where *Native Hawaiian Law* plays a part, for, as MacKenzie notes, while "intended, obviously, for attorneys and law students, . . . we have tried to make it so that the language is accessible to the general public and to the Hawaii community generally."¹⁶⁰ *Native Hawaiian Law* provides an indispensable tool for understanding Native Hawaiian law, of course, but its greater contribution is to the new narrative. Only in first seeing the markers and then in using the tools available to us to understand them, can all people, Aboriginal and non-Aboriginal become a part of the new legal narrative, not only in Hawai'i, but also globally.

Native Hawaiian law is but one form of law operating at the supra-, sub-, and trans-national levels, and forming a part of the plurality of legal systems and structures which overlap and interact in the world around us today. Native Hawaiian law, then, as *Native Hawaiian Law* makes clear, forms an integral part of the global legal order.¹⁶¹ For that reason, it is incumbent upon all people to understand Aboriginal law, and so it is incumbent upon all of us, Hawaiians or not, to understand Native Hawaiian law. MacKenzie's book, therefore, helps us with two important tasks. First, to understand more deeply the nature and operation of Native Hawaiian law and, second, and at least equally, if not more importantly, to understand the plurality of the legal structures operating in Hawai'i and globally. Both tasks allow us not only to support, but also to become a part of a new global legal narrative.

III. CONCLUDING REFLECTIONS

2015 offered all Hawaiians a choice: to stand in the way of the Native Hawaiian comeback, or to be supportive of the struggle and to become a part

¹⁵⁹ See *supra* text accompanying note 87.

¹⁶⁰ Coleman, *supra* note 85, at A14.

¹⁶¹ See MacKenzie, *Introduction*, *supra* note 95, at xi-xv.

of a new narrative, one embracing all Hawaiians through the diversity of their legal structures, as well as the supporting global narrative. *Native Hawaiian Law* provides a source, not merely for judges and lawyers and academics in every discipline, but also for every Hawaiian to educate oneself, to become involved, and to begin a new narrative. In turn, the choice also offers an opportunity: for all Hawaiians to unite around a common political will, one that sees the importance of Native Hawaiian cultural, social, and political life as valuable.

Yet there is so much more that supporting this narrative could mean. Take, as but one example, the way in which we relate to the physical world around us. It is only as recently as 200 years ago that most of the world's land resource was held in non-private forms of property. *Native Hawaiian* law reveals new ways (that are in fact old ways) in which all people might conceive of their relationship to land, in a way not always involving only the private property relationship made possible by the liberal tradition. In a world in which concerns about the environment and global finance lead us to ask if there might not be other ways of relating to resources and to others, ways that place emphasis on duty and obligation to the community as opposed only to individual right, Native Hawaiian culture and law might suggest these alternatives to private property as the only way of dividing up the earth's resources. Native Hawaiian law reveals to us that there are, in fact, many ways, with their own people and history, providing lessons about successes and failures, and that those lessons are not so temporally distant to us. But more importantly, what we learn from Native Hawaiian law, and from the new narrative prophesied by Saul, is that these alternatives are not so culturally distant from us, either. Rather, there is a vast, inter-generational and inter-cultural dialogue contributing to a narrative about our place in and relationship to the world. And the distribution of land is but one way in which peoples of differing social, cultural, political, economic and legal orders can learn from one another.

Learning from one another is the goal that animates the whole of *Native Hawaiian Law*. Mahealani Wendt's poem entitled *Voyage* appears as the epigraph to the book:

We are brothers
In a vast blue heaven,
Windswept kindred
Souls at sea.
We are the sons
Of immense night,
Planets, brilliant and obscure,
Illimitable stars,
Somnolent moon.

We have loved
 Lash and sail,
 Shrill winds and calm,
 Heavy rains driven in squalls
 Over turbulent sea.
 We have lashed our hearts
 To souls of islands,
 Joined spirits with birds
 Rising to splendour
 In a gold acquiescence of sun.
 We are voyagers
 And sons of voyagers—
 Our hands work the cordage
 Of peace.¹⁶²

MacKenzie opens her own preface with Mary Kawena Pukui’s proverb:

E kaupē aku no i ka hoe a kō mai.
 Put forward the paddle and draw it back
 Go on with the task that is started and finish it.¹⁶³

And Mahealani Wendt summarizes the goal for the contributors to the book this way:

This treatise . . . has as its ambition no less than world peace predicated on ancient wisdoms—wisdoms not only instructive but critical to our survival as a species. It is our modest contribution to a grand enterprise. With these good works . . . our intent is that our collective strivings and humankind will be fruitful, mau a mau, forever.¹⁶⁴

These words aptly characterize the task that lies ahead for all people. In other words, as important as *Native Hawaiian Law* is for Native Hawaiians, it is equally important for non-Hawaiians, who can find much of use in engaging with and in and contributing to the narrative that has already begun. And so, the choice faced by Hawaiians in 2017 is not merely theirs, it is ours too: will you stand in the way, or will you support a new, temporally unlimited, supra-, sub-, and trans-national narrative? This monumental and magnificent book deserves a place not only in the home of every Hawaiian, but also, and just as much, it deserves to be known about and read by every person of good will, wherever and whenever they may be.

¹⁶² *Id.* at vii.

¹⁶³ *Id.* at viii (citing MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 39 (1983)) (emphasis in the original).

¹⁶⁴ Mahealani Wendt, *Foreword* to NATIVE HAWAIIAN LAW, *supra* note 20, at vi.