Hawai‘i Family Court and Bridging the Misconnect

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[*] Nakoa Seraphim Gabriel, attorney at law, William S. Richardson School of Law Alum Class of 2024. I write this article in an attempt to highlight the glaring issues facing Native Hawaiian Youth in relation to Hawai‘i Family Court proceedings. This piece is by no means meant to be the “answer” to such issues, rather my intent is that this writing serves as a spark to ignite future conversations, albeit difficult ones. With that, thank you to my family for their unwavering support, especially my mother, whose unconditional love has kept me afloat throughout my schooling and career. Additionally, I would like to thank Professors Troy Andrade, Faye Kimura, Susan Serrano, and Kapua‘ala Sproat for all of your guidance and mentorship. Finally, I wanted to extend sincere gratitude to my APLPJ staff (Jennifer T., Edward S., Tina L., Steven M., Travis K.), without you folks this would not have come to fruition.

I. INTRODUCTION

Native Hawaiian keiki are being ripped from their homes. The keiki are placed with strangers who strip away their identity, reducing "Kaimana" to just "Kai" because their full name is deemed too difficult to pronounce. Days quickly turn into weeks, then months, as the keiki lose touch with their Native Hawaiian roots and are offered limited, but harshly supervised contact with their biological parents.[1] New parents and family members filter into their lives until their experiences with their ʻohana quickly become just memories.[2] This is the sad reality for Native Hawaiians[3] entering the Hawaiʻi Family Court system.

Historically, a pre-contact Native Hawaiian family or ʻohana was more expansive than the traditional nuclear family. ʻOhana included those not directly related by blood or tied through marriage (ʻohua).[4] ʻOhua were considered dependents of the ʻohana, and through the efforts of the ʻpoʻo,[5]

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[1] *See generally* John Hill, *'Just A Number': Parents Who Face Losing Their Kids Say Court-Appointed Attorneys Don't Do Enough*, HONOLULU CIV. BEAT (Nov. 7, 2022), https://www.civilbeat.org/2022/11/just-a-number-parents-who-face-losing-their-kids-say-court-appointed-attorneys-dont-do-enough [https://perma.cc/WYK3-J655] (detailing the first-hand experiences of parents undergoing Child Welfare investigation). One such parent, Nikki Alpichi, describes how the State took custody of her four children when one child accused her then-boyfriend of molestation. *Id.* At her first court hearing regarding the matter, Alpichi had ten minutes to decide if she agreed to court jurisdiction. *Id.* At the suggestion of her attorney, who told her "You have no time, you're already going through so much anxiety and stress, you don't know what's to come at this hearing." *Id.* Alpichi reluctantly agreed. *Id.* Alpichi went on to regret this decision, stating, "Now I look back at it as the dumbest thing I ever did." *Id.* Several months later, Alpichi dipped into savings, hired a private attorney, completed all required services, and was still fighting for custody of her children. Hill, *supra* note 1.

[2] *Id.*

[3] *See generally Racial-Ethnic Identification*, OFF. HAWAIIAN AFF. (2021), http://www.ohadatabook.com/go_appendix.21.html [https://perma.cc/87BA-WCWB]. For purposes of this paper, "Native Hawaiian," "Kānaka Maoli," and "Kānaka" will be used interchangeably to refer to all persons of Hawaiian ancestry regardless of a specific blood quantum.

[4] E. S. Craighill Handy & Mary Kawena Pukui, *The Hawaiian Family System* 59 J. POLYNESIAN SOC'Y 170, 177 (1950).

[5] Translates to "head" in reference to head of the household. *Id.*

the ʻohua would be integrated with the ʻohana as one cohesive unit.[6] Another extension embodied in an ʻohana was the hānai or adopted members.[7] Children taken in as hānai members were reared by their adoptive families and treated as a part of the ʻohana with the same duties as their adoptive siblings.[8] Native Hawaiians did not view ʻohana as consisting only of present living members; rather, ʻohana included all who played a role in the family, such as the deceased and spiritual family members through ʻaumākua.[9]

When it came to internal disputes, ʻohana often relied upon a conflict resolution concept known as hoʻoponopono.[10] Hoʻoponopono, translated, means "to correct" and was seen as many things, such as a form of family therapy or a peacemaking process; Hoʻoponopono helped maintain and restore good relationships between family members and the spiritual realm.[11] A hoʻoponopono session, like a modern-day Alternative Dispute Resolution ("ADR") meeting, strictly adhered to rules and requirements to maintain civility and focus on the goal at hand.[12]

Native Hawaiian ʻohana are being pulled apart by the Hawaiʻi Family Court. A statistical annual report from 2017-2020 illustrated that Native Hawaiian youth ("NHY") comprised 40 to 44 percent of those

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[6] *See id.*

[7] Ryan Kananiokahome Poiekeala Kanakaʻole, *The Indivisible ʻOhana: Extending Native Hawaiian Gathering Rights to Non-Hawaiian Family Members*, 12 ASIAN-PAC. L. POL'Y J. 145, 155 (2011).

[8] N. Kanale Sadowski & K. Kaʻanoʻi Walk, *Pili ʻOhana: Family Relationships*, *in* NATIVE HAWAIIAN LAW: A TREATISE 1129, 1140 (Melody Kapilialoha MacKenzie et al. eds., 2015).

[9] *See* Kanakaʻole, *supra* note 7, at 156; MARY KAWENA PUKUI ET AL., NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 168 (1983) [hereinafter NĀNĀ I KE KUMU].

> The *ʻohana* also included the immortals; always the *ʻaumākua* (ancestor gods) . . . And because the *ʻaumākua* could take many forms . . ., the *ʻohana* roll call also took in named and known sharks or owls or lizards, or the fires of the volcano or the rocks and pebbles of the stream. . . . In old Hawaiʻi, one's relatives were both earthly and spiritual. Both were looked to for advice, instruction and emotional support. Thus communication with the supernatural was a normal part of *ʻohana* living. NĀNĀ I KE KUMU, *supra* note 9, at 168.

[10] Sadowski & Walk, *supra* note 8, at 1130.

[11] Sadowski & Walk, *supra* note 8, at 1130.

[12] Manulani Aluli Meyer, *Healing Through Ritualized Communication*, INDIGENOUS PEACEMAKING INITIATIVE 1, 2, https://peacemaking.narf.org/wp-content/uploads/2021/03/5.-Hooponopono-paper.pdf [https://perma.cc/Z9NP-MPFM], (last visited Apr. 20, 2023); *See infra* Part II.C. for a detailed overview of the stages and functions of hoʻoponopono.

entering the system.[13] The same report was completed in 2021, yielding similar results at 42 percent.[14] In addition to higher entry rates, the average length of stay in foster care for NHY was higher than it was for non-NHY, and their permanency outcomes were poorer.[15]

In response to public concerns over the high number of NHY and parents requiring case management, the Family Court, along with several independent non-profit organizations, have recently prioritized this issue by introducing new programs.[16] These programs, such as those discussed below in Part IV.B, draw upon Native Hawaiian cultural values or practices to better relate to Native Hawaiian families in the system.[17]

Many scholars and legal professionals have argued in favor of these programs to ensure easy access to the Family Court system for Native Hawaiians, under the belief that it will reduce the NHY statistic.[18] However, these solutions are approaching the issue from a corrective standpoint, meaning they seek to aid the high number of NHY already in the system. This article plans to approach the problem from a preventative standpoint that seeks to halt NHY entry entirely.

This work will pull upon the duality of two frameworks to evaluate the effectiveness of the current Family Court system in Hawai‘i. The first prong employs a general model framework crafted by Professor Barbara A. Babb focusing on the creation of a unified family court through the ecology of human development theory ("EHDT").[19] The second prong pulls upon the principles of therapeutic jurisprudence.[20]

The EHDT, originally theorized by psychologist Urie Bronfenbrenner, argues that implementing strategies designed to strengthen "competing influences" on children and their families' lives can enhance

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[13] *Hawai‘i Data Booklet APSR FFY 2023*, ST. HAW. DEP'T HUM. SERVS. 1, 38 (Jun. 30, 2022) [hereinafter *Data Booklet*], https://humanservices.hawaii.gov/ssd/files/2022/10/A-Hawaii-Data-Booklet-APSR-FFY-2023-Final-20229.pdf [https://perma.cc/7GA3-7A39].

[14] *Id.*

[15] *Id.* at 61.

[16] *Family Court Programs,* HAW. ST. JUDICIARY, https://www.courts.state.hi.us/courts/family/family_court_programs [https://perma.cc/PJA7-WURC] (last visited Oct. 9, 2024).

[17] Wilma Friesma, *'Ohana Conferences: A Collaborative Approach to Meeting the Needs of Abused and Neglected Children*, 6 BUILDING CONNECTIONS 9, 9-10 (Oct. 2012), https://humanservices.hawaii.gov/ssd/files/2013/05/RAC-Oct-12-Newsletter-FINAL.pdf [https://perma.cc/MQ6Q-SAA9].

[18] *See e.g.* Part I.V. B.2.

[19] Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 476-78 (1998); *See infra* Part III

[20] *See id*.

their overall functioning.[21] The "competing influences" are scaled in terms of impact (i.e., the positive or negative effects that arise), and it is through this scaling that their relationships, and thus their influences, are balanced.[22]

The second prong, therapeutic jurisprudence, is critical of the courts' role and suggests one more akin to that of a healer.[23] Intrinsic to one's particular location or jurisdiction, therapeutic jurisprudence looks for ways to maximize therapeutic consequences and remedy the damage that has been done.[24] The deep-rooted harm inflicted upon families involved in Family Court proceedings makes it difficult to assess objective court productivity, particularly in terms of effectiveness to the families involved.[25] This framework, however, properly critiques the Hawai'i Family Court through a lens that focuses on the complex and intimate repercussions of child welfare proceedings by looking past the superficial wounds and digging further into the underlying damage caused.[26]

In examining therapeutic implications under the second prong, this article discusses the great injustice dealt to Native Hawaiians as a result of Hawai'i's current Family Court. Specifically, it adopts Professor Kapua'ala Sproat's contextual legal framework of restorative justice embodied in the human rights principle of self-determination.[27] This article will analyze the effects of Hawai'i's court system on NHY and their 'ohana using these four indigenous values: (1) cultural integrity, (2) lands and resources, (3) social welfare and development, and (4) self-governance. These values are essential in an analysis of Native Hawaiians in the Family Court because they have been recognized as customarily significant for indigenous peoples and represent salient dimensions of restorative justice.[28] The roles and traditions of a Native Hawaiian family outlined in the following section support this reasoning.[29] This sub-framework will emphasize the great harm that is actively occurring and highlight the changes necessary to provide for

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[21] Urie Bronfenbrenner, *Ecological Models of Human Development*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF EDUCATION 37, 38 (Torsten Husén & T. Neville Postlethwaite eds., 1994).

[22] Babb, *supra* note 19, at 501.

[23] Babb, *supra* note 19, at 511.

[24] *Id.* at 509.

[25] *See id.*

[26] *See id.* As discussed *infra* Part IV.A., the statistics involving NHY across multiple data points, such as entry rates, length of time involved in the system, and current ethnic distribution, reflect poorly for NHY. This is further analyzed *infra* Part IV.C.3., revealing the many negative effects attributed to such data points.

[27] *See* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities,* 95 MARQ. L. REV. 127, 172-77 (2011).

[28] *Id.* at 173.

[29] *See infra* Part II.B.

the overall needs of Hawai‘i’s families.[30]

Part II of this paper provides a brief historical account of the traditional Native Hawaiian family and the roles played among members. This section also analyzes the Native Hawaiian framework for ADR, known as ho‘oponopono. Part III briefly outlines the dual framework of both Professor Babb and Professor Sproat that will be used as a lens to critique the current Hawai‘i Family Court system.

Part IV provides the current situation for Native Hawaiian families and youth within the Hawai‘i Family Court. This section then applies the framework mentioned in Part III to illustrate that the current Hawai‘i Family Court provides for the first prong of EHDT, but does not address the second prong of therapeutic jurisprudence due to its failure in applying the four indigenous values of restorative justice outlined by Professor Sproat. Part V provides for an alternative system via a Native Hawaiian Cultural Court based on the success of Circle Sentencing in Aboriginal communities. The dual framework will again be re-implemented to show how this approach would be more beneficial to NHY and their ‘ohana. Finally, Part VI will provide a conclusion that reaffirms the shortcomings of Hawai‘i’s current Family Court system and provides an improved alternative via a Native Hawaiian Cultural Court.

II. UNDERSTANDING INTERPLAYS BETWEEN THE NATIVE HAWAIIAN FAMILY AND RELIGION

A. *Kumulipo: The Native Hawaiian Creation Story*

In analyzing the Hawai’i Family Court and the issues that Kānaka Maoli are facing, it is essential to first provide historical context for what family meant to Kānaka Maoli. Family dynamics and spiritual influences are interconnected, illuminating the true meaning of “family” from a Native Hawaiian perspective. In contrast to the nuclear family model upon which the Hawai‘i Family Court was founded, this section illustrates why the current system falls short in addressing the needs of Kānaka Maoli families.

The Kumulipo is a traditional chant passed down orally from generation to generation, explaining Native Hawaiian genealogy, and

[30] *See infra* Part IV.

linking their ancestry to akua[31] as well as all life on earth.[32] The Kumulipo is comprised of sixteen sections: the first seven detail the creation of all animals and plant life (Pō), the eighth discusses the evolution of gods and humans (Ao), and the final eight sections repeat the genealogies as well as recall life stories of ancestral gods and demigods.[33] According to the Kumulipo, the universe started in complete darkness, or Pō.[34] From this darkness came a son named Kumulipo and a daughter named Pōʻele.[35] Together, Kumulipo and Pōʻele created the world as we know it.[36] It is through the Kumulipo that Native Hawaiians are wholly bound to the ʻĀina[37] in all that they do.[38]

Symbolism often elucidates essential Native Hawaiian values. For example, the origin of the kalo plant is told through the tale of Hāloanaka.[39] It is said that the sky father, Wākea, with his daughter Hoʻohōkūkalani,

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[31] *Akua*, NĀ PUKU WEHEWEHE ʻŌLELO HAWAIʻI [hereinafter WEHEWEHE], https://wehewehe.org [https://perma.cc/B9GL-GMF8] (last visited Apr. 20, 2023) (Search "Akua" using the search bar. The word "Akua" translated here means "God, goddess, spirit, ghost, devil, image, idol, corpse; divine, supernatural, godly."). In Native Hawaiian culture and religion played a crucial role in all aspects of life. *See, e.g.*, Vaughan MacCaughey, *The Hawaiian Elepaio*, 36 AUK 22, 35 (1919). Native Hawaiians viewed the Elepaio, an indigenous bird species, as a demigod capable of providing omens. *See id.* at 33. For example, Native Hawaiians often pre-selected trees to be harvested for canoe making and if the Elepaio interacted with a selected tree indicating a bad omen, Native Hawaiians would find the tree unfit and abandon it. *See id.*

[32] MARTHA WARREN BECKWITH, THE KUMULIPO A HAWAIIAN CREATION CHANT 117 (1951); Shelley Muneoka et al., *No nā Hulu Kūpuna: A Native Hawaiian View of Elderhood*, *in* AGING ACROSS CULTURES: GROWING OLD IN THE NON-WESTERN WORLD 349, 350-51 (Helaine Selin ed., 2021).

[33] Martha W. Beckwith, *Function and Meaning of the Kumulipo Birth Chant in Ancient Hawaii*, 62 J. AM. FOLKLORE 290, 290-93 (1949).

[34] D. Kapuaʻala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change* Devastation, 35 STAN. ENV'T L. J. 157, 167 (2016).

[35] *See id.*

[36] *See id.*

[37] *ʻĀina*, WEHEWEHE, *supra* note 31, (search "ʻāina" using the search bar. The term "ʻāina" translates to "land" or "earth." The ʻāina is considered sacred to Native Hawaiians given the connection to the Kumulipo. Native Hawaiians also historically relied upon the ʻāina as a significant source of sustenance).

[38] *See* Sproat, *supra* note 27.

[39] Shawn Malia Kanaʻiaupuni, *Identity and Diversity in Contemporary Hawaiian Families: Hoʻi Hou I Ka Iwi Kuamoʻo*, *in* 1 HŪLILI MULTIDISCIPLINARY RSCH. ON HAWAIIAN WELL-BEING 53, 59 (2004). Hāloanaka is used as the shortened version of his whole name, Hāloanakalaukapalili.

conceived a child.[40] This first child, however, was stillborn.[41] The pair decided to bury the child and from this burial sprouted the first kalo plant named Hāloanaka.[42] As time passed, Hoʻohōkūkalani conceived another child and birthed Hāloa, a healthy boy that all Native Hawaiians trace their ancestry to.[43] The name Hāloa was specifically chosen to honor Hāloanaka as the eldest child, emphasizing the respect often attributed to elders in Native Hawaiian society.[44] The tale of Hāloanaka reinforces the value of family held by Native Hawaiians, as well as its nexus to Āina.[45]

B. *The Expansive ʻOhana Through a Native Hawaiian Framework*

ʻOhana, the Native Hawaiian word for family, comes from Hāloanaka, which literally translates to "the off-shoots of a family stock," and is symbolic of the kalo plant.[46] Adult kalo plants have several off-shoots that will continue to grow and furnish future kalo plants. Such imagery is saliently akin to the ʻohana given our knowledge of the genealogy and the origin of all Native Hawaiians from both Kumulipo and Pōʻele.[47]

From a western perspective, an ʻohana might consist of keiki,[48] mākua,[49] and kūpuna.[50] Native Hawaiians, however, did not view ʻohana as consisting of present living members only; rather, ʻohana included all who played a role in the family, such as the deceased as well as spiritual family members through ʻaumākua.[51] ʻOhana also included ʻohua—those not directly related by blood or tied through marriage.[52] ʻOhua were considered dependents of the ʻohana and, through the efforts of the ʻpoʻo, would be

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[40] *See id.*

[41] *See id.*

[42] *See id.*

[43] *See id.*

[44] *See id*.

[45] *See id.*; *See also infra* Part IV.C.2.

[46] Handy & Pukui, *supra* note 4, at 175.

[47] Kanakaʻole, *supra* note 7, at 148.

[48] *Keiki*, WEHEWEHE, *supra* note 31 (Search "keiki" using the search bar. The term "keiki" translated here means "child" often used to refer to minors within a family).

[49] *Mākua*, WEHEWEHE, *supra* note 31 (Search "mākua" using the search bar. To be distinguished from singular "makua" and plural "mākua." Although commonly used to refer to a parent, mākua could also be used to represent "any adult of the parent's generation, as aunt, uncle, cousin.").

[50] *Kūpuna*, WEHEWEHE, *supra* note 31 (Search "kūpuna" using the search bar. To be distinguished from singular "kupuna" and plural "kūpuna." The term "kūpuna" translated here refers to grandparents or ancestors).

[51] NĀNĀ I KE KUMU, *supra* note 9; *See* Kanakaʻole, *supra* note 7, at 156.

[52] *See* NĀNĀ I KE KUMU, *supra* note 9; Handy & Pukui, *supra* note 4, at 177.

integrated with the ʻohana as one cohesive unit.[53]

Another part of the ʻohana was the hānai or adopted members.[54] Hānai translated as a verb means "to feed" and as a noun refers to an individual that provides food for another.[55] Children who were taken in as hānai members were reared by their adoptive family and treated as a part of the ʻohana with the same duties[56] as their adoptive siblings.[57] In Native Hawaiian culture, it was common practice for the kūpuna to request to hānai grandchildren.[58] This was of such importance to kūpuna that they would occasionally stake claim to a child prior to their birth.[59] A kūpuna might raise a child for a number of reasons: wanting to relieve close relatives of the hardship or burden in child rearing, desire to pass on knowledge to the hānai child, or desire to have an individual to care for them in their imminent old age.[60] Another common reason to hānai a child was simply for the enjoyment of having one within the home.[61] Rights of the kūpuna to adopt a child were often stronger than all other claims, even to that of the natural parents.[62] As such, the natural parents were often forced to relinquish their rights to their child if so desired by the kūpuna of the ʻohana.[63] When a child was given away through such a process, it was common for the natural parents to recite a traditional phrase[64] that would bind a type of formal agreement between the natural parents and kūpuna.[65] In contrast to the Western ideology of adoption, when a child is hānai, they may be raised and

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[53] Handy & Pukui, *supra* note 4, at 177.

[54] Kanakaʻole, *supra* note 7, at 155.

[55] Alan Howard et al., *Traditional and Modern Adoption Patterns in Hawai'i*, *in* ADOPTION IN EASTERN OCEANIA 21, 23 (Vern Carroll ed., 1970).

[56] *See generally* KANALU G. TERRY YOUNG, RETHINKING THE NATIVE HAWAIIAN PAST (1st ed. 1998) (discussing duties of children).

[57] Sadowski & Walk, *supra* note 8.

[58] Howard et al., *supra* note 55, at 24.

[59] *Id.*

[60] *Id.* at 27 (explaining that a common expression was "[h]ana a ka mea kama ʻole hele kuewa i ke alanui" which literally translates to "[w]hat a childless person will eventually do is to wander uncared for on the highway.") This gives insight as to the importance found in having a child to look after one in their old age. *Id.*

[61] *Id.* at 27; Sadowski & Walk, *supra* note 8.

[62] Howard et al., *supra* note 55, at 24.

[63] *Id.*

[64] Sadowski & Walk, *supra* note 8, at 1140. Biological parents would say "'Nāu ke keiki kūkae a naʻau," meaning "I give this child, intestines, contents and all."

[65] *Id.*

reared by another (kahu hānai),[66] but this did not mean the child loses all contact with their birth parents.[67] The hānai often kept a close relationship with their natural parents.[68] When it came to important decisions that needed to be made about the hānai child, the kahu hānai and natural parents would come together to discuss the matter to craft the best solution.[69] In modern Hawai‘i, the term hānai is often used more loosely to refer to any child one might provide parent-like care for.[70] Hānai has since been legally recognized in Hawai‘i courts.[71]

Luhi was a short-term form of child care that bears some similarities to our understanding of modern-day foster care.[72] In a luhi arrangement, when the current guardian (whether it be natural parents or kahu hānai) was unable to care for the child, due to such things as illness or fatigue, the child would be looked after by another.[73] However, luhi is distinguishable from both the hānai relationship mentioned previously as well as our modern-day foster care system in that it was meant to be temporary.[74] Under Luhi, a child was returned to their guardian once the guardian requested so and there was no arguing the issue.[75]

As evidenced thus far, the ‘ohana in ancient Hawai‘i extended beyond the conventional concept of the conventional "American Nuclear family."[76] It was expansive and an integral part of a larger network reliant on the collective efforts of multiple ‘ohana for support.[77] An ‘ohana may have had a core group of members that were directly blood-related (stock); however, much like the offshoots of the kalo plant, an ‘ohana had other branches that enabled it to expand and flourish (i.e., ‘ohua, hānai, luhi).[78]

In a land division system known as the ahupua‘a, ‘ohana would act as a unit to provide for themselves and other surrounding ‘ohana with goods

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[66] Howard et al., *supra* note 55, at 24.

[67] Sadowski & Walk, *supra* note 8, at 1140.

[68] *See id.*

[69] *See id.*

[70] *See id.*; *Infra* Part IV.B.3 for an analysis of hānai.

[71] *See infra* Part IV.A.3.; Leong v. Takasaki, 55 Hawai‘i 398, 411, 520 P.2d 758, 766 (1974); Int. AB, 145 Hawai‘i, 498, 454 P.3d 439 (2019).

[72] Howard et al., *supra* note 55, at 29.

[73] Sadowski & Walk, *supra* note 8, at 1140.

[74] Howard et al., *supra* note 55, at 29.

[75] *See id.*

[76] *See* NĀNĀ I KE KUMU, *supra* note 9; Handy & Pukui, *supra* note 4, at 177.

[77] Kana‘iaupuni, *supra* note 39, at 61.

[78] *See id*.

and services.[79] The ahupuaʻa broke up land on each island into sections, running from the shores of the beaches to the tops of the mountains.[80] Within each ahupuaʻa was the chief, whose responsibility was to ensure that his ahupuaʻa was being productive and that the people within were satisfied.[81] Native Hawaiian people worked within their ʻohana to provide for the needs of themselves and others.[82] Reciprocity was the law of the land, and the sharing of foods or services inaccessible to others' ʻohana was a fundamental action under the ahupuaʻa.[83]

C. *Conflict Resolution Through Hoʻoponopono*

The ʻohana would rely on hoʻoponopono when they were confronted with a problem that affected an individual member or the group as a whole.[84] Hoʻoponopono translated means "to correct"[85] and was seen as many things like a form of family therapy or a peacemaking process.[86] Hoʻoponopono helped to maintain and restore good relationships between family members and the spiritual realm.[87] Contrary to the Western concept of illness, Native Hawaiians believed sickness as more than just a physical injury or disease.[88] Instead, Kānaka believed that illness could be a result of spirits affected by the ʻohana's actions or through the breaking of kapu (religious restrictions).[89]

Invitation to a hoʻoponopono was not exclusive to those involved in the dispute. Instead, it was open to the entire ʻohana as long as they were willing to participate. Hoʻoponopono sessions would conclude when the ʻohana was healed of whatever ailment they were battling, regardless of how many sessions it took.[90] Hoʻoponopono was typically conducted by the

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[79] Dieter Mueller-Dombois, *The Hawaiian Ahupiaʻa Land Use System: Its Biological Resource Zones and the Challenge for Silvicultural Restoration*, 3 BISHOP MUSEUM BULL. CULTURAL ENV'T STUD. 23, 27 (2007).

[80] Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE 5, 8 (Melody Kapilialoha MacKenzie, et al. eds., 2015).

[81] *Id.* at 9.

[82] *Id.* at 9.

[83] Kanaʻiaupuni, *supra* note 39, at 61 ("Ike aku, ʻike mau, kokua aku kokua mai; pela iho la ka nohona ʻohana. Recognize and be recognized, help and be helped; such is family life. Family life requires an exchange of mutual help and recognition.").

[84] NĀNĀ I KE KUMU, *supra* note 9, at 145.

[85] WEHEWEHE, *supra* note 31.

[86] Sadowski & Walk, *supra* note 8, at 1130.

[87] *See id.*

[88] NĀNĀ I KE KUMU, *supra* note 9, at 147.

[89] *See id.*

[90] Sadowski & Walk, *supra* note 8, at 1134.

haku (head of the household, often seen as the leader of the ʻohana)[91] and began with agreement by all participants to the following ground rules: (1) each individual in the ʻohana is committed to being part of the problem-solving process; (2) all words and deeds that are part of the hoʻoponopono will be shared in an atmosphere of ʻoiaʻio (the essence of truth); (3) the ʻohana must share a common sense of aloha[92] for one another or be committed to reinstating that spirit; (4) everything said in a hoʻoponopono is done in confidence and will not be repeated when the session is complete; (5) the haku must be commonly agreed on as a fair and impartial channel through which the hoʻoponopono is done.[93]

Phase one of hoʻoponopono is known as kukulu kumuhana,[94] and begins with an inner focusing by the ʻohana on the problem at hand.[95] The haku, acting as a mediator, will invoke pule[96] as often as needed to bring forth the issues that must be worked on collectively by the ʻohana through spiritual invocation.[97] This pooling of energy serves the dual purpose of identifying the reason for the hoʻoponopono and allowing all those involved to focus their energy on the issue in one unified effort.[98] Phase two is known as mahiki (the setting to rights)[99] and involves the literal hiahia (entanglement)[100] of the issue. At this point, the ʻohana will speak to the haku directly about one problem at a time and will remain with this problem until it is traced to the root cause; this maintains order in that the issue is completely resolved before moving on to the next issue.[101] The mahiki phase is metaphorically represented through the untangling of a rope,

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[91] Handy & Pukui, *supra* note 4, at 179.

[92] *Aloha*, WEHEWEHE, *supra* note 31 (search "aloha" using the search bar. The word "pule" roughly translates to several meanings including love, affection, compassion, mercy, sympathy, pity, kindness, sentiment, grace, charity; greeting, salutation, regards; sweetheart "prayer, grace, or blessing."). Additionally, Hawaiʻi has enacted that those within the judiciary and state government capacity give due consideration to the "aloha spirit" in carrying out their duties. HAW. REV. STAT. § 5-7.5 (2023).

[93] Meyer, *supra* note 12.

[94] *Kukulu kumuhana*, WEHEWEHE, *supra* note 31 (search "kukulu kumuhana" using the search bar. "Kukulu kumuhana" translated here means "to pool thoughts and prayers to solving common problems, as during hoʻoponopono; to set up topics for discussion, as an agenda.").

[95] Meyer, *supra* note 12, at 4.

[96] *Pule*, WEHEWEHE, *supra* note 31 (search "pule" using the search bar. The word "pule" roughly translates to "prayer, grace, or blessing.").

[97] Meyer, *supra* note 12, at 4.

[98] Sadowski & Walk, *supra* note 8, at 1130.

[99] *See id.*

[100] Meyer, *supra* note 12, at 4.

[101] Sadowski & Walk, *supra* note 8, at 1135.

removing one knot at a time or even the peeling back of an onion, layer by layer.[102] The root cause of negative feelings or emotions can be buried over time and it takes effort through this detangling process to pull the core of the issue to the surface.[103] Once the core is identified, the haku goes into the third phase known as mihi[104] and kala[105] (repenting-forgiving-release) at which point, the participating members will address one another.[106] Through mihi, the wrongdoer admits their wrongs and asks for forgiveness from all affected.[107] Kala asks those involved in the issue to symbolically "let go" and "free each other" of the negativity (guilt, anguish, embarrassment, etc.) that the issue has caused.[108] Due to the amount of work that phases two and three carry, they may often be repeated, until all disputes or issues have been resolved.[109] The final phase is pani[110] and marks the closing of the gathering.[111] The haku will generally summarize the session and close with prayer; traditionally, a ceremonial meal would follow.[112]

As a model system, hoʻoponopono was not limited to family disputes and was used to settle important political disputes as well.[113] In January 1737, a battle was to occur on the island of Oʻahu between Alapaʻi, the chief of Big Island, and chiefs on Oʻahu allied with Peleiōhōlani, the chief of Kauaʻi.[114] Alapaʻi arranged to convene with Peleiōhōlani, with advice from his war counsel, upon recognizing that Peleiōhōlani was his

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[102] *See id.*

[103] Meyer, *supra* note 12, at 4.

[104] *Mihi*, WEHEWEHE, *supra* note 31 (search "mihi" using the search bar. The term "mihi" translated here literally means "repentance, remorse; to repent, apologize, be sorry.").

[105] *Kala*, WEHEWEHE, *supra* note 31 (search "kala" using the search bar. The term "kala" translated here literally means "[t]o loosen, untie, free, release, remove, unburden, absolve, let go, acquit, take off, undo; to proclaim, announce; to forgive, pardon.").

[106] Sadowski & Walk, *supra* note 8, at 1135.

[107] *See id.* (seeking forgiveness was also initiated with spiritual family members as well, such as ʻaumākua and akua).

[108] *See id.*

[109] *See id.*

[110] *Pani*, WEHEWEHE, *supra* note 31 (search "pani" using the search bar. The term "pani" translated here literally means "To close, shut, block." As a noun it is similar to "closure.").

[111] *See id.*

[112] Sadowski & Walk, *supra* note 8, at 1136.

[113] *See generally* S.M. KAMAKAU, RULING CHIEFS OF HAWAIʻI (Kamehameha Schools Press rev. ed. & trans. 1992) (1961).

[114] *See id*.

distant blood cousin.[115] The two chiefs formally met and agreed to a truce; no blood was shed and war canoes that were en route to Oʻahu were ordered to turn around.[116] Similarly, the battle of Kakanilua was concluded when the invading chief, Kalaniʻōpuʻu, sent his young son into the battlefield to seek the opposing chief, Kahekili, and request a truce.[117]

Hoʻoponopono acted as a Native Hawaiian equivalent to modern-day ADR practices.[118] Unlike traditional ADR practices, however, hoʻoponopono pulls upon the spiritual aspect of the ʻohana to unite them in facing the issues at hand.[119] Some scholars have advocated for this model for implementation today within the Pacific Islander legal systems because of its potential for success.[120] Part IV.B.2 discusses the themes of hoʻoponopono as applied in modern-day ʻOhana Conferencing.[121]

III. Determining an Effective Family Court System: An Ecological & Culturally Conscious Contextual Analysis

A. *Ecology of Human Development Theory ("EHDT") & Therapeutic Jurisprudence*

The difficulty in formulating a proper family law adjudicatory system lies in the far-reaching and resounding repercussions

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[115] *Id.* at 71-72.

[116] *Id.* at 72.

> …[b]oth chiefs were attired in a way to inspire admiration and awe, and the day was one of rejoicing for the end of the dreadful conflict . . . between the two chiefs stood the counselor Naʻili, who first addressed Peleiōhōlani saying, ʻ[w]hen you and Alapaʻi meet, if he embraces you and kisses you let Alapaʻi put his arms below yours, lest he gain the victory over you'. . . Alapaʻi declared an end of the war, with all things as they were before. *Id.*

[117] *Id.* at 85-89 (illustrating the importance of peacemaking in the context of Native Hawaiian history, even in hostile conditions like active war). Here, the invading chief from Big Island, Kalaniʻōpuʻu stormed the shores of Maui in an attempt to overthrow the reigning chief, Kahekili. On day one, 800 warriors attacked and only two survived. The following day, more of Kalaniʻōpuʻu's warriors attempted to engage the enemy and again his warriors were slaughtered. Fearing complete decimation, Kalaniʻōpuʻu sent his young son, Kiwalaʻo, into the battlefield in an attempt to call an end to the fighting. Dressed in the garments of a chief, Kiwalaʻo made his way through the warriors; upon seeing the young chief, warriors would cease fighting and lay on the ground in response to his high rank. Eventually, the young boy made his way to Kahekili where he pleaded for an end to the fighting. The battle was then considered over.).

[118] *See* Sadowski & Walk, *supra* note 8, at 1132.

[119] *See* Noreen Mokuau, *A Family-Centered Approach in Native Hawaiian Culture*, 71 Fams. Soc'y: J. Contemp. Hum. Serv. 607, 608 (1990).

[120] *See id.*

[121] *See supra* Part IV.B.2.

that their decisions have.[122] A court ruling to terminate parental rights does not solely impact the parents; the entire core of the family is ultimately uprooted and such trauma can alter both physical and mental health of all involved.[123] Taking into account this concern, one lens through which the effectiveness of a family law adjudicatory system has been scrutinized is the interdisciplinary paradigm proposed by Professor Babb.[124] This model system relies on a two-pronged approach, first relying on the EHDT and then turning to therapeutic jurisprudence.[125]

Founder of the EHDT, American psychologist Urie Bronfenbrenner [126] once described developmental psychology as "the science of strange behavior of children in strange situations with strange adults for the briefest possible periods of time."[127] This was the nature of developmental psychology in the 1970s.[128] It was far from natural.[129] Lab-conducted experiments probed children to produce synthetic information that would be used to fuel the work of manuals, guides, and sometimes treatises.[130] Frustrated with this inaccurate method of research gathering and the skewed results that resulted, Dr. Bronfenbrenner proposed EHDT in 1977.[131]

Through the first prong, EHDT argues that in order to fully understand human development, one must consider the entire ecological system that surrounds the child.[132] Dr. Bronfenbrenner has proposed four

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[122] *See* Babb, *supra* note 19, at 525.

[123] *See id.*

[124] Professor Babb is a professor at the University of Baltimore School of law and a distinguished expert in Family Law, with over thirty years of teaching experience in the field. In addition to her extensive teaching and numerous publications surrounding a plethora of Family Law issues, Professor Babb also designed and pioneered the nation's only post JD certificate in Family Law. *See id.*

[125] *See* Babb, *supra* note 19, at 513.

[126] Dr. Urie Bronfenbrenner was an American psychologist, widely regarded as one of the world's leading scholars in human development. Dr. Bronfenbrenner's work utilized a contextual framework to analyze human development, eventually establishing the "Ecology of Human Developmental Theory." *See* Bronfenbrenner, *supra* note 21.

[127] *See Ecological Systems Theory Simply Explained With Examples*, SCIENCE STRUCK, https://sciencestruck.com/ecological-systems-theory-explained-with-examples [https://perma.cc/T5A5-KFYZ] (last visited Apr. 20, 2023).

[128] *See id.*

[129] *See id.*

[130] *See generally https://mkontopodis.wordpress.com/2019/11/22/dev-psy/*

[131] *See Ecological Systems Theory Simply Explained With Examples, supra* note 127.

[132] *See* Bronfenbrenner, *supra* note 21. ("The ecological environment is conceived

major systems[133] that impact the ecological system of children, thus affecting their futures.[134] The first and innermost system is the "microsystem" and consists of immediate relationships that are present on a day-to-day basis—this includes the husband-wife, child-parent, and child-child relationships.[135] These are bonds that directly impact the child and are often experienced first-hand.[136] For example, we often correlate an abusive household to negative indicators by a child, like bad grades or poor behavior.[137] Through the lens of an adjudicatory system, the microsystem might be the interactions a child might have with the court or state officials throughout the welfare process.[138]

Dr. Bronfenbrenner calls the next system the "mesosystem," and it examines the relationship between the microsystems and their effect on the child.[139] An illustration of the mesosystem in practice might dissect the relationship between parents and a child's Guardian Ad Litem ("GAL"), looking at how these interactions either positively or negatively affect the child.[140] The third system is known as the exosystem and looks at the links between social settings that do not directly involve the child, but nevertheless impact them (i.e., a parent's workplace, that may directly affect the parent, and therefore indirectly affect the child).[141] Branching out further from the exosystem is the macrosystem that looks at the ideological and institutional patterns of a given culture and subculture that could affect all other systems.[142] An analysis of the macrosystem might look at the child's geographic location and ethnicity in relation to the aforementioned

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as a set of nested structures, each inside the other like a set of Russian dolls. Moving from the innermost level to the outside.").

[133] *See* Babb, *supra* note 19. Since the publication of Professor Babb's framework, a fifth system has been recognized, the "chronosystem." This system takes into account changes over time. Given that this system accounts for long term changes, like effects suffered by an adult that were caused from childhood trauma, and is impossible to accurately measure, it has been omitted.

[134] *See id.*

[135] *See id.* at 507. Today, the concept of "husband-wife" relationship might consist of other relationships on the spectrum as well as those not formally married. *See id.*

[136] Sprouts, *Bronfenbrenner's Ecological Systems: 5 Forces Impacting Our Lives*, YOUTUBE (Dec. 1, 2021), https://www.youtube.com/watch?v=g6pUQ4EDHeQ [https://perma.cc/VVM8-63BT].

[137] *See id.*

[138] *See* Babb, *supra* note 19.

[139] Barbara A. Babb, *Family Courts are Here to Stay, So Let's Improve them*, 52 FAM. CT. REV. 642, 643 (2014) [hereinafter *Family Courts are Here to Stay*].

[140] *See* Sprouts, *supra* note 136.

[141] *See id.*

[142] *Family Courts are Here to Stay*, *supra* note 139.

systems.[143]

The second prong of Professor Babb's framework relies upon therapeutic jurisprudence.[144] Therapeutic jurisprudence views law as a force that produces both therapeutic and anti-therapeutic consequences, regardless of intent.[145] In implementing this prong to an analysis of the adjudicatory system, the goal of the court should be to maximize the therapeutic consequences through addressing deeper psychological wrongs.[146] Dr. David Wexler, a co-founder of therapeutic jurisprudence, broadly applied a therapeutic jurisprudence approach to the procedural process of child custody cases, noting that the current adversarial system "encourages us to find the worst thing about the other party, to bring it out, and to talk about just how terrible that other parent is. This is traumatic to children and, of course, damaging to the relationship of the parents."[147] Although Dr. Wexler's comment applies broadly to child custody, a similar argument could be raised within the scope of child welfare.[148] In fact, given the historical importance of cultural values to Native Hawaiians mentioned previously, as well as the significant trauma embodied in the colonization of Native Hawaiian people,[149] it could be said that these harms are magnified and require an even deeper analysis than provided through therapeutic jurisprudence.[150] Therefore, in order to fully analyze the therapeutic jurisprudence prong, a more thorough contextual framework that acknowledges the historical and cultural injustice felt by Kānaka Maoli must be applied.[151]

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[143] *See id.*

[144] *See* Babb, *supra* note 19.

[145] David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125-130 (2000).

[146] *Family Courts are Here to Stay*, *supra* note 139, at 643.

[147] *See* Wexler, *supra* note 145, at 126.

[148] *See id.*

[149] *See* Sproat, *supra* note 27, at 184.

[150] *See supra* Part II.B.

[151] *See generally* Sproat, *supra* note 27.

B. *Understanding Therapeutic Jurisprudence for Kānaka Maoli Through a Contextual Legal Analysis*[152]

Professor Sproat [153] proposes a restorative justice through self-determination framework in her article, *Wai through Kānāwai*, that applies a modified contextual legal analysis. [154] Professor Sproat opined that although effective, a standard contextual legal analysis would fall short of adequately fulfilling a legal inquiry of indigenous peoples.[155]

In her synthesized recount of legal theory, Professor Sproat begins with a brief outline of legal formalism as a theory that views adjudication according to (1) the law, which is rationally determinate, (2) judging that is mechanical, and (3) legal reasoning that is autonomous.[156] Legal formalism employs a cookie-cutter approach to issues, viewing law as "objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics."[157] A formalist analysis ultimately fails to explain or predict how such processes work for indigenous people. By its foundation of rules (i.e., "intent of framers") and methods of reasoning (i.e., *stare decisis*),[158] legal formalism encourages a notion that native people are inferior to Europeans and thus unworthy of self-governance.[159] To illustrate the ineffective nature of legal formalism in relation to indigenous rights,

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[152]This sub-section serves as a general overview of Professor Sproat's restorative justice through self-determination framework that is applied as a means of therapeutic jurisprudence. *See* Sproat, *supra* note 27, at 171. For direct application of the framework to the Hawai'i Family Court, *see infra* Part IV.C.

[153] Professor Kapua'ala Sproat is the Director of the Ka Huli Ao Center for excellence in Native Hawaiian Law at University of Hawai'i at Mānoa, William S. Richardson School of Law. Professor Sproat is an expert in Native Hawaiian Law as well as Native Hawaiian water rights. Professor Sproat's publications have revolved around Native Hawaiian rights and legal issues that persist for Native Hawaiians today. One of her more cited pieces (and one relied upon extensively in this piece) is the collaborative effort in *Native Hawaiian Law: A Treatise*.

[154] *See* Sproat, *supra* note 27.

[155] *Id.* at 171 (finding that a "contextual legal analysis integrates both 'realities' of decision-making in complex or controversial cases, and exposes for participants and the public 'what is really going on' and 'what the decision really means.' Yet, for Indigenous peoples who are differently situated than others because of the long-term impacts of colonialism, contextual legal inquiry itself needs further refinement to explicitly integrate Native peoples' unique history and cultural values into a larger analytical framework that accounts for restorative justice and the key dimensions of self-determination").

[156] *See* Sproat, *supra* note 27, at 154-55.

[157] *See id*.

[158] *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (Translating to, "To stand by decided cases; to uphold precedent; to maintain former adjudications.").

[159] *See* Sproat, *supra* note 27, at 155-56.

Professor Sproat analyzes *Rice v. Cayetano*[160] and opines that formalism is often employed to achieve a desired outcome rather than providing a neutral analytical medium.[161]

In the 1920s, legal realism sprouted, which challenged the ideals of formalism: primarily the concept of "the law as a formula that produces 'correct' or 'just' results when mechanically applied to specific cases."[162] Rather, legal realism views legal decision-making in light of "social context, facts of the case, judges' ideologies, and [recognition that] professional consensus critically influence individual judgments, and patterns of decisions over time."[163] With the foundation built by legal realism, critical legal analysis emerged in the 1980s to "critique the ostensible objectivity and neutrality of the law and the legal process."[164] Critical legal analysis successfully sparked important discourse regarding the ability of the law to act as a neutral decision-maker and challenged the power structure that underpins society.[165] Critical legal analysis ultimately failed to make significant changes and was challenged by many as being out of touch with the majority of society.[166]

In the late 1980s, the concept of critical race theory was introduced, relying upon concepts from critical legal scholars prior (e.g., the viewpoint that law and legal rules are indeterminate).[167] Unlike critical legal scholars, however, critical race theorists infused the narrative of people of color in order to fully explore how "the law excluded certain groups and benefited others."[168] Through the advancement of analytical techniques previously mentioned, critical race theorists hoped to "reveal the law's blindness toward unconscious racism, the ways in which legal discourse inscribes and reproduces subordinating images of racial groups, and the ways in which legal institutions and discourse contribute to the construction and maintenance of racial hierarchies."[169]

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[160] Rice v. Cayetano, 528 U.S. 495, 518-24 (2000). *See infra* Part IV.C.4.

[161] *See* Sproat, *supra* note 27, at 160.

[162] *See id.* (citing Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261, 287 (1998)).

[163] *See id.*

[164] *See* Sproat, *supra* note 27, at 162 (citing Eric K. Yamamoto et al., *Race, Rights and Reparation: An Overview, in* RACE, RIGHT AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 3, 12 (2001).

[165] *See id.* at 162.

[166] *See id.* at 163.

[167] *See id.* at 165.

[168] *Id.*

[169] Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political*

Critical race theory provided invaluable insight as to how the law excluded certain groups and benefitted others[170] but, as Professor Sproat points out, critical race theory inherently falls short in analyzing several values salient to indigenous people's rights.[171] At its core, whereas critical race theory is concerned with the pursuit of justice through equality, native people are more concerned about justice through self-determination efforts which includes returning and restoring traditional lands and other resources.[172] Professor Sproat posits that a contextual legal analysis inclusive of native people's rights should address the following four values of self-determination embodied in restorative justice: (1) cultural integrity; (2) lands and natural resources; (3) social welfare and development; and (4) self-government.[173] Though these values are inexplicably intertwined,[174] they individually hold great significance under international human rights principles of self-determination.[175]

The first value of cultural integrity looks at whether actions or decisions support and restore cultural integrity or if such actions enable the diminishment of cultural integrity.[176] This first value is paramount in ensuring the cultural identity of Kānaka Maoli is not lost.[177] As with many indigenous communities, the cultural integrity of Kānaka Maoli has been chipped away for hundreds of years by the hands of foreign invaders.[178] One

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Lawyering Practice in Post-Civil Rights America, 95 MICH. L. REV. 821, 868 (1997).

[170] *See id.*; *See* Sproat, *supra* note 27, at 163.

[171] *See* Sproat, *supra* note 27, at 167.

[172] *Id.*

[173] *See id.* at 172-73.

[174] *See id.*; N. Mahina Tuteur, *Reframing Kānāwai: Towards a Restorative Justice Framework for Indigenous Peoples*, 7 INDIGENOUS PEOPLES' J. L., CULTURE & RESISTANCE 59, 73 (2022) (elaborating that one value does not subsist on its own).

> …culture cannot exist in a vacuum and its integrity is linked to land and other natural and cultural resources upon which Indigenous Peoples depend for physical and spiritual survival . . . Native communities' social welfare is defined by cultural veracity and access to, and the health of, natural resources . . . Finally, cultural and political sovereignty determine who will control Indigenous Peoples' destinies (including the resources that define their cultural integrity and social welfare) and whether that fate will be shaped internally or by outside forces. Tuteur, *supra* note 174, at 73.

[175] Sproat, *supra* note 27, at 137.

[176] *See id.* at 179; Tuteur, *supra* note 174, at 74.

[177] *See* Sproat, *supra* note 27, at 179; Tuteur, *supra* note 174, at 74.

[178] *See* Tuteur, *supra* note 174, at 74.

example was the formal banning of hula[179] in 1830 by Chief Kaʻahumanu under the undue influence by puritanical missionaries.[180] In pushing such an agenda, historians argue that the missionaries' primary incentive to ban hula was its perceived sexual nature conflicting with their own moral values.[181] However, a more insidious motive could be found in the stripping of cultural integrity in order to further the political agenda of invading missionaries and their descendants.[182] From 1830 to 1900, Hawaiʻi became a hub for plantation farmers to grow sugar cane and hundreds of thousands began flocking to the small island chain in order to stake their claim.[183] Given this context, some have argued that missionaries banned hula and other Native Hawaiian cultural practices in order to further establish a capitalist economy within Hawaiʻi that supported their needs.[184] To push this agenda even further, Act 57 of the Laws of the Republic of Hawaiʻi effectuated in 1896 forbade the teaching of ʻŌlelo Hawaiʻi (the Native Hawaiian language).[185] Today, both cultural practices are no longer forbidden and, in fact, encouraged. In 2022, Concurrent House Resolution 130 formally apologized for the banning of ʻŌlelo Hawaiʻi in public schools.[186] Despite the blatant deterioration of Native Hawaiian cultural integrity throughout history, the passage of Concurrent House Resolution

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[179] *See* Amy Kuʻuleialoha Stillman, *Re-Membering the History of the Hawaiian Hula*, *in* CULTURAL MEMORY: RECONFIGURING HISTORY AND IDENTITY IN THE POSTCOLONIAL PACIFIC 187, 188 (Jeannette Marie Mageo ed., 2001). Hula is a Native Hawaiian dance form that is often accompanied by oli (chant) or mele (song). *Id*. Movements of hula often have cultural or religious underpinnings, illustrating the importance of such values in everyday life. *Id*.

> It is evident, then, that hula is a site of cultural memory. Performers draw freely on material available to them, selecting topics from among historical events or personages as well as topics that are currently in vogue. The selection process is shaped by other considerations as well, such as programmatic variety of tempo and costuming. *Id*.

[180] Noenoe K. Silva, *He Kānāwai E Hoʻopau I Na Hula Kuolo Hawaiʻi: The Political Economy of Banning the Hula*, 34 HAWAIIAN J. HIST. 29, 29-30 (2000).

[181] *The History of Hula: How Hula Was Saved*, OLA PROP. INC., https://www.olaproperties.com/blog/lets-talk-story/the-history-of-hula-how-hula-was-saved [https://perma.cc/R4XT-HCSC] (last visited Apr. 21, 2023).

[182] *See id.*

[183] Robert Takaki, *"An Entering Wedge": The Origins of the Sugar Plantation and a Multi-Ethnic Working Class in Hawaiʻi*, 23 LAB. HIST. 32, 32-33 (1982).

[184] Silva, *supra* note 180 ("The missionaries' . . . response was to expunge those Hawaiian customs that seemed to undermine the grand objective of material accumulation—in effect, most of the indigenous culture: traditional art, language, dance, sexual mores, nudity, etc.").

[185] Act 57, Laws of the Republic of Hawaiʻi § 30 (1896).

[186] H.R. Con. Res. 130, 31st Leg. (2022).

130 does elucidate some hope for this first value.

The second value of "lands and natural resources" refers to all lands, waters, and natural resources that provide native peoples with the necessary means of survival, both through physical and spiritual sustenance.[187] The goal of this value should be to examine whether or not actions or laws perpetuate the subjugation of ancestral lands and resources or redress historical injustice in another way.[188] In addition to being an international human right,[189] the use of land must be examined in order to fully understand the harm caused to native peoples, primarily the "appropriation of ancestral lands and resources that facilitates indigenous peoples' loss of identity and culture."[190] Focusing this understanding on the issue at hand, the reverence for ʻĀina by Kānaka Maoli is of paramount importance. The Kumulipo[191] entails the origins of Kānaka Maoli; it reaffirms that Kānaka do not view land use as a beneficial commodity.[192] Rather, it is the concept that ʻĀina is an entity in itself that demands mutual respect.[193] Kānaka Maoli tended the land in order to produce staple dietary needs like kalo (taro), ʻuala (sweet potato), and ʻulu (breadfruit).[194] Aside from dietary needs, ʻĀina represented something greater, the relationship is best described here, "[l]ike many other native people, [Maoli] believed that the cosmos [were] a unity of familial relations. [Their] culture depended on a careful relationship with the land, [their] ancestor, who nurtured [them] in body and spirit."[195] The bond shared between Kānaka Maoli and ʻĀina is something that must be included in any analysis of what self-determination would look like through restorative justice.

The third value of Professor Sproat's framework is social welfare and development which looks at whether an action or decision has the "potential to improve health, education, and living standards" as opposed to maintaining the status quo.[196] A contextual legal analysis under this value

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[187] Tuteur, *supra* note 174, at 75.

[188] *See* Sproat, *supra* note 27, at 181.

[189] S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 347 (1994).

[190] Sproat, *supra* note 27.

[191] *See supra* Part II.C.; BECKWITH, *supra* note 32.

[192] *See* BECKWITH, *supra* note 32.

[193] *Id.*

[194] Marie K. Fialkowski et al., *Native Hawaiian Complementary Feeding Practices as Told by Grandparents: A Transgenerational Experience,* 5 CURRENT DEVS. NUTRITION 40, 40-42 (2020).

[195] Sproat, *supra* note 27, at 180 (citing HAUNANI-KAY TRASK, LIGHT IN THE CREVICE NEVER SEEN xxiv (1994).

[196] Sproat, *supra* note 27, at 182-83; Tuteur, *supra* note 174, at 77.

works to remedy two of the most common phenomena experienced by indigenous people that cause them to live in an economically disadvantaged condition: the progressive plundering of indigenous peoples' lands and resources; and patterns of discrimination that have excluded members of indigenous communities from enjoying social welfare benefits generally available in the states in which they live.[197] The stark reality is that the arrival of foreigners to Hawai'i sparked a catalyst of disasters for Kānaka Maoli.[198] Within the first century of contact, the Native Hawaiian population was reduced from 1 million to less than 40,000.[199] To make matters worse, the formal colonization of Hawai'i brought challenges in obtaining western titles to the ancestral lands formerly held by Kānaka Maoli resulting in mass displacement.[200] In application,

The final value under this contextual framework is self-governance and analyzes if "a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance."[201] The systemic dispossession of indigenous identity via the taking of land and resources was widespread, leaving those in its wake politically vulnerable.[202] The story of Hawai'i is no different, as scholar Jonathan Kamakawiwo'ole Osorio stated:

> Colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands and ultimately their government. [In Hawai'i] the mutilations were not physical only, but psychological and spiritual. Death came not only through infection and disease, but through racial and legal discourse that crippled the will, confidence, and trust of the Kānaka Maoli as surely as leprosy and smallpox claimed their limbs and lives.[203]

In the midst of this void, Kānaka Maoli have formed a necessary reliance on the federal government, which brings us to the issues of self-governance today.[204] Through self-governance, the hope would be for Kānaka Maoli to tell the story of their history and overthrow, that such important facts will

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[197] Anaya, *supra* note 189, at 352-53.

[198] Tuteur, *supra* note 174, at 77.

[199] *Id.*

[200] Sproat, *supra* note 27, at 182. Without access to their land, Native Hawaiians were said to consist of a "floating population crowding into the congested tenement districts of the larger towns and cities of the Territory under conditions which many believed would inevitably result in the extermination of the race." *Id.*

[201] Sproat, *supra* note 27, at 181.

[202] *Id.*

[203] *Id.* at 184.

[204] *Id.*

remain intact for time immemorial. This serves the purpose of ensuring that such atrocities are not forgotten and replaced by the script of colonizers who justify the colonization and dispossession of native land,[205] chalking up the plight of Kānaka Maoli as a necessary evil.[206] With Kānaka Maoli being the voice of their own history, the hope is that the irreparable harms caused will not be forgotten and can be adequately addressed.[207]

Cumulatively, these four values represent foundational pillars of international human rights principles of self-determination that, in turn, need to be discussed considering the historical injustice that Kānaka continue to face.[208] In employing this framework, each value will be examined through a contextual legal analysis looking at what is truly at stake for Native Hawaiians in the Hawai'i Family Court. While a traditional analysis would view the high number of NHY in foster care at face value, this framework offers to look at "what's really going on" and digs deeper into how these numbers truly impact Native Hawaiians.[209] Such an analysis reveals how the Family Court could account for restorative justice and "the key dimensions of self-determination."[210]

IV. KĀNAKA MAOLI IN THE HAWAI'I FAMILY COURT TODAY

A. *Untangling the Statistics of Native Hawaiian Youth in Foster Care*

The Hawai'i Family Court was formally established under Hawai'i Revised Statute section 571, committing that "children and families whose rights and well-being are jeopardized shall be assisted and protected, and secured in those rights through action by the court."[211] Moreover, the statute clarifies that the court may implement an adaptive plan that is flexible to

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[205] 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, 201 (2001) (explaining that the histories recorded or written by non-native people often justify colonial conquest). Such history is often retold throughout time in a cyclical nature that eventually erases the narrative as experienced by native people. *Id.* This is something that, given the atrocities experienced by Native Hawaiians, one would hope could be avoided through the importance of self-governance. *Id.*

[206] *See* Johnson v. M'Intosh, 21 U.S. 543 (1823). An illuminating example is seen in the notorious *M'Intosh* case where the Indian people were described as "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest . . . to leave them in possession of their country." *Id. at* 590.

[207] *See id*.

[208] Sproat, *supra* note 27, at 181.

[209] *Id.*, at 171.

[210] *See id.*

[211] HAW. REV. STAT. § 571-1 (2024).

the needs of the minor child, families, and community in order to achieve the aforementioned quoted language.[212]

The Family Court has established several instances in which termination of parental rights to a minor is warranted, such as where a child is forcefully but legally removed from a parent's care because the parent is then, and in the foreseeable future, unable to provide care for the child.[213] In light of the prevalence of child abuse and neglect, the court enacted the Child Protective Act ("CPA") in 2010, aiming to prioritize the needs of children.[214] Under the CPA, the Family Court may hold a termination of parental rights hearing to examine whether or not such termination is necessary in order to provide for the best interest of the minor.[215] When determining if parental rights should be terminated, the court must decide if there is clear and convincing evidence that: (1) the parent is not currently able to provide the child with a safe family home, even with a service plan; (2) that the parent cannot, within a reasonable time (two years), provide the child with a safe family home, even with a service plan, and (3) that the proposed permanent plan is in the child's best interest.[216] Regardless of these factors, however, the Family Court has stated that the overall goal in such proceedings is reunification with the family rather than out-of-home placement.[217]

A recent study conducted in 2021 by Human Services of Hawai‘i found that there were 2,520 youth in the foster care system.[218] This represented a slight drop from the previous year, which was 2,679 youth, but fluctuations from 2017–2021 indicate that slight decline between years followed by marginal increases in other years is a normal pattern.[219] In 2021 alone, 944 youth entered the system, with the most frequent factors for the precipitating incident being: (1) unacceptable child-rearing methods (72.4%); (2) inability to cope with parenting responsibility (64.7%); and (3) drug abuse (35.9%).[220] In addition, the most prevalent ethnicity of youth with confirmed reports of abuse or neglect for the 2021 fiscal year were

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[212] *See id.* ("[C]ourt may formulate a plan adapted to the requirements of the child and the child's family and the necessary protection of the community, and may utilize all state and community resources to the extent possible in its implementation.").

[213] HAW. REV. STAT. § 571-61 (2023).

[214] HRS § 587A-2.

[215] HAW. REV. STAT. § 587A-33 (2024).

[216] *See id.*

[217] HAW. REV. STAT. § 587A-2 (2024).

[218] *Data Booklet*, *supra* note 13, at 24 52. 26.

[219] *See id.*

[220] *See id.*, at 10 fig. 4, 21.

NHY, making up 37.6%.[221] These startling statistics reveal that not only are general entry rates consistent overall, but that those with the highest entry rates are NHY, primarily due to unacceptable child-rearing methods.[222] This is opposed to the misconception that termination of parental rights occurs most often as a result of physical abuse of spouse (16 percent) or chronic family violence (15 percent).[223] In conjunction with having the highest entry rate, NHY hold the longest average length of stay in foster care and are being reunified with their ʻohana at an average of 4 percent to 11 percent less than that of non-Hawaiian youth.[224] The only silver lining is that the percentage of NHY entering the system has slightly decreased overall in recent years, with studies showing that from 2012 to 2016, the percentage of NHY entry rate was 49 percent to 50 percent, while from 2017 to 2020, the NHY entry rate was 40 percent to 44 percent.[225] This very slim decrease can be directly attributed to various independent programs that have launched over the years with their aim being to drastically reduce the NHY statistic.[226]

B. *Applying the Ecology of Human Development Theory*

1. Microsystem

In applying the EHDT to the Hawaiʻi Family Court, the first system to examine is the microsystem. This looks at how our current system affects the direct interactions children are experiencing.[227] In examining the general timeline of a child welfare case under Hawaiʻi Family Court,[228] one of the first points of contact experienced by the child and family as a whole would be by a Child Welfare Services ("CWS") caseworker.[229] However, these first interactions experienced by the child are often shocking and traumatizing.[230] Despite not many experiences being publicized, primarily

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[221] *Id.*, at 15 fig. 12.

[222] *See id*.

[223] *Data Booklet*, *supra* note 13, at 15 fig. 12, 10 fig. 4.

[224] *Id.* at 61-62.

[225] *Id.*

[226] *See id*.

[227] *See* Babb, *supra* note 19.

[228] Zoom interview with Laurie Tochiki, Executive Director, EPIC ʻOhana, (Dec. 21, 2022).

[229] *Guide to Child Welfare Services*, STATE HAW. DEP'T HUM. SERV. 1, 3 (2019), https://humanservices.hawaii.gov/ssd/files/2013/04/a-guide-to-child-welfare-final.pdf [https://perma.cc/74S2-GVPV].

[230] John Hill, *'You Need a Warrant!': Hawai'i's Dubious Practice of Taking Children Without a Court Order*, HONOLULU CIV. BEAT (Sep. 25, 2022),

due to confidentiality reasons, some parents have been open about their first experience with CWS.[231] These chaotic first encounters often occur, ironically, in the presence of the children that such interventions are designed to protect.[232]

2. Mesosystem and Exosystem

Shifting focus to the mesosystem requires attention to fostering healthy relationships between parental guardians and court officials of the Hawai‘i Family Court system.[233] When judging the exosystem, we analyze how external environments (not directly in contact with the child) influence the child's well-being; here, the exosystem might represent the interactions between entities of the court, GALs, and attorneys, that inadvertently influence the child.[234] Given the close proximity that both of these values share, they will be discussed together in this subsection.

The majority of the actions taken by both state and private entities attempting to redress the disparate number of NHY in foster care have funneled their resources into addressing these two particular ecological systems. One such program by EPIC ‘Ohana is their employment of ‘Ohana Conferences in 1989.[235] Open to all families (both Native Hawaiian and

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https://www.civilbeat.org/2022/09/you-need-a-warrant-hawaiis-dubious-practice-of-taking-children-without-a-court-order [https://perma.cc/7NG7-7FYS].

[231] *Id*. (telling the story of a mother who lost custody of her newborn child due to allegations by her estranged husband.) Jennifer Chapman recalls that an HPD officer knocked on her door announcing that he was there to take the child. *Id.* After Chapman refused his entry stating, "'You are not coming into my house. *Id.* You need a warrant!'" The officer grabbed her by the arm and threw her down. *Id.* Another officer took the baby and handed him over to the CWS caseworker present on scene. *Id.*

[232] *See generally* John Hill, *'You Need a Warrant!': Hawai'i's Dubious Practice of Taking Children Without a Court Order*, HONOLULU CIV. BEAT (Sep. 25, 2022), https://www.civilbeat.org/2022/09/you-need-a-warrant-hawaiis-dubious-practice-of-taking-children-without-a-court-order [https://perma.cc/7NG7-7FYS].

[233] Olivia Guy-Evans & Saul Mcleod, *Bronfenbrenner's Ecological Systems Theory*, SIMPLY PSYCH. (Jan. 17, 2024) [hereinafter *Ecological Systems Theory Simply Explained*], https://www.simplypsychology.org/Bronfenbrenner.html [https://perma.cc/8PSX-DDNX] (finding that healthy relationships and interactions amongst the child's mesosystem aids the positive development of a child). Using an example of a parent and teacher relationship, the mesosystem might find that, "if the child's parents and teachers get along and have a good relationship, this should have positive effects on the child's development, compared to negative effects on development if the teachers and parents do not get along.". *Id.*

[234] *See id.*

[235] Wilma Friesema, *'Ohana Conferences: A Collaborative Approach to Meeting the Needs of Abused and Neglected Children*, NAT'L. CT. APPOINTED SPECIAL ADVOC. ASS'N. (Oct. 2008), https://static1.squarespace.com/static/5e4e3d25708f9f32842ef13d/t/5e4f75a8ba1e4c4c5b2bcc77/1582265769274/Ohana+Conferencing++A+Collaborative+Approach+to+Meetin

non-Native Hawaiian), an ʻOhana Conference ("Conference") allows for an ʻohana undergoing case involvement to gather all whom they might find supportive to participate in a meeting where they discuss case goals and management.[236] The ground rules and procedure of a Conference rely strongly on principles similar to hoʻoponopono in order to ensure the ʻohana feel comfortable with talking about the sensitive issues at hand.[237]

Individuals may be required to participate in a Conference via their service plan or can voluntarily request one.[238] The Conference is open to invite upon parents' request only.[239] Examples of those often invited to a Conference are CWS caseworkers, attorneys, GALS, as well as family members like grandparents, siblings, or aunts and uncles; nevertheless, this invitation rests solely with the parents.[240] As hoʻoponopono was often mediated by the haku, Conferences are mediated by one individual (an EPIC ʻOhana facilitator) to set the tone for a neutral and organized quality discussion.[241] Conferences last between two to three hours in which the group will collectively talk about concerns, legal timelines, and to clarify expectations.[242] In addition to discussing upcoming steps, a Conference also aids parents in formulating a backup plan in terms of placement.[243] At the conclusion of a Conference, all parties are given a transcript of the meeting notes and the parents are given the option to schedule future Conferences.[244] ʻOhana Conferences provide an indispensable service to families in coordinating the future of their case; this planning has a clear impact for those families currently in the system.[245]

The formal establishment of ʻOhana Conferencing is not the only effective tool that has been employed to encourage a healthy ecological

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g+the+Needs+of+Abused+and+Neglected+Children.pdf [https://perma.cc/DA9Y-H8EM].

[236] *ʻOhana Conferencing*, EPIC ʻOHANA, INC. [hereinafter EPIC ʻOHANA], https://www.epicohana.org/ohana-conference [https://perma.cc/F9GP-UB5C] (last visited Apr. 22, 2023). The group may discuss things such as: Impending court hearings, required drug tests, important documents that may need to be submitted to the court, etc. *See id.*

[237] *See supra* Part II.C.

[238] *See supra* Part II.C; HAW. REV. STAT. § 587A-27 (2024).

[239] *See* EPIC ʻOHANA, *supra* note 236.

[240] *See id.*

[241] *See id.*

[242] *See id.*

[243] *See id.* (explaining that biological parents may opt to have other members of the family take on the parental rights of their child, should the court find them unable to meet the satisfactory requirements outlined).

[244] *See id*. Just as in hoʻoponopono, there are no "set" number of conferences. They may occur as regularly as the parents find necessary. *See id*.

[245] *See Data Booklet*, *supra* note 13, at 62-63; *Id.* at 39, fig. 54.

mesosystem for Native Hawaiian families. A progeny of the Queen Lili‘uokalani Trust,[246] Ka Pili ‘Ohana, is another community-based, culturally-grounded program that was first piloted on O‘ahu’s leeward[247] coast in 2019.[248] Ka Pili ‘Ohana works to support NHY in foster care by encouraging cooperative relationships between biological parents and CWS workers, increasing visitation with biological family, engaging the ‘ohana in culturally relevant activities, and aiding NHY and their ‘ohana to navigate the foster care system resources.[249]

Nā Kāma a Hāloa is a community-based network that was founded in 2018 with the goal of instilling a Native Hawaiian perspective into the Hawai‘i foster care system.[250] One such project by Nā Kāma a Hāloa has been the creation of a four-hour module that new hires for CWS caseworkers, as well as CWS contracted providers, must complete.[251] This four-hour module provides workers with some insight into the extended ‘Ohana and the importance of such familial ties in a Native Hawaiian context.[252] Nā Kāma a Hāloa shows definitive support to the exosystem and macrosystem in that it provides caseworkers with cultural sensitivity training that, in turn, affects NHY.[253]

In spite of the seemingly clear disconnect that is occurring between parental guardians and key players involved in the Hawai‘i Family Court, various initiatives have been deployed over the years to provide

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[246] *See generally* Avis Kuuipoleialoha Poai & Susan K. Serrano, *Ali‘i Trusts: Native Hawaiian Charitable Trusts*, *in* NATIVE HAWAIIAN LAW: A TREATISE 1171, 1196-202 (Melody Kapilialoha MacKenzie et al. eds., 2015) (elaborating on Hawai‘i’s last reigning monarch, Queen Lili‘uokalani and the trust that she established). The Trust was intended to be a “charitable trust for the benefit of orphans and other destitute Hawaiian children. *Id.*

[247] The term “leeward” is a sailing term that refers to the side of the island that is sheltered from downwind. For purposes of this paper, leeward refers to the west coast of O‘ahu.

[248] *Ka Pili ‘Ohāna Foster Care Program Launched*, LILI‘UOKALANI TR. (Feb. 2, 2019), https://onipaa.org/news/ka-pili-‘ohana-foster-care-program-launched [https://perma.cc/2AQQ-XRER].

[249] *See id*.

[250] *Nā Kama A Hāloa*, EPIC ‘OHANA, INC., https://www.epicohana.org/nakama [https://perma.cc/F9GP-UB5C] (last visited Apr. 22, 2023).

[251] Cheryl Tsutsumi, *New Cultural Training Seeks to Improve Outcomes for Child Welfare Cases*, KA WAI OLA (May 1, 2022), https://kawaiola.news/ohana-family/new-cultural-training-seeks-to-improve-outcomes-for-child-welfare-cases [https://perma.cc/LEK2-AYQF] (“Understanding fundamental Hawaiian values — aloha, ‘ohana, mālama, laulima, lōkahi and pu‘uhonua — is another pillar of the training. All are rooted in Hawaiian history and tradition.”).

[252] *See id*.

[253] *See id*.

assistance.[254] In fact, as a result of programs like those mentioned above, studies have shown a slight decrease in NHY entering foster care over the past four years.[255] From a strict analysis of improving the mesosystem and exosystem, Hawai'i Family Court does an adequate job. The programs currently in place strengthen the relationships of those encompassing the NHY's mesosystem and exosystem (i.e. guardians, family members, and court/state workers), and ensure that key individuals remains informed on the status of the case.[256] This corrective approach sufficiently does just that: aid those already entered into the foster care system.[257]

3. Macrosystem

The macrosystem looks at the specific culture and location in which the child is developing and how this could influence the child's upbringing.[258] Unlike the other systems discussed under EHDT, this system is unique in that "it does not refer to the specific developments of one developing child, but the already established society and culture which the child is developing in."[259] In light of the discussion about historical trauma to Kānaka Maoli thus far, the effectiveness of the macrosystem is easily disputed.[260] Although the islands of Hawai'i are home to Kānaka Maoli, the fact is that the coalescence of colonization and systemic racism has forced Kānaka Maoli to feel lost on their own 'Āina.[261] The issue of colonialism and its visible effects are not exclusive to Kānaka Maoli, however, indigenous people across the United States have struggled to adjust to the adversarial nature of our court systems.[262] The Hawai'i Family Court, through judicial precedents, has taken steps to improve the macrosystem of families involved by accounting for the unique culture and socioeconomic values that Hawai'i presents.[263] For example, in *Leong v. Takasaki*, the

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[254] *See id.; Nā Kama A Hāloa, supra* note 250.

[255] *Data Booklet, supra* note 13 ("It is encouraging to see that that the percentage of Native Hawaiian children entering foster care in the last four years (SFYs 2017-2020 ranging from 40 percent to 44 percent) is lower than it had been in the previous 5 years (SFYs 2012-2016 at 49 percent or 50 percent each year.").

[256] *See Ecological Systems Theory Simply Explained*, *supra* note 233.

[257] *Id*.

[258] *See id*.

[259] *See id*.

[260] *See* Coffey & Tsosie, *supra* note 205.

[261] *See id.*

[262] *See id.*

[263] *See* Leong v. Takasaki, 55 Hawai'i 398, 520 P.2d 758 (1974); Int. AB, 145 Hawai'i 498, 515 454 P.3d 439, 456 (2019); In re L.I., 149 Hawai'i 118, 482 P.3d 1079 (2021).

Hawai‘i Supreme Court formally recognized the term hānai[264] as an established relationship, regardless of direct blood relationship.[265] In light of *Leong*, the Hawai‘i Family Court then emphasized the role that a hānai parent has in *Interest of AB*.[266] There, the court granted hānai parents the ability to intervene in court hearings.[267] These are just a few instances in which the Family Court has taken a progressive stance to be inclusive of Native Hawaiian cultural terms and practices which does lend moderate support to the macrosystem.[268] These judicial precedents allow support for those undergoing active case involvement; however, they do little to deter potential future case introduction.[269]

From a surface-level analysis, the Hawai‘i Family Court does a sufficient job at addressing the ecological systems that surround a child and their ‘ohana, and ensures that these various relationships are best fostered given the circumstances. This piece now shifts into the therapeutic jurisprudence analysis employing the framework by Professor Sproat.

C. *Therapeutic Jurisprudence Through Sproat's Contextual Framework*

1. Cultural Integrity

The Hawai‘i Family Court currently does not consider the first value of Professor Sproat's framework because it does not sufficiently support and restore cultural integrity amongst NHY and their ‘ohana. In support of maintaining cultural integrity and identity, studies have shown that children brought up in households non-representative of their own culture have higher levels of child depressive symptoms, feelings of loneliness and dissatisfaction, and conduct problems in the new home shortly after

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[264] *See supra* Part III.B.

[265] Leong, 55 Hawai‘i 398, 520 P.2d 758 (reversing a circuit court decision that a mental distress claim suffered by a ten-year-old boy witnessing his step-grandmother's death was invalid). There, the court reasoned that, "requirement of a physical impact resulting in physical injury should not stand as artificial bar to recovery for negligent infliction of serious mental distress and the absence of blood relationship between victim and plaintiff witness should not bar recovery." *Id.*

[266] Int. AB, 145 Hawai‘i at 498, 454 P.3d at 456 (ruling that "when determining whether a person has asserted interest sufficient to intervene in child welfare proceedings, family court must consider any asserted hānai relationships as factor weighing in favor of intervention.").

[267] *See id.*

[268] *See also* In re L.I., 149 Hawai‘i 118, 482 P.3d 1079 (holding that courts must appoint counsel for indigent parents when DHS files for petition for family supervision and that a three-month delay in appointing counsel was a structural error).

[269] *See* Leong, 55 Hawai‘i 398, 520 P.2d 758; Int. AB, 145 Hawai‘i 498, 515 454 P.3d 439, 456; In re L.I., 149 Hawai‘i 118, 482 P.3d 1079.

placement.[270] Data has shown that although the rate at which NHY and non-NHY are emancipated[271] from the system is comparable at about 7 percent to 9 percent, the rate at which reunification occurs is poorer for NHY.[272] For example, in 2021, the reunification rate for NHY was 40 percent, while for non-NHY, it was 58 percent.[273] This data indicates that at a steady rate, NHY are being returned to their ʻohana at a significantly lower rate than others.[274] As a result, it could be inferred that the cultural values and traditions that should be passed down are too being lost.[275]

The role of ʻohana to educate keiki about cultural and traditional values has always been at the core of Kānaka Maoli upbringing.[276] The kūpuna taught the keiki essential activities such as how to fish, raise taro, and proper behavior under Kapu.[277] The kūpuna also provided invaluable training to a selected keiki, often the hiapo, about the family's particular traditions and acted as a "living history book."[278] By passing on the family's knowledge through this method, the ʻohana's particular traditions and genealogy would be preserved.[279] Based on the keiki's respective gender,

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[270] Maurice Anderson & L. Oriana Linares, *The Role of Cultural Dissimilarity Factors on Child Adjustment Following Foster Placement*, 34 CHILD. & YOUTH SERV. REV. 1, 7 (2012).

> Results showed that cultural mismatch between foster children and their caregivers has measurable negative effects on self-reports of child internalizing symptoms and foster parent reported level of child externalizing problems. The study suggests that ethnic dissimilarity largely contributes to child symptoms (i.e., internalizing) experienced following initial placement. For depressive symptoms and loneliness and social dissatisfaction outcomes, dissimilar ethnicity between biological and foster parent surfaces is detrimental perhaps because they create in the displaced child a lack of belongingness which reduced the child's ethnic identity and social connectedness to the foster home.

[271] *Data Booklet*, *supra* note 13, at 61-62. Here, the term "emancipation" refers to a child aging out of foster care at the age of eighteen.

[272] *See id*.

[273] *See id*. This is not an outlier, over the course of the past five years the average reunification rate for NHY has been between 4 to 11 percent lower than non-NHY. *See id.* at 61-62.

[274] *See id.*

[275] *See id.*

[276] *See* NĀNĀ I KE KUMU, *supra* note 9, at 168.

[277] *See id.*

[278] *See id*.

[279] *See id*.

they would learn about everyday work from either parent and other adults within the ʻohana to support the overall system of ahupuaʻa.[280]

Today, recent studies have revealed that Hawaiian mothers were found to be more important in transmitting knowledge of folklore, and fathers were more important in transmitting beliefs related to activities.[281] Similarly, NHY relayed that they often learned the most about lifestyle knowledge from siblings, aunts, uncles, and grandparents.[282] Some of the probative questions asked were, "How much do you value Hawaiian beliefs, behaviors, and attitudes?" and "How important is it to you to maintain Hawaiian cultural traditions?"[283] Across the board, children who had both parents with Native Hawaiian ancestry reported significantly higher averages in all measures[284] than those with only one parent of Hawaiian ancestry.[285] This provides insight supportive of keeping NHY with guardians of Native Hawaiian ancestry in order to further their cultural integrity and improve overall well-being.

Given the grim entry and reunification statistics with NHY, the importance of cultural integrity is not being adequately addressed. In a contextual legal inquiry involving indigenous peoples, it is an absolute necessity to weigh the cultural impacts that are at play.[286] NHY in Hawaiʻi represent the lowest statistic for reunification; this bars NHY from the greatest asset in maintaining their cultural integrity–ʻohana.[287] Recent studies have shown when NHY are not reunified with their family, the most common placement (an average of 38.4 percent) is a non-relative family with neither parent having Native Hawaiian or Pacific Islander blood.[288]

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[280] *See id*.

[281] ʻIwalani R. N. Else et al., *The Role of Native Hawaiian Mothers and Fathers in Conveying Traditional Hawaiian Beliefs and Practices to Children*, *in* 4 HŪILI: MULTIDISCIPLINARY RSCH. ON HAWAIIAN WELL-BEING 94, 101 (2007). The study conducted in 2007, took a sample of 1,233 male and 1,374 female Hawaiian participants ranging from 9th to 12th grade. *See id*. Participants were given a health survey; the survey was a forty-five-minute self-report questionnaire consisting of demographic, help-seeking, cultural, and psychiatric measures and was developed in collaboration with the National Center for American Indian and Alaska Native Mental Health Research. *See id*.

[282] *See id*.

[283] *See id.* at 97-99.

[284] *See id.* at 96-97 (referring to the Hawaiian Culture Scale that was constructed based on information provided by several Hawaiian participant focus groups. These groups included kūpuna and Native Hawaiian educators.).

[285] *See id*.

[286] *See* Sproat, *supra* note 27, at 178.

[287] *See supra* Part II.B.

[288] Joyce Y. Lee et al., *Native Hawaiian and Pacific Islander Children in Foster Care: A Descriptive Study of an Overlooked Child Welfare Population*, 141 CHILD. & YOUTH SERV. REV. 1, 8-9 (2022).

The Hawai'i Family Court is failing to perpetuate cultural integrity by not only disparately removing NHY from their 'ohana, but also placing them with non-Native Hawaiian families and, thus, supporting the false script that colonization provided requisite support to Native Hawaiians.[289]

2. Land and Natural Resources

Although this value may not be as pertinent as other values to the discussion at hand, the significance of land and natural resources to Kānaka Maoli must still be discussed. The 'Āina was representative of far more than just the physical aspects of land and ocean.[290]To Kānaka Maoli, 'Āina also had spiritual and psychological aspects.[291] These principles materialized through the care-taking of the 'Āina; historical accounts often attribute Kānaka Maoli as being mindful of their use of resources for fear of both depleting resources and upsetting the spiritual world.[292] With these strong ties linking 'Āina to other values of Kānaka Maoli self-determination, the argument for maintaining Kānaka Maoli youth on their native lands holds water. From a broader perspective, data has shown that displacement from one's indigenous land has a significant physical and mental toll on a person and compromises subjective emotional states such as happiness, self-satisfaction, or general well-being.[293]

Hawai'i specific data makes it clear that pending termination of parental rights hearing, NHY are more likely to be placed out of home in

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[289] *See* Coffey & Tsosie, *supra* note 205, at 288.

[290] Tuteur, *supra* note 174, at 75

[291] Laurie D. McCubbin & Anthony Marsella, *Native Hawaiians and Psychology: The Cultural and Historical Context of Indigenous Ways of Knowing*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 374, 376 (2009) ("Psychological *'aina* is related to mental health, particularly in regard to positive and negative thinking. Spiritual *'aina* speaks to daily relationships between Native Hawaiians and the spiritual world. Traditionally, the spiritual world has been—and continues to be—a source of great guidance and strength for Native Hawaiian people.").

[292] Paul F. Nahoa Lucas, *No Ke Ola Pono o ka Lāhui Hawai'i: The Protection and Perpetuation of Customary and Traditional Rights as a Source of Well-Being for Native Hawaiians, in* 1 HŪILI: MULTIDISCIPLINARY RSCH. ON HAWAIIAN WELL-BEING 197, 199-200 (2004).

[293] Jeffrey G. Snodgrass et al., *The Mental Health Costs of Human Displacement: A Natural Experiment Involving Indigenous Indian Conservation Refugees*, 2 WORLD DEV. PERS. 25, 31-32 (2016) (discussing a study done on the indigenous Sahariya tribe of India, in which the tribe members were forcibly displaced by the state). The tribe was examined prior to the move and after the move, looking at a variety of factors ranging from mental function, to physical health. *Id.* The findings revealed that after the displacement the Sahariya tribe members experienced generally improved food and water security. *Id.* Nevertheless, regardless of this newfound security, mental and physical overall health had deteriorated. *Id.* It was not just increased rates of depression, but the displacement affected "the highest states of mental functioning—such as happiness, life satisfaction, and the like—cannot be fully reduced to physical and material health or other variables. *Id.*

comparison to their non-NHY counterparts.[294] In looking at discharge rates from foster care for NHY, perhaps the most revealing statistical difference between NHY and non-NHY are the rates at which they are adopted and reunified with their parents.[295] From 2017 to 2021, NHY were adopted out of foster care on average 6 percent more than non-NHY, and were reunified with their parents at about 10 percent less than non-NHY.[296] Not enough studies have been conducted regarding the background of foster placement in terms of ethnic identity or cultural practice; however, it was estimated in 2021 that about 45 percent of foster parents reported being at least part Native Hawaiian.[297] Nonetheless, there is no provision or safeguard implemented by the Family Court to ensure that NHY are appointed Native Hawaiian foster parents.[298] In summary, NHY are more likely to be adopted out of foster care, and less likely to be reunified with their biological parents.[299] This results in NHY being raised in foreign homes, which severs the religious and cultural ties that their connection to ʻĀina so preciously holds.

3. Social Welfare

In looking at the value of social welfare through a Kānaka Maoli lens, it is essential to judge the Hawaiʻi Family Court in light of what it has done to improve the health, education, and living standard of families in the system. Hawaiʻi Revised Statutes Section 571-1 outlines the creation of a system of family courts within Hawaiʻi, stating the chapter's purpose is to:

> [B]e liberally construed to the end that children and families whose rights and well-being are jeopardized shall be assisted and protected, and secured in those rights through action by the court; that the court may formulate a plan adapted to the *requirements of the child and the child's family* and the necessary protection of the community, and may utilize all state and community resources to the extent possible in its implementation.[300]

Although on the surface it would appear that the Hawaiʻi Family Court has

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[294] *See Data Booklet*, *supra* note 13, at 40 fig. 55.

[295] *Id.*

[296] *See id.*

[297] *See* Anita Hofschneider, *Racial Disparities Vex Hawai'i's Child Welfare System. Can They Be Fixed?*, HONOLULU CIV. BEAT (Dec. 12, 2022), https://www.civilbeat.org/2022/12/racial-disparities-vex-hawaiis-child-welfare-system-can-they-be-fixed [https://perma.cc/JF7F-4FKY].

[298] *See id*.

[299] *See id*.

[300] HAW. REV. STAT. § 571-1 (2024).

provided a roadmap to ensure the social welfare of Kānaka Maoli families through inclusive programs like ʻOhana Conferencing, Nā Kāma a Hāloa, and Ka Pili ʻOhana (to name a few), these are programs that offer help post-entry.[301] The lives of affected Kānaka Maoli families are turned on their heads once CWS becomes involved; children are taken from the home, and, at their first hearing, parents are given services to complete throughout the duration of their case.[302] It is at this point that Kānaka Maoli parents are given access to programs like ʻOhana Conferences.[303] These parents are then required to appear at periodic review hearings for the duration of their case, which could last for up to two years.[304]

What these programs offer is really an attempt to level the playing field in order to make it manageable for Kānaka Maoli to stay afloat in the Hawaiʻi Family Court. Executive Director of EPIC ʻOhana, Laurie Tochiki, questioned, through the metaphor of a house: At what point, in relation to the house, should services be rendered?[305] When people are at the door? (representative of a case that is on the cusp of requiring CWS involvement).[306] Or perhaps closer to the yard or sidewalk, which might be indicative of a family that poses a mere risk for CWS involvement.[307] And finally, "the road," which would be the common family.[308] The reality of the Family Court system presently is that parents are only being provided aid once they have passed through the door.[309] Given what is at stake during these court proceedings, this intervention comes far too late to provide any substantial positive outcomes.

Upon entering the "door" of CWS involvement, children statistically face a plethora of issues that threaten their social welfare.[310] In addition to increased risk for emotional, behavioral, and health issues, CWS involvement alone has been linked to diminished participation in school and extracurricular activities.[311] No studies have been conducted as to the

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[301] *See* EPIC ʻOHANA, *supra* note 236; *Nā Kama A Hāloa*, *supra* note 250.

[302] Hill, *supra* note 1; *Guide to Child Welfare Services, supra* note 229, at 6.

[303] *See Guide to Child Welfare Services, supra* note 229, at 6.

[304] *See id.* at 8.

[305] *See* Zoom interview with Laurie Tochiki, *supra* note 228.

[306] *See id.*

[307] *See id*.

[308] *See id*.

[309] *See id.*

[310] Katherine Kortenkamp & Jenna Ehrle, *The Well-Being of Children Involved with the Child Welfare System: A National Overview*, 43 URBAN INST. 1, 2 (2002).

[311] *Id.* at 2-4.

correlative effects on NHY, but data has shown that the aforementioned risks are further exacerbated in children belonging to minority groups.[312]

Another danger upon entry into Family Court is foster care, which can occur concurrently throughout one's CWS case or at the conclusion should parents' parental rights be terminated.[313] As discussed in Part IV.A., NHY are more likely to enter foster care and tend to have longer stays in foster care than their non-NHY counterparts.[314] The effects of foster care on youth are staggering: youth that have experienced any form of foster care are seven times as likely to experience depression, five times as likely to experience anxiety, three times as likely to have attention deficit disorder, hearing impairments, or vision issues, and twice as likely to suffer from learning disabilities.[315]

Hawai'i Family Court system provides aid to Kānaka Maoli 'ohana at a point that is not conducive to providing a positive outcome. 'Ohana are being swallowed up into Family Court and NHY are being negatively impacted as a result. This in turn feeds the cyclical and systemic issues that Kānaka face today.[316]

4. Self-Governance

The Hawai'i Family Court does not meaningfully address this final value as it does not redress the loss of self-governance. Rather, it would appear that the Family Court supports dependance by Kānaka Maoli on the State of Hawai'i. An example is seen under the CPA, which specifies that the Court's main goal is to ensure the safety and health of children who have been harmed or are in life circumstances that threaten them.[317] The language of the statute's "purpose; and construction" chapter might lead one to believe that self-governance efforts would be supported, however, an

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[312] Shereen White & Stephanie Marie Persson, *Racial Discrimination in Child Welfare is a Human Rights Violation –Let's Talk About it That Way*, AM. BAR ASS'N (Oct. 13, 2022), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2022/fall2022-racial-discrimination-in-child-welfare-is-a-human-rights-violation.

[313] *Guide to Child Welfare Services, supra* note 229, at 3-6.

[314] *Data Booklet*, *supra* note 13, at 61-62; *See also supra* Part IV.A.

[315] *Study Shows Foster Care is Bad for Your Health*, CHILD. HOME SOC'Y MINN. & LUTHERAN SOC. SERV. MINN. (Oct. 19, 2016), https://chlss.org/blog/study-shows-foster-care-is-bad-for-your-health [https://perma.cc/3A7T-CAWL].

[316] Noreen Mokuau, *The Impoverishment of Native Hawaiians and the Social Work Challenge*, 15 HEALTH & SOC. WORK 235, 237 (1990) (discussing some of the welfare issues that Native Hawaiians face today such as: lower life expectancy, poorer mental health, and general lower health status). These can be attributed to many things, but as the journal points out, a recurring explanation is the "cultural change and modernization have led to stresses that are all too often the precursors of the health and mental health problems evident today. *Id.*

[317] HAW. REV. STAT. § 587A-2 (2024).

important caveat distinguishes that such cultural considerations are subjectively applied and are limited to service plans.[318] These service plans are only administered upon acceptance to jurisdiction by the Court, which in turn subjugates Native Hawaiians to the United States' control.[319] Kānaka Maoli hailed to appear before the court have no choice but to yield to jurisdiction, should they want a chance at reunification with their children; once entry is made, it is the Family Court that decides what culturally appropriate services (if any) are administered.[320]

An analogous example of the issues of self-governance experienced by Kānaka Maoli might be the various Native American tribes throughout the United States. However, unlike Kānaka Maoli, Native Americans have been given important legislative tools that enable them to pursue self-governance. Under the Recognized Indian Tribe List Act, [321] Native American tribes are granted federal recognition; in addition to being seen as a "domestic dependent nation," federal recognition allows Native American tribes to maintain a government-to-government relationship with the United States.[322] On its face, federal recognition would seem to plainly allow Native American tribes to practice a form of self-governance in constructing and monitoring their own legal systems, schools, and other government functions without interference by the United States Government.[323] A contextual legal analysis, however, reveals "what's really going on" and the inherent power imbalance of this relationship.

The Supreme Court in *Morton v. Mancari* established the "special relationship" between federally recognized tribes and the United States, finding that any program or statute that gives unfair treatment to Native Americans involved a political, not racial, preference.[324] Then, in *Lyng v.*

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[318] *See id*. The language being "Full and careful consideration shall be given to the religious, cultural, and ethnic values of the child's legal custodian when service plans are being discussed and formulated." *Id*.

[319] *See id*.

[320] *See id*.

[321] Federally Recognized Indian Tribe List Act of 1994, Pub. L No. 103-454,108 Stat. 4791.

[322] *Frequently Asked Questions About Native American*, OFF. TRIBAL JUST. (Oct. 6, 2022), https://www.justice.gov/otj/about-native-americans [https://perma.cc/3RJ3-XPY3].

[323] James Ennis Street, *Federal Recognition of Native American Tribes in the United States and the International Right to Self-Determination: Why Congress Should Exercise its Constitutional Authority to Federally Recognize the Lumbee Tribe*, 33 DUKE J. COMPAR. & INT'L L. 121, 122 (2023).

[324] *See* Justin L. Pybas, *Native Hawaiians: The Issue of Federal Recognition*, 30 AM. INDIAN L. REV. 185, 186 (2005); Morton v. Mancari, 417 U.S. 535, 541–42 (1974). In *Morton,* non-Indian employees of the Bureau of Indian Affairs (BIA) argued that a BIA preference for Indians violated the equal protection clause under Due Process of the Fifth

International Union, the Court ruled that under the Equal Protection Clause, a law that does not involve a racial classification would be justified so long as it surpassed the low bar of rational basis, that is, that the law must be "rationally related to a governmental interest."[325] Thus, through federal recognition, Native Americans have altered how the Supreme Court interprets statutes and legislation relating to their people, specifically through the use of rational basis, making it easier for such aid and preferential treatment to pass muster.[326]

The Indian Child Welfare Act ("ICWA") was adopted in 1978 in light of federal recognition and has been a powerful family court addition that amplifies self-determination pursuits for Native Americans. [327] Although ICWA has many functions, its main purpose is to give Indian tribes jurisdiction over custody proceedings involving children of Indian blood; this gives tribes the right to intervene and make suggestions when it comes to out-of-home placement, both temporary and permanent.[328] ICWA was constructed in response to, much like the current issue in Hawai'i with NHY, the disparate number of Indian children within the family court system.[329] Data has shown that ICWA has had a tremendous impact on the Indian child statistic within family court: in 1975, the average state foster care placement rate was 32.38 per 1,000 Indian children, compared to 1986, when the average state foster care placement rate decreased dramatically, to 17.50 per 1,000 Indian children.[330] Adoption rates for Indian children in 1975 were 2.61 per 1,000 Indian children as compared to 0.81 per 1,000 for non-Indian children. When re-analyzed in 1986, the rate was identical for

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Amendment. *See id*. Ultimately, the Supreme Court concluded that given the "special relationship" or status of Native Americans as a federally recognized tribe, there was no racial preference. *See id*. Rather this was a political preference, meaning that a rational basis test would be applied instead of strict scrutiny. *See id*.

[325] *See* Lyng v. Int'l Union, 485 U.S. 360, 374-75 (1988). Here, Congress amended the Food Stamp Act effectuating that workers who participated in strikes would not be eligible for government assistance through food-stamps. *See id*. The Court applied rational basis because it involved a political classification as opposed to a racial classification. *See id*.

[326] *See* Pybas, *supra* note 324.

[327] *See* Pybas, *supra* note 324.

[328] 25 U.S.C. § 1911 (1978); *ICWA History and Purpose*, MONT. DEP'T PUB. HEALTH & HUM. SERV., https://dphhs.mt.gov/cfsd/icwa/icwahistory [https://perma.cc/S5WQ-S5QR] (last visited, Apr. 22, 2023).

[329] *ICWA History and Purpose*, *supra* note 328 ("…prior to the passage of ICWA, approximately 75%–80% of Indian families living on reservations lost at least one child to the foster care system. Child Welfare agencies were often ignorant, indifferent of or insensitive to cultural differences in child rearing and parenting practices and, as a result, many unnecessary, and unwarranted, foster and adoptive placements were made.").

[330] *See* Ann E. MacEachron et al., *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451, 457-58 (1996).

both Indian and non-Indian children at around 0.29 per 1,000 children.[331] Finally, in 1975, it was found that, on average, 25% of Indian foster care children were placed in Indian foster care homes, whereas in 1986, 51% of Indian foster care children were placed in Indian foster care homes.[332] This data is reflective that ICWA effectuated change in the number of Indian children being placed in foster care but also aided those that did get admitted by keeping more of them in placements that would be supportive of their cultural background (i.e., Indian foster care homes).[333]

ICWA is not without fault, however, and has come under criticism in recent years. In *Brackeen v. Haaland*, a white couple (the Brackeens) in Texas fostered a Native American minor (A.L.M.) and sought to adopt him upon termination of the biological parents' rights.[334] Concurrently, a Navajo Nation social worker located an unrelated tribal family willing to permanently adopt A.L.M. and a dispute arose as to which family should have preference; the Brackeens argued that they had raised the child for sixteen months, acting as his only known family therefore they should have preference, whereas the Navajo Nation opposed this placement under the child's Navajo blood and guidelines under ICWA.[335] The Court granted the Brackeens' petition, finding that ICWA violated the Texas Constitution.[336] The decision has since been challenged, and the United States Supreme Court granted *certiorari* with oral arguments concluding on November 9, 2022.[337] Should the Court find ICWA unconstitutional, it would muzzle the vested sovereign powers that Native Americans were once offered through federal recognition.[338] On the other hand, if the Supreme Court upholds ICWA as valid law, the sovereign powers afforded through federal recognition will supply the "bite" that indigenous peoples so desperately need.[339]

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[331] *See id.*

[332] *See id.*

[333] *See id*.

[334] *See* Brackeen v Haaland, 994 F.3d 249, 252-53 n.15 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (U.S. Feb. 28, 2022) (No. 21-376).

[335] Joshua Rhett Miller, *Couple in Native American Adoption Supreme Court Fight: Losing Our Kid Would be an 'Earthquake'*, N.Y. POST (Nov. 10, 2022, 9:30 PM), https://nypost.com/2022/11/10/couple-reveal-native-american-adoption-supreme-court-fight [https://perma.cc/7VYB-Y235].

[336] *See id*.

[337] Oral Argument, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376), https://www.supremecourt.gov/oral_arguments/audio/2022/21-376.

[338] *See* Brackeen v Haaland, 994 F.3d 249, 252-53 n.15 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (U.S. Feb. 28, 2022) (No. 21-376).

[339] Since the publication of this piece, the Supreme Court in a 7-2 decision has

Nevertheless, Kānaka Maoli are not currently offered programs or protections like those provided under ICWA, primarily because they have not yet been federally recognized.[340] Without federal recognition, Kānaka Maoli are viewed as a "racial group," which subjects them to the Equal Protection Clause strict scrutiny standard.[341] Under this standard, the courts have been likely to strike down programs that benefit Native Hawaiians as illegal racial discrimination or "preferences."[342] A clear example was seen in *Rice v. Cayetano*, where the Supreme Court applied a formalist view in their decision that limiting OHA's election of trustees to Native Hawaiian voters was a violation of the Fifteenth Amendment.[343] There, the Supreme Court based its decision on a framed history of Hawai'i that fit their agenda; the Court "blurred the lines between indigenous Maoli and Rice's ancestors (American Colonists) [in finding] that ancestry was a 'proxy for race.'"[344] Rather than leaning on a "special relationship" like that found in federally recognized Native American tribes and applying a contextual analysis that might have been sympathetic to Native Hawaiians, the Court conveniently likened ancestral identification to racial discrimination.[345]

Within the Kānaka community, differing opinions have clashed over the potential federal recognition of Native Hawaiians. On one side are those, like legal scholar Davianna Pomaika'i McGregor,[346] who believe federal recognition could be an "essential first step towards complete sovereignty of Native Hawaiians."[347] From a contextual point of view, Kānaka have argued that recognition would permit establishing a government that would

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upheld ICWA as constitutional. https://www.supremecourt.gov/opinions/22pdf/21-376_7l48.pdf

[340] Keli'i Akina, *Federal Recognition of Hawaiian Sovereignty: One People, Many Views*, 18.2 (Feb. 1, 2023), https://kawaiola.news/oha/trustees/federal-recognition-of-hawaiian-sovereignty-one-people-many-views [https://perma.cc/9HNJ-2GKR].

[341] *See* Sproat, *supra* note 27, at 169-70. The strict scrutiny standard is often coined the highest standard of review and requires that the law be passed to "further a compelling governmental interest." *See id*.

[342] *See id*.

[343] Rice v. Cayetano, 528 U.S. 495, 518-24 (2000); *see* Sproat, *supra* note 27, at 169-70. The Office of Hawaiian Affairs ("OHA") is a "state agency established to combat the lingering effects of colonization on Hawai'i's indigenous people and to create better conditions for them." Sproat, *supra* note 27, at 169-70.

[344] Sproat, *supra* note 27, at 159.

[345] *See id.*

[346] Professor Davianna Pomaika'i McGregor is a Hawaiian historian and founding member of the Department of Ethnic studies at the University of Hawai'i at Mānoa as well as the director of the Center of Oral History.

[347] *See* Cecily Hilleary, *Native Hawaiians Divided on Federal Recognition*, VOA NEWS (Feb. 7, 2019, 8:43 AM), https://www.voanews.com/a/native-hawaiians-divided-on-federal-recognition/4775275.html [https://perma.cc/39EE-XQLF].

better foster self-determination and the particular needs of Kānaka.[348] Through this creation, Hawai'i would become a self-governing entity that "may have leverage to negotiate with state and federal entities to pursue policies that prioritize the general well-being of the Native Hawaiian community."[349] Those in opposition argue that federal recognition would further divide the already dismembered lāhui.[350] For example, uncertainties might arise, such as which Native Hawaiian entity should take the lead in these sovereignty movements and what such movements would look like.[351] There is also the discussion of blood quantum and how federal recognition would perpetuate this western tool of segregation through guidelines or requirements.[352] In light of the pending *Brackeen* opinion, some have argued that federal recognition fails to offer any substantial power and that the Native Hawaiian people would still be subjected to United States control.[353] Valid arguments are raised on both sides of federal recognition; however, Native Hawaiians presently have no such statutes or special relationship with the United States government.[354]

Without such recognition, the United States has made it clear that indigenous people do not have the political relationship that would enable them to form sovereign entities.[355] Without an alternative to the current Family Court system, Kānaka Maoli have no option but to submit to jurisdiction in a court system that perpetuates the historical conditions imposed by colonizers (here, the United States).[356]

In concluding this framework analysis, the efforts of both Professor Babb and Sproat have provided invaluable insight as to what really makes a successful family court system. The Hawai'i Family Court does provide moderate relief to NHY in looking at the first prong of ecological

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[348] *See* Akina, *supra* note 340.

[349] *See id*.

[350] Sproat, *supra* note 27, at 184.

[351] *See* Akina, *supra* note 340.

[352] *See* Rona Tamiko Halualani, *Purifying the State, State Discourse, Blood Quantum, and the Legal Mis/Recognition of Hawaiians*, *in* BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES 141, 142-43 (David Theo Goldberg et al. eds., 2001) (explaining how "blood quantum" was first used officially in the Native Hawaiian context under the Hawaiian Homes Commission Act of 1921, where only those with 50% or more Native Hawaiian blood were eligible to receive benefits. It is important to recognize that such distinction in the Native Hawaiian context was never made previously; blood quantum to establish the "Hawaiianess" of someone was not a traditional Native Hawaiian practice).

[353] *See* Brackeen v. Haaland, 994 F.3d 249, 252-53 n.15 (5th Cir. 2021), *aff'd in part, vacated in part, rev'd in part*, 599 U.S. 255 (2023).

[354] *See* Akina, *supra* note 340.

[355] *See* Sproat, *supra* note 27, at 173.

[356] *Id.*, at 184.

developmental systems.[357] Many specialized programs like ʻOhana Conferencing and Nā Kāma a Hāloa are gaining traction in reducing the active number of NHY in foster care by ensuring the systems of interaction are appropriately equipped with cultural knowledge and understanding. However, the second prong of therapeutic jurisprudence is where the Hawaiʻi Family Court ultimately flounders. Given the deep historical trauma experienced by Kānaka Maoli, this prong holds exceptional weight. In spite of the special programs previously mentioned, Kānaka Maoli youth are still being removed from their homes at a higher rate than any other demographic.[358] The Hawaiʻi Family Court has not provided any significant relief to improve Kānaka Maoli self-determination efforts.[359] Therefore, the therapeutic jurisprudence prong is not adequately addressed.

V. SOLUTION THROUGH A NATIVE HAWAIIAN CULTURAL COURT

With the many demands of Kānaka Maoli families in family court, one proposed solution has been the implementation of a Native Hawaiian Cultural Court ("Cultural Court").[360] This concept would encompass culturally appropriate solutions to address Kānaka Maoli families; in a way, it would act similarly to ICWA, with the Cultural Court taking jurisdiction over the family upon an initial report of child endangerment.[361] With jurisdiction, the reported family would be dealt with by a court of Kānaka Maoli, whose goal would be to aid the affected family. Although this aid might come in many forms, the concept would pull upon principles of hoʻoponopono, as the family and court work together to find the root of the problem and address it accurately to ensure a safe family home for the child.[362]

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[357] *See supra* Part IV.B and Part I.V.C.

[358] *Data Booklet*, *supra* note 13, at 32 fig. 52.

[359] *See supra* Part IV.C.4.

[360] Zoom Interview with Kamanaʻopono M. Crabbe, Chief Executive Officer, Office of Hawaiian Affairs (Feb. 9, 2023).

[361] *See Guide to Child Welfare Services, supra* note 229. In child welfare actions, once the first report of abuse is noted, the case will be sent to either Volunteer Case Management or referred to the Hawaiʻi Family Court for review ("VCM"). *See id*. With my proposed court, rather than families being diverted to VCM or Hawaiʻi Family Court, upon a finding of Kānaka Maoli ancestry, the family would be directed to Native Hawaiian Cultural Court.

[362] HAW. REV. STAT. § 587A-7 (2024). For a complete list of factors that the Court considers when deciding if the home is minimally safe for a child to be reunified at the family home. *See id*.

A. *Foundation for a Cultural Court Via Circle Sentencing: Historical Overview*

A model system that might serve as a mold for this proposed cultural court might be "Circle Sentencing" ("Circle"), originally started in Canada in 1992 for criminal convictions.[363] Much like the Kānaka Maoli of Hawai'i, the Aboriginal people of Canada [364] have faced similar statistics of incarceration rates: Aboriginal adults are incarcerated more than eight times the national rate, and the over-representation of Aboriginal youth in the criminal justice system parallels this shocking fact.[365] Judge Barry Stuart first implemented Circle Sentencing in the case of twenty-six-year-old Philip Moses, an Aboriginal male convicted of theft with a record consisting of forty-three prior convictions.[366] There, the hearing began as normal with opening statements by the judge and counsel present. [367] Unlike the traditional adversarial setting our courts are accustomed to, the seats were arranged in a circle of thirty or so chairs.[368] One by one, those in attendance introduced themselves and spoke about the issue at hand, primarily "what might best protect the community and extract Philip from the grip of alcohol and crime."[369] The informal discussion eventually culminated in an agreed-upon punishment: a suspended sentence with a two-year probation order and a three-stage review plan that would aid Moses' reintegration.[370]

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[363] Peggy Dwyer, *Sentencing Aboriginal Offenders: The Future of Indigenous Justice Models*, 29 SYSTEM 30, 36 (2004).

[364] *Indigenous People and Communities*, GOV. CAN., https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303 [https://perma.cc/P55C-JZ4U] (last visited Apr. 22, 2023) ("'Indigenous peoples' is a collective name for the original peoples of North America and their descendants"). Often, "Aboriginal peoples" is also used. *See id*. The Canadian Constitution recognizes three groups of Aboriginal peoples: Indians (more commonly referred to as First Nations), Inuit and Métis. *See id*. These are three distinct peoples with unique histories, languages, cultural practices and spiritual beliefs. *See id*.

[365] *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*, GOV'T CAN. (Jan. 20, 2023), https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/p3.html [https://perma.cc/6YHC-F7NK].

[366] Hugh J. Benevides, *R. v. Moses and Sentencing Circles: A Case Comment*, 3 DALHOUSIE J. LEGAL STUD. 241, 242-43 (1994) ("In Stuart, J.'s opinion, this was an appropriate case for a sentencing circle, not because there were high hopes for a successful rehabilitation of the offender, but because no other options had worked. In the judge's words, 'what would be lost in trying?'").

[367] R v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) http://ilclegalpleadings.usask.ca/islandora/object/legal%3A685 [https://perma.cc/3PAQ-W5NS].

[368] *See id*. at 356 (explaining that by promoting "equal access and exposure to each other, the dynamics of the decision-making process were profoundly changed.").

[369] *See id*.

[370] *See id.* ("The tone was tempered by the close proximity of all participants. For

Today, Circle Sentencing is still utilized primarily in cases that warrant severe community intervention, with exceptions to those convicted of a strictly indictable offense (i.e., sex offenses).[371] As in *R. v. Moses*, Circle Sentencing is open to the community, hosting anywhere from fifteen to fifty participants.[372] These sessions will typically consist of two separate meetings, each lasting about two to four hours.[373] After the first meeting, the offender is provided a set of goals to work on and the group reconvenes weeks or months later to assess progress; then, the final sentence with recommendations from the circle sentencing is given.[374]

Circle Sentencing has since been attempted by a variety of other jurisdictions like the trial done in 2002 in Nowra, New South Wales.[375] There, an identical model to that originally conducted in 1992 was followed in an attempt to find a more effective way to deal with repeat Aboriginal offenders.[376] A total of thirteen Aboriginal offenders were selected, all having plead guilty to multiple offenses.[377] Upon the completion of the Circle Sentencing, the initial reaction by offenders was highly emotional, as one stated, "everyone was so overwhelmed . . . it was so emotional. I went straight home and my solicitor rang me to see how I was . . . it felt so good to have so many people concerned about me . . . it made me think."[378] Victims who participated in the Circle Sentencing related similarly, finding that being able to confront the offender and talk about what happened provided them with a sense of relief.[379] As a part of the trial experiment, offenders and Circle participants were checked on at various points via

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the most part, participants referred to each other by name, not by title. While disagreements and arguments were provoked by most topics, posturing, pontification, and the well worn platitudes, commonly characteristic of courtroom speeches by counsel and judges were gratefully absent."); Benevides, *supra* note 366, at 243 ("The first stage required Moses to reside with his family on its trap line for two months. This was intended to re-integrate him into the family lifestyle and the family itself. The second stage required him to attend a two-month alcohol rehabilitation program in British Columbia. The third stage involved his return to the family home in Mayo, and an alcohol-free life.").

[371] Heino Lilles, *Circle Sentencing: Part of the Restorative Justice Continuum*, INT'L INST. FOR RESTORATIVE PRACS. (Aug. 9, 2022), https://www.iirp.edu/news/circle-sentencing-part-of-the-restorative-justice-continuum.

[372] *See id*.

[373] *See id*.

[374] *See id*.

[375] IVAN POTAS ET AL., CIRCLE SENTENCING IN NEW SOUTH WALES A REVIEW AND EVALUATION iv (2003).

[376] *See id*. at 3.

[377] *Id.* at 9.

[378] *Id*. at 42-43.

[379] *Id*. at 42.

progress reports; all related positive feelings about the progress that was being made, and at the conclusion of the year-long monitoring, only one of the thirteen offenders reoffended, yielding a 93% success rate.[380] As an important disclaimer, the sole re-offender was the only one that, despite being Aboriginal, did not belong to the local Aboriginal community in which the Circle was being conducted.[381] These studies of Circle Sentencing were conducted to address criminal conduct, but their application would prove viable in a family court setting, primarily the Hawai‘i Family Court.

B. *Native Hawaiian Cultural Court Realized*

There are several takeaways that need to be applied to a potential Cultural Court formulated for Native Hawaiians. One of the core concepts under Kānaka Maoli dispute resolution is ho‘oponopono and the reaffirmation of its meaning "to correct" rather than punish.[382] This should be reinforced as the main goal of a Native Hawaiian Cultural Court: for the community to come together to help the offender make amends and re-integrate. Much like Circle Sentencing, the community of an ‘Ohana undergoing a child welfare case would pool together to discuss the allegations and talk about the root of the problem. Those present besides the ‘ohana[383] and the community would be kūpuna and a judge. Having kūpuna present and actively participating in a Native Hawaiian Cultural Court would serve to better relate to the needs of the ‘Ohana both on a spiritual and physical level.[384] The purpose of having a judge presiding over Cultural Court proceedings would be to ensure legal ramifications are established and that the meeting is kept on track.[385] In the event that a Native Hawaiian Cultural Court is not successful and, upon its completion, the ‘ohana still requires attention the of the Hawai‘i Family Court, this presiding judge would act as the nexus for that crossover.

Whereas Circle Sentencing provides the procedural model in which a Native Hawaiian Cultural Court might function, the themes of

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[380] *Id*. at 53.

[381] POTAS ET AL., *supra* note 375, at iv.

[382] *See supra* Part IV.B.2.

[383] Handy & Pukui, *supra* note 4. ‘Ohana for purposes of a Cultural Court should encompass the expansive family; not just parents and children. Rather, any extended family members (blood related or not). *See id.*

[384] *See* POTAS ET AL., *supra* note 375, at 43-44. The equivalent to kūpuna in Circle Sentencing would be "elders." *See id*. These elders are seen as key figures of the community, and hold vital roles of power. *Id*. "The values and morals the elders instill in the process and the understanding they have of the offenders, victims and dynamics of the community, provide a greater sense of legitimacy and authority to the process according to majority of the offenders." *Id*.

[385] *See id.* at 5-6.

hoʻoponopono provide the ethos for which a Cultural Court carries out such functions. As hoʻoponopono involves ground rules regarding the commitment of each member to better the ʻohana as well as the sharing of words and deeds in the undertone of ʻoiaʻio[386] stated in confidence, so would a Native Hawaiian Cultural Court. Historically, Kānaka Maoli have employed hoʻoponopono to resolve a range of disputes by employing the phases kukulu kumuhana, mahiki, mihi and kala, and pani.[387] Cultural Court may not employ these phases exactly as conducted in a traditional hoʻoponopono, yet the ideals remain the same. For example, at the outset of a Cultural Court hearing under kukulu kumuhana, the lead haku may not invoke pule to help those in attendance focus but instead might begin the hearing with a brief introduction of the case and issues at hand.[388] In a Cultural Court setting, mahiki might be the substantive discussion that occurs during Circle Sentencing where all those in attendance state their piece on the particular case in order to "untangle" what is the true problem at hand.[389] In this sense, mihi and kala would function much like it does in hoʻoponopono in that the ʻohana would have a chance to talk directly to community members to address their shortcomings and seek guidance as to how to best remedy the issue.[390] The final step of pani would represent the summarization of an ʻohana's Cultural Court hearing and formalize objectives for the ʻohana to complete prior to any future hearings.[391]

The concept of a Native Hawaiian Cultural Court would not be without fault. A critique amongst scholars in response to such approaches has been the effectiveness when the offender is not significantly bound to their community.[392] In order to be successful, the proposed court relies upon the bonds shared between the ʻohana, kūpuna, and the community. If the ʻohana does not share respect for the kūpuna or feels alienated from their community, a Cultural Court would not be productive.[393] Furthermore, this

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[386] *See* Meyer, *supra* note 12.

[387] NĀNĀ I KE KUMU, *supra* note 9, at 149-51; *see* Meyer, *supra* note 12, at 4.

[388] *See* Meyer, *supra* note 12, at 4.

[389] *See* POTAS ET AL., *supra* note 375 (finding that some offenders benefited from non-traditional forms of prescribed services. For example, one offender had multiple offenses involving battery and destruction of public property. However, Circle Sentencing was administered and community dialogue uncovered that the offender suffered from alcohol abuse. As such, a majority of the offenders punishment revolved around treatment for his alcohol addiction in conjunction with anger management classes).

[390] *See* Meyer, *supra* note 12.

[391] *See id.*

[392] *See* POTAS ET AL., *supra* note 375, at 13.

[393] *See id.* (illustrating that the one offender who did not find the Circle Sentencing effective did not identify himself as a member of the community). He was unknown to elders and the community as a whole. *Id.* The study found that, "the fact that the offender

Cultural Court approach would be best applied, like the criminal court counterpart, to serious cases warranting potential termination of parental rights.[394] Another caveat warranting application of the Cultural Court would be an ʻohana that has prior CWS involvement, much as Circle sentencing was primarily applied to repeat offenders.[395] Given the statistics of recidivism prevalence in Child Welfare cases, these would be perfect situations to employ a Cultural Court that could break the cycle and heal the ʻohana.[396]

C. *EHDT and Therapeutic Jurisprudence Through Contextual Legal Analysis Re-Applied*

In implementing the addition of a Cultural Court, a re-analysis must occur utilizing the two-prong contextual legal and ecological analysis outlined in Part III. The first prong of EHDT is sufficiently met as the ecological systems of a child would be addressed by introducing a Cultural Court.[397] Through collective meetings similar to that of Circle Sentencing, interactions experienced at the microsystem would be strengthened through a Cultural Court; affected children would interact with community members and kūpuna that could provide invaluable support. An analysis of the mesosystem under such an addition would reveal stronger relationships between Native Hawaiian parents and the members involved in their case. Instead of court figures such as judges, bailiffs, and other court officers, Native Hawaiian parents' main point of contact would be members of their own community. This would help mitigate the tense interactions that often occur as a result of differing cultural and social backgrounds between parents and court staff, thus providing better outcomes for success.[398] Similar thinking would be applied to the exosystem as the programs and services that may be prescribed to parents, though not directly impacting the children, will trickle down to have positive effects on them. The final system analyzed under EDHT is the macrosystem, and in applying, a Cultural Court would be fully supported. By its very nature, this proposed court acts to best harbor positive interactions, bearing in mind the particular geolocation and cultural values that Hawaiʻi represents. Therefore, all of the

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and Elders felt no link seemed to undermine the Circle in this instance. The offender was not being punished by his own community." *Id.*

[394] *See* Zoom interview with Laurie Tochiki, *supra* note 228. Given the number of cases across the state, employing the Cultural Court approach to each situation may be overly burdensome and overwhelming. *See id*. Applying it in this manner ensures that only those cases where termination is immenent are given access to the Cultural Court.

[395] *See id.*

[396] *See Data Booklet*, *supra* note 13.

[397] *See supra* Part IV.B.3.

[398] *See generally* Hill, *supra* note 1.

systems under the ecology of human development are satisfied and a Cultural Court would pass the first prong.

In assessing the second prong of therapeutic jurisprudence via Professor Sproat's restorative justice framework, a Native Hawaiian Cultural Court would support all four values. A cultural court would greatly diminish the amount of youth being ripped away from Kānaka Maoli homes, therefore preserving Kānaka Maoli familial roles and traditions. Through such preservation, cultural integrity can hopefully be kept intact.[399] As legal scholars Rebecca Tsosie and Wallace Coffey perfectly summarized, "tradition provides the critical constructive material upon which a community rebuilds itself."[400]

The second value of lands and natural resources, though of lesser relevance to the issue at hand, remains inextricably connected to all of the values under Professor Sproat's restorative justice framework. Here, a Cultural Court would serve the function of keeping youth in their homes and on ancestral lands, allowing for the practice and use of resources available to them by the ʻĀina.[401] Ultimately, this proposed system would act to redress injustice dealt to Kānaka Maoli by the subjugation of ancestral lands.

The third value of social welfare is equally satisfied, given the focus of my proposed Cultural Court. Similar to that of Circle Sentencing, a Cultural Court's goal would have a greater emphasis on "notions of the restoration and, in particular, of the integration of the offender [here ʻohana] once the matter has been dealt with satisfactorily.[402] Instead of separating an ʻohana and requiring them to conduct services (e.g., parenting lessons) individually, ʻohana would work actively as a unit alongside the guidance of the Cultural Court.[403] An intimate venue like that of a Cultural Court would provide ʻohana with great support in terms of health, living standards, and education, lending support to this third value.

The final value of self-governance is also illustrated with a Native Hawaiian Cultural Court. Collectively, Kānaka Maoli have disagreed on the issue of federal recognition, and as *Brackeen* looms, such recognition could prove fruitless; a Cultural Court, however, could provide the requisite first step towards sovereignty that has been so sought after.[404] Like Circle Sentencing, reports requiring CWS involvement would be screened and monitored for potential admittance into Cultural Court, similar to the

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[399] *See* Sproat, *supra* note 27, at 179.

[400] Coffey & Tsosie, *supra* note 205, at 199.

[401] *See* Sproat, *supra* note 27, at 181.

[402] *See* Lilles, *supra* note 371, at 99.

[403] HAW. REV. STAT. § 587A-2 (2024).

[404] Oral Argument, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376), https://www.supremecourt.gov/oral_arguments/audio/2022/21-376.

function of specialty courts currently in place.[405] Through this process, the Cultural Court inhibits streamlined feeding into the Hawai‘i Family Court. Native Hawaiians would have an avenue for their child welfare cases to be handled by an entity (here, one's own community) that adequately addresses the cultural and social distinctions present in an ‘ohana.[406]

On its face, a Cultural Court would reduce the high entry rates for NHY.[407] In providing a deeper contextual analysis, however, the reduction of entry rates for NHY supports self-governance notions through contradicting constructs of Hawai‘i's colonialism.[408] A successful and functioning Cultural Court would dispel that not only Hawai'i as a sovereign state would not function without the United States or foreign involvement but also historians' excuse of "cultural inferiority" for Native Hawaiians as a means for justified conquest.[409] It would highlight to the United States that Kānaka Maoli are able to formulate and staff a productive court system, completely unlike the adversarial system currently used that relies upon Native Hawaiian cultural beliefs and practices.[410]

The hope is that a "Cultural Court" might gain traction amongst family courts across the United States, and its use would become mainstream. Such implementation is not as farfetched as it may seem, given that some specialty courts, like Drug Treatment Courts (DTCs), began as recently as 1989.[411] Just as DTCs began as an experiment to tackle a particularized issue (the high number of drug offenders clogging the system) and are now used amongst almost every state court, so too could a Cultural Court gain notoriety. Through the widespread use of a Cultural Court model, the issues surrounding Kānaka sovereignty would inadvertently become signaled in a more public forum. This attention could

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[405] Coffey & Tsosie, *supra* note 205, at 201.

[406] *See ICWA History and Purpose*, *supra* note 328 (discussing the formation and reason for ICWA. Choctaw tribal chief, Calvin Isaac, stated during the U.S. Senate testimony prior to the passage of ICWA).

> one of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by non-tribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing. Many of the individuals who decide the fate of our children are, at best, ignorant of our cultural values and, at worst, have contempt for the Indian way and convinced that removal, usually to a non-Indian household or institution can only benefit an Indian child. *Id.*

[407] *See Data Booklet*, *supra* note 13.

[408] *See* Coffey & Tsosie, *supra* note 205, at 201.

[409] *See id*.

[410] *See* Neil B. Nesheim, *The Indigenous Practice that is Transforming the Adversarial Process*, 55 JUDGES' J. 16, 16-17 (2016).

[411] *See id*. at 18.

have a domino effect on future legislative efforts to support Native Hawaiian sovereignty and self-governance. As touched upon in Part IV.C.4., the Supreme Court in *Rice* applied a formalist approach to frame the history of Hawai‘i to best serve their agenda.[412] Should Cultural Courts gain recognition and effectively be applied by other states, it could alter the "history of Hawai‘i" that future courts apply when dealing with issues related to Hawai‘i.

VI. CONCLUSION

The over-representation of NHY in the Hawai‘i Family Court is a glaring and sad reality. For many years, this has been at the forefront of concern by the Family Court and has resulted in the sprouting of multiple organizations that prioritize making changes to the Kānaka Maoli statistic. From an analysis of the ecological macrosystems surrounding the child, these programs have been effective at promoting healthy inter-relationships. However, when applying a contextual legal analysis that takes into account the historical injustice of Kānaka Maoli, the Hawai‘i Family Court fails. Current initiatives are addressing the active number of Kānaka Maoli families rather than trying to prevent entry rates altogether. Through my proposed alternative in Native Hawaiian Cultural Court, not only would ecological macrosystems be satisfied, but the historical injustice experienced by Kānaka Maoli could be addressed. A Cultural Court would support the human rights principles of cultural integrity, land and natural resources, self-determination, and self-governance.

[412] *See* Sproat, *supra* note 27, at 159.