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The name ‘Ohia was inspired by a line from a chant for Kalākaua: ‘ohia mai ā pau pono nā ‘ike kumu o Hawai‘i, gather up every bit of the basic knowledge of Hawai‘i.

Ka Huli Ao Center for Excellence in Native Hawaiian Law is an academic center that promotes education, scholarship, community outreach and collaboration on issues of law, culture and justice for Native Hawaiians and other Pacific and Indigenous peoples.

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‘Ohia mai ā pau pono nā ‘ike kumu o Hawai‘i
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HE WAʻA HOU: AN ALTERNATIVE COURT FOR HAWAIʻI

K. Kaʻanoʻi Walk

ʻOhia:
A Periodic Publication of Ka Huli Ao Center for Excellence in Native Hawaiian Law
HE WAA HOU: AN ALTERNATIVE COURT FOR HAWAI’I

K. Ka’ano’i Walk¹

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I. INTRODUCTION

A man approaches a kahuna kālai wa'a – master canoe builder – and humbly requests a canoe. Customarily, a man would ask a kahuna kālai wa'a to build a canoe only after finding a fine tree from which to make it. But this man does not know of a suitable tree – or where to find one. Koa is the preferred wood for canoe making but the 'ulu, kukui, 'ōhi'a hā and wiliwili trees are also acceptable. Realizing that he does not have a wood source, the man begins to turn away. But the kahuna kālai wa'a stops him. The kahuna kālai wa'a asks him two simple questions: “What will this canoe be used for? What would you like this canoe to do?” The man is relieved. He knows that if he can answer these questions, the type of wood that will fulfill his needs can be found later.

In much the same way, Hawai‘i’s political future is full of uncertainty. There are both demands for independence from the United States and calls for the formation of a political entity within the United States. Many in the Hawai‘i ‘ōiwi community may consider it less fruitful to discuss the functions of individual branches of a potential government, entity, or nation before first establishing our political status. The formation of a future court system is no different. Some say that discussing the specific contours of a court system, without first determining political status, is premature. However, like the kahuna kālai wa'a in the story above, we should pose two simple questions: what will this court system be used for? What would we like this court system to do? Hawai‘i ‘ōiwi have an impressive lineage of canoe building. When many people

2 David Malo, Hawaiian Antiquities: Mo’olelo Hawai‘i 126 (Nathaniel B. Emerson trans., 2d ed. 1951). As recorded by Malo, after the man located a fine koa tree he would tell the kahuna kālai wa’a, “I have found a koa tree, a fine large tree.” Id.
3 Id. However, koa was always the principal wood used in canoe-making. Id.
4 For example, in the June 2009 edition of the Ka Wai Ola Newspaper, a newspaper published by the Office of Hawaiian Affairs, a letter was submitted with the author’s pledge of allegiance to the Kingdom of Hawai‘i and a demand for a “peaceful end” to the United States’ “unlawful occupancy and America’s undeclared war against the Hawaiian People.” Aliko Poe Silva, Tyranny and Iwi Desecration: A Letter to President Barack Obama, KA WAI OLA NEWS- PAPER, June 2009, at 22, available at http://www.oha.org/kwo/2009/06/col-silva.php. The letter also requests that the United States abide by international law and that these egregious acts be reconciled by appeal to the International Court of Justice at The Hague. Id.
6 “Hawai‘i ‘ōiwi” will be used instead of the English terms “Native Hawaiian” and “Hawaiian.”
needed transport, we fashioned canoes with two or three hulls. If the task required speed, we preferred a wa’a kioloa – a sharp, narrow racing canoe. The future Hawai‘i ‘ōiwi court is our wa’a: what do we – as Hawai‘i ‘ōiwi – want our court system to do? Or perhaps more importantly: what values should our Hawai‘i ‘ōiwi courts possess?

Hawai‘i ‘ōiwi have seen great political and governmental changes throughout the history of the Hawai‘i Islands. The change to an ali‘i system prepared Hawai‘i to become a kingdom government and ushered in the incorporation of Anglo-American court processes and structures. Perhaps as a result, traditional dispute resolution practices were not formally incorporated into court procedures. In 1893, the United States-backed overthrow of the Kingdom of Hawai‘i government caused a divergent political and governmental change. Hawai‘i was no longer governed by Hawai‘i ‘ōiwi. The provisional government, republic and territory periods disregarded traditional wisdoms, leading to more injustice for Hawai‘i ‘ōiwi.

Currently, the State of Hawai‘i is the operating government in the Hawai‘i Islands. In the 1970s and 80s, under Chief Justice William S. Richardson, the State of Hawai‘i’s Supreme Court made bold strides in preserving traditional customs and practices of the Hawai‘i ‘ōiwi. However, as time passed, policies, politicians and judges changed. So did the landscape and demographics of Hawai‘i. Hawai‘i ‘ōiwi, a minority, are currently “at the bottom of the socio-economic scale in their own islands.” Although this is a sure indictment of the whole state system, the state’s judicial system requires additional scrutiny. Currently, Hawai‘i’s correctional facilities are overpopulated by Hawai‘i ‘ōiwi (male and female) and some legal practitioners observe discrepancies in criminal prosecutions according to ethnicity.

“Ua lehulehu a manomano ka ‘ikena a ka Hawai‘i. Great and numerous is the knowledge of the [Hawai‘i ‘ōiwi].” This ‘ōlelo no‘eau does not simply mean that Hawai‘i ‘ōiwi were great and knowledgeable in the

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7 Malo, supra note 1, at 131. As late as 1819, triple hulled canoes were still being built by kahuna kālai wa’a. Id.
8 Id. at 222.
9 For instance, ho‘oponopono, a traditional familial-based dispute resolution practice. See infra note 54 (defining ho‘oponopono).
11 For instance, public land rights were not recognized by those courts. See infra note 105 and accompanying text.
12 See generally Sai, supra note 10. The author questions the United States’ authority in Hawai‘i. According to Dr. Sai, “[t]he joint resolution of annexation is not a treaty or conveyance from the so-called Republic of Hawai‘i, rather it is a unilateral declaration that was used to seize and occupy the Hawaiian Islands during the Spanish-American War.” Keanu Sai, The Myth of Ceded Lands and the State’s Claim to Perfect Title, KA WAI OLA NEWSPAPER, Apr. 2009, at 12, available at http://www.oha.org/kwo/2009/04/story12.php. “The United States today could no more annex Iraq by a joint resolution than it could annex the Hawaiian Islands by joint resolution in 1898.” Id.
15 See infra note 167 and accompanying text (quoting Kanale Sadowski, Hawai‘i ‘ōiwi attorney and former State of Hawai‘i Public Defender).
past. Their wisdom is very much applicable in our discussion of the relationship between Hawai‘i ‘ōiwi and Hawai‘i’s State judicial system. Our cultural views, as Hawai‘i ‘ōiwi, are our identity and must be the foundation of our discussion of a future Native court in Hawai‘i. The wa‘a must be our own. However, it is prudent to learn from the experiences and practices of other court systems as well. Successful canoes have been built elsewhere.

“‘Ahe pau ka ‘ike i ka hālau ho‘okahi. All knowledge is not taught in the same school.”18 In Hawai‘i, the hālau,19 or longhouse, housed canoes as well as distinct sets of knowledge or disciplines. In essence, the Hawai‘i ‘ōiwi of the past understood that each hālau had differences, yet all contain ‘ike, or knowledge. Therefore, knowledge was found everywhere. In contemplating a Native court20 for Hawai‘i, this article searches for this ‘ike from other Native court systems. It concludes that Native courts should be: (1) established, created, or run by indigenous or aboriginal people; (2) Native language accessible; (3) constructed upon traditions and customs in their judicial structure and practices; and (4) respected by the Native peoples for fairness and consistency.

In particular, the article explores and highlights the Hopi, Navajo Nation, and Republic of Palau courts. The positive aspects of these courts’ structures, practices, and procedures are gathered to help guide the discussion on a future Hawai‘i ‘ōiwi court system. Specifically, this article explores the incorporation, implementation, and preservation of tradition and custom by these Native court systems.

Part II of this article moves through the governmental and political changes throughout Hawai‘i’s history; describes ho‘oponopono,21 a surviving traditional dispute resolution practice of Hawai‘i ‘ōiwi; and explains the current State of Hawai‘i court system as it deals with Hawai‘i ‘ōiwi. The history serves as a backdrop and foundation for the exploration of a future Hawai‘i ‘ōiwi court. Part III analyzes how the current judicial system in Hawai‘i serves the Hawai‘i ‘ōiwi population. In particular, Hawai‘i ‘ōiwi legal practitioners offer their thoughts on improvements to the court system, concerns, and hopes for the future. Part IV introduces the history, government, and court systems of the Hopi, Navajo Nation, and the Republic of Palau. This section also highlights the Hopi, Navajo, and Palauan traditions and customs, and the origins of their distinct traditional and customary dispute resolution practices. Part V highlights the positive aspects found in the Hopi, Navajo Nation, and Republic of Palau courts, including how those court systems have addressed the stark differences between Anglo-American jurisprudence and traditional and customary dispute resolution practices. Drawing on the teachings of these court systems, Part VI recommends four values that should be implemented by Hawai‘i’s future Native court system. It is hoped that this article will serve as a first step in many more discussions and research on the important topic of a Hawai‘i ‘ōiwi court.

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19 Hālau means “long house, as for canoes or hula instruction; meeting house.” Pukui & Elbert, supra note 17, at 52. Hālau are also comparable to the universities of today.
20 For the purposes of this article, the definition of a “Native court” is a court that is: (1) established, created or run by indigenous or aboriginal people; (2) Native language accessible; (3) constructed upon traditions and customs in their judicial structure and practices; and (4) respected by the Native peoples for fairness and consistency. Furthermore, any other uses or associations with the term “Native court” should be disregarded.
21 See infra note 53 and accompanying text (citing Mary Kawena Pukui, E.W. Haertig & Catherine A. Lee, Nānā I Ke Kumu: Vol. I 60 (1972)).
II. KO HAWAI’I MO‘OLELO: HAWAI’I’S GOVERNMENTAL & JUDICIAL HISTORY

A. ‘Aha

Hawai‘i ‘ōiwi “‘lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion.’” Hawai‘i ‘ōiwi also “had explanations for all natural phenomenon” and viewed “the universe as an inter-connected whole where everything had a place.” Through the centuries of inhabitance on the Hawai‘i Islands, many political and governmental changes occurred. For instance, before the ali‘i (chief) system, Hawai‘i ‘ōiwi established and implemented ‘aha (councils).

In each moku, or district, the people living within the land jurisdiction of that moku chose practitioners to help govern the affairs of the residents. Although the different ‘aha of each moku were established independently to meet the specific needs of their people, as modeled after Moloka‘i, all ‘aha were composed of practitioners and experts. When these selected practitioners came together, they were acknowledged as an ‘aha. The purpose of the ‘aha was “to preserve and manage the natural resources of the land for the benefit of the people.” Their long-term vision was not only fixed on the living but on the “generations un-
born” as well.31 These ‘aha councils were so successful throughout all the islands that the people “governed themselves in [this] way for seven hundred years before the arrival of the ali’i during the ending of the ninth century.”32 After sixteen generations under the ‘aha councils, peace was established throughout Hawai‘i and all had sufficient food, materials for houses, and clothing.33 From this proficient communal system, the Hawai‘i ‘ōiwi gained prowess in farming, fishing, spiritual gifts, building, and so forth.34

The population eventually bloomed in Hawai‘i and this “affected the guidance of the ‘aha councils in each of the moku.”35 All of the practitioners from all the islands gathered again on Moloka‘i for a second time to address this issue.36 At this meeting, the practitioners developed a plan that would divide each moku into smaller parcels of land called ahupua‘a.37 Each ahupua‘a would form its own ‘aha council of practitioners for each ahupua‘a.38 Unlike the modern state government in Hawai‘i, the total control of each ahupua‘a “was dependent and decided upon by the people that lived there.”39 Under these ‘aha councils, each ahupua‘a council “had the final say in the manner in which their lands should produce food or in the way the lands should be changed for the benefit of the people.”40 The creation of the ahupua‘a councils alleviated the responsibilities of the ‘aha councils of the moku – the power now rested in the ‘aha councils of each ahupua‘a. The ‘aha of the moku would only be called upon “if a decision had to be made that would affect every ahupua‘a in that moku.”41

The significance of the word ‘aha is connected to its other meaning: a type of woven cord.42 When the ancient Hawai‘i ‘ōiwi took the bark of the ‘olonā and prepared it and weaved it into a single cord, that cord was called an ‘aho.43 To create an ‘aha, many ‘aho must be weaved together.44 This symbolism is “extremely significant in the mana‘o of our kūpuna”45 because the ‘aho used to create the ‘aha cord represents each expert on the council.46 Expert practitioners of distinct fields would be woven into an ‘aha: fishing, healing, water preservation, forest preservation, architecture, and astronomy.47 They wove their expertise together for one purpose: “to serve the people.”48 When all was pono, or spiritually balanced,49 the land and its people

31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id. An ahupua‘a is a “[l]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (ahu) of stones surmounted by an image of a pig (pua‘a), or because a pig or other tribute was laid on the altar as tax to the chief.” PUKUI & ELBERT, supra note 17, at 9.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
45 Kūpuna means “ancestors.” PUKUI & ELBERT, supra note 17, at 186.
47 Id.
48 Id.
49 Id. See also infra note 165 (translating pono in other ways).
flourished abundantly with food and many descendants. And while the 'aha governed the populace, a traditional form of dispute resolution was practiced by Hawai'i 'ōiwi families.

**B. Ho'oponopono**

In early times, Hawai'i 'ōiwi resided in “small family communities” that were “guided by the elders of the family.” The elders of each family handled both familial disputes as well as disputes with other families or ali'i. Ho'oponopono is the “specific family conference in which relationships were ‘set right’ through prayer, discussion, confession, repentance, and mutual restitution and forgiveness.” Ho'oponopono is also described as “ancient [Hawai‘i ‘ōiwi] therapy,” a variety of “mediation” and “conflict management,” “problem-solving,” a “peacemaking process,” and a process for “disentangling” ill feelings.

Mary Kawena Pūkūi described an example of ho'oponopono and the reciprocating benefits:

Here an 'ohana senior or a kahuna questioned family members until specific offenses and offenders were disclosed. Once it was established that brother had fought, father had broken a kapu, or a child had stolen, the transgressor could then make full confession, arrange reparation if possible, ask for and be forgiven. Or, to put it another way, he could recognize, ventilate, atone for, and thus remove or mitigate his guilt.

Within the family forgiveness process, the akua, or gods, fully participated and each “[d]eity forgave totally and without reservations.” Aunty Lynnette Paglinawan, a leading authority on ho'oponopono, shared that ho'oponopono works because: (1) it is based on honesty and no secrets; (2) no recording is allowed; (3) it is an oral contract; and (4) like an 'upena, a fishing net, “the tangles must be untied one-by-one to get one continuous line once more.”

The attitude of the participants is also important because: (1) there must be aloha for the people you are with; (2) family is important; and (3) commitment is important. According

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50 Id.
51 Pali Jae Lee and Koko Willis, Tales From The Night Rainbow 17 (4th prtg. 1994).
52 Amongst the elders were masters, or kahuna. Id. at 30.
53 Id.
60 Kapu means “prohibited” or “sacred, holy, consecrated.” Pukui & Elbert, supra note 17, at 132.
62 Id.
63 Ho'oponopono Training Session with Laulani Teale, Project Coordinator, Native Hawaiian Bar Association & Native Hawaiian Legal Corporation Peacemaking Project, and Lynnette Paglinawan, Ho'oponopono Authority, in Kalihi, Haw. (Nov. 7, 2008).
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to Paglinawan, hō‘oponopono has "transferability across ethnicity" and may be used with other peoples and cultures. This traditional familial dispute resolution practice has survived many political and governmental changes in Hawai‘i, including the change from 'aha to ali‘i.

C. Ali‘i

Prior to Kamehameha I’s unification of the Hawai‘i Islands and Kamehameha III’s promulgation of Hawai‘i’s first constitution in 1840, “all legislative, executive, and judicial functions were vested in the highest chiefs.” The system of government was the kapu system introduced by Pa‘ao, a priest from Kahiki, in approximately 1300 A.D. Under this system of government, there were two types of kapu: kapu akua and kapu ali‘i. The kapu akua were religious restrictions and usually carried a heavier penalty if broken, while the kapu ali‘i were prohibitions set by the ali‘i, or chiefs, to govern daily affairs. During this period, “a substantial body of customary laws existed relating to water rights, fishing rights, land tenure, and taxation.” Despite having no distinct judiciary, judicial forms were observed by foreigners. During Kamehameha I’s reign over all the islands, “the land-owning chiefs continued to exercise both judicial and executive powers;” however, the king introduced a new innovation in which governors were appointed to act as his representatives on all other islands where he was not present. Kamehameha I was “the court of last resort.”

D. Kingdom of Hawai‘i

Following the death of Kamehameha I in 1819, the concept of sovereignty was introduced to Hawai‘i’s ali‘i because of “the need to control foreigners.” A key component to asserting this sovereignty was showing that Hawai‘i, as an independent nation, was “capable of enforcing its laws...in a way that would satisfy west-
ern standards." Another thrust toward a westernized development of law came from the collapse of "the old religious kapu and the arrival of the missionaries in 1820." 

Hawai‘i’s modern judicial history begins with "Kamehameha III’s proclamation of the Constitution of 1840"60 in which the "rudimentary elements of the separation of powers principle were recognized, although not fully developed."81 The Constitution of 1840 "provided for legal redress of injury and punishment of crimes by trials according to law."82 The Supreme Court, "consisting of the King, [Kuhina Nui] (Premier),83 and four other chiefs elected by the lower House of the Legislature, was established with final and appellate jurisdiction."84 Furthermore, the King appointed tax officers to be assessors, collectors and judges.85 These tax officers were not only directly subject to the King-appointed governors of each island, but their judicial decisions were also appealable to those governors.86 In addition, a further appeal could be made to the Supreme Court.87 On the district level, two or more district judges were appointed by the governors of each island, "whose terms were for an indefinite period, subject to impeachment."88 The fruit of this transformation was realized on November 28, 1843, when Timoteo Ha‘alilio and William Richards successfully obtained the signatures of both British and French officials "on a joint proclamation recognizing Hawai‘i as an independent nation and a member of the family of nations."89

On October 29, 1845, the legislature of Hawai‘i enacted and Kauikeaouli, or Kamehameha III, approved "a series of acts to 'Organize the Executive Ministry,' which are traditionally referred to as the Or-

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78 Id. As early as 1839, Hawai‘i’s sovereignty was challenged by other nations. NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 35 (2004). The establishment of the Roman Catholic Church in Hawai‘i was initially thwarted by “anti-Catholic Calvinists” who had become advisers to the king and premier. Id. As a result, in July 1839, a French warship, the Artemise, arrived in Honolulu with several demands concerning the establishment of a Roman Catholic mission. Id. If the demands were not complied with, Captain Cyrille Laplace of the Artemise was instructed to “make war on Hawai‘i.” Id.
79 Matsuda, supra note 23, at 136. “The protestant religion filled a gap left by the fading of ancient beliefs.” Id. In 1827, Ka‘ahumanu, Kuhina Nui (Premier), and Kamehameha III established a “national penal code based on Christian concepts.” Silverman, supra note 69, at 1. In 1839, a Declaration of Rights modeled after the Magna Carta was drafted by a group of Hawai‘i ‘ōiwi. STATE OF HAWAI‘I JUDICIARY, ANNUAL REPORT BICENTENNIAL EDITION 6 (1976). The famed Hawai‘i ‘ōiwi historian David Malo was a group member. Id.
80 Richardson, supra note 67, at 7.
81 Id.
82 Id. Furthermore, a divided jury system operated according to “extraterritorial provisions in treaties with France and Great Britain.” Silverman, supra note 70, at Introduction. Foreigners would sit in foreign cases and Hawai‘i citizens in Hawai‘i cases. Id.
83 Kuhina Nui, Ka‘ahumanu, a wife of Kamehameha I, appointed Hawai‘i’s first judicial officers, “selected the first jury and presided over the first formal trial for murder.” Id. at 1.
84 Richardson, supra note 67, at 7.
85 Id. The tax officers were specifically judge “in all cases arising under the tax law, ‘in all cases where land agents or landlords were charged with oppressing the lower classes and also in cases of difficulty between land agents and tenants.” Id.
86 Id.
87 Id. “These judges had jurisdiction over all cases except those within the authority of the tax officers.” Id.
88 Silva, supra note 78, at 37. Thereafter, Hawai‘i officially celebrated November 28th as “Lā Kū‘oko‘a, or Independence Day.” Id. Tragically, however, after continuing their work in the United States, Ha‘alilio died while on transit home to Hawai‘i. Id.
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ganic Acts." As a result, five departments were created in the executive branch. That statute indicated "an important step in the evolution of the constitutional monarchy." As the Kingdom of Hawai‘i's government structure began to change, foreign lawyers were increasingly employed by the government.

During the 1850s, William Little Lee, the second lawyer to arrive in Hawai‘i, was a key player in shaping the legal landscape of Hawai‘i. In just under a year after his arrival, Lee was appointed Chief Justice of the newly formed Superior Court of Law and Equity. In 1850, Lee assisted the King in drafting a criminal code. After serving in politics and lawmaking, Lee was appointed Chief Justice of the Supreme Court and would hold this position until his death in 1857. As observed by one scholar, in just a few years, Lee "dramatically reshaped the legal landscape of the kingdom." However, Hawai‘i 'ōiwi were also active participants in the legal profession. From the 1840s to 1893, 475 Hawai‘i 'ōiwi were judges or lawyers. The Kingdom of Hawai‘i "continued to adopt Western laws governing property, crime, and contracts, eventually adopting the entire body of Anglo-American common law by a reception statute enacted in 1892." Although sovereignty was obtained, the Kingdom of Hawai‘i's government would soon be overthrown.

E. Overthrow: A Provisional Government, Republic, and Territory Follow

On January 17, 1893, a United States-backed group overthrew the peaceful Kingdom of Hawai‘i

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91 Id. at 33. This process changed the role of the Mō‘ī (King) from an “all-powerful warrior-chieftain serving as the human embodiment of and trustee for the Akua [or gods]” to a political leader of the government “working closely with other elected and appointed officials.” Id. at 33.
92 The first lawyer to arrive in Hawai‘i was John Ricord. Id. at 37. On February 27, 1844, thirty-one year old Ricord arrived in Hawai‘i “after studying law in Buffalo, New York, and traveling extensively across the United States.” Id. at 34 n.26 (discussing Ricord’s years of service in Hawai‘i). Eleven days after his arrival, Ricord was appointed legal advisor to Kamehameha III. Id.
93 Id. at 37-39. William Little Lee was born in New York and pursued legal training at Harvard. Id. at 36-37. He arrived in Hawai‘i on October 12, 1846. Id.
94 Id. at 37-38.
96 Van Dyke, supra note 90, at 38. From April 1851 to April 1852, Lee served as the Speaker of the House of Representatives. Id.
97 Id. Lee was also one of three drafters of the Constitution of 1852. Id.
98 Id. Lee was appointed Chief Justice of the Supreme Court on December 6, 1852. Id.
99 Id.
100 Silverman, supra note 70, at Introduction. Prior to the government overthrow of 1893, Hawai‘i ‘ōiwi were the clear majority in the law profession. Id. Even King David Kalākaua practiced law before ascending the throne. Id. From the 1840s to 1893, there were also “200 Caucasians, several Chinese and one Japanese, educated in Japan” practicing law. Id. In 1846, the courts began to centrally license Kingdom attorneys. Id. at 10.
101 Matsuda, supra note 23, at 137.
102 See Silva, supra note 78 and accompanying text (discussing the official recognition of the Kingdom of Hawai‘i’s sovereignty).
government. The subsequent provisional government and republic increased the judicial application of Anglo-American common law and departed further from Hawai‘i’s traditional knowledge. These courts were unsympathetic to public rights in land claims, and “absolute, exclusive fee-simple ownership became the norm.” Under the new constitution of the republic, the Supreme Court consisted of “a Chief Justice and two Associate Justices appointed by the President of the island government with the approval of the Senate.” The judges served lifetime tenure terms with fixed judicial salaries. The next highest court, the circuit court, was formed with circuit judges appointed to “six-year terms by the President subject to Senate ratification.” These circuit judges had jurisdiction in probate, equity, and admiralty. Most interesting is the fact that the republic’s constitution “contained a general provision recognizing the three functions of government, but specific language carrying the separation of powers principle into effect was absent.”

In 1898, Hawai‘i was supposedly annexed by the United States through the Joint Resolution of Annexation that “created a five-person Commission to draft and recommend an organic act to govern the new territory.” Similar to the republic, the supreme and circuit court judges were to be appointed by a president, with Senate approval. The Commissioners found Hawai‘i’s judicial system to be “so enlightened and excellent by the standards of the time that they urged its retention.” However, although the Organic Act retained the basic court structure established under the Kingdom of Hawai‘i, the method of selection, compensation, and tenure of the judiciary was drastically altered.

This new court system was flawed. For example, bench vacancies were permitted to continue for long durations. In a 1957 report by Henry P. Chandler, the former Director of the Administrative Office of the United States Courts to the Territorial Chief Justice Philip Rice, Chandler wrote that the judiciary was “disjointed to an extreme degree,” the chief justice “exercised no control over the overall administration of the judiciary,” separate budgets were submitted by several courts to the legislature, and there was a “lack of uniform court hours, vacation times, and courtroom procedure.” However, Chandler did praise the

103 Sai, supra note 10, at 56-57. Furthermore, “the legation assigned to the Hawaiian Kingdom, together with United States Marines and Naval personnel, were directly responsible for the illegal overthrow of the Hawaiian government.” Id. at 57.
104 Matsuda, supra note 23, at 137.
105 Id. at 140.
106 Richardson, supra note 67, at 12.
107 Id. However, although their salary “could not be diminished during their term of office,” their lifetime tenure was subject to impeachment. Id.
108 Id.
109 Id.
110 Id. “In fact, the section included the caveat that the judicial, legislative, and executive powers would remain distinct except as herein provided.” Id.
111 Sai, supra note 10, at 58, 60-62 (discussing the controversy surrounding Hawai‘i’s annexation).
112 Richardson, supra note 67, at 13.
113 Id. However, under the territorial government, the President of the United States appointed supreme and circuit court justices. Id.
114 Id.
115 Id. For instance, the tenure of supreme court judges was reduced from life to four years and from six to four years for circuit judges. Id. at 13-14. Furthermore, judicial compensation was cut in half. Id. at 14.
116 Id. at 14. “In one decade, two vacancies on the supreme court prevented the court from sitting for a total of eighteen months.” Id.
117 Id. at 15.
government for compensating the judges and magistrate by salary rather than fee so that they may remain impartial. In 1959, the legal landscape of Hawai‘i would change once again.

F. The State of Hawai‘i

In 1959, Hawai‘i became the “fiftieth state” of the United States. The State’s judiciary consists of one supreme court, circuit courts, and other inferior courts established by the legislature. Under the sixteen-year tenure of Supreme Court Chief Justice William S. Richardson, the courts wrestled with the notion of customary rights. During this judicial period in Hawai‘i, custom existed only “in a few scattered places.” However, the laws enacted under the Kingdom of Hawai‘i “intended that natives have continued access to water and other items needed for subsistence.” Under the guidance of Chief Justice Richardson in Kalipi v. Hawaiian Trust Co., the “court held that residents of an [ahupua‘a] may enter upon undeveloped private lands within the [ahupua‘a] to gather native materials.” Nonetheless, the court restricted recognition of those entitlements to balance modern realities with traditional rights. As a result, (1) “gathered materials must be used for native customs;” (2) “gathering must be exercised only on undeveloped land;” and (3) gathering must occur “only within the [ahupua‘a] within which the gatherer resides.” Although restrictions were set, “the court’s incursion into the concept of absolute, individual ownership was remarkable given past denigration of custom.”

The Richardson court was also successful in maintaining public shoreline access. With some of the world’s most beautiful beaches, Hawai‘i’s shoreline is “particularly valuable for ingress and egress, and for

118 Id.
119 Id. at 16. The supreme court was also “given the power to promulgate rules of practice and procedure for all courts.”
120 William Shaw Richardson was appointed as Chief Justice of the Hawai‘i State Supreme Court in 1966 and served in such capacity until retirement in 1982. King Kamehameha V Judiciary History Center, State of Hawai‘i Judiciary, Chief Justices of the Hawai‘i Supreme Court (1997).
121 Matsuda, supra note 23, at 138. “The only state-recognized sources of custom [were] the decisions and statutes that explicitly recognize[d] and define[d] customary rights.” Id.
122 Id. at 140.
123 66 Haw. 1 (1982).
124 See Pukui & Elbert, supra note 17 (defining an ahupua‘a).
125 Matsuda, supra note 23, at 140. An 1859 Kingdom of Hawai‘i statute was adopted by the State under the Hawai‘i Revised Statute § 7-1 to read:

Where the landlords have obtained, or may hereafter obtain, alodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way.

Id. (quoting Haw. Rev. Stat. § 7-1 (2008)).
126 Id. at 141.
127 Id.
128 Id.
recreational and aesthetic purposes.”

Attempts by private landowners to exclude the public from beach access have been vehemently rejected by the State legislature and courts. In In re Ashford, the court held that “private ownership begins at the vegetation line at the upper wash of the waves, rather than at the mean high tide mark.” In particular, “[t]he court interpreted a boundary listed as [‘ma ke kai], or along the sea, using the testimony of [kama‘aina] witnesses that the upper wash was the boundary” although “a vigorous dissenting opinion noted long-standing surveying practice[s] to the contrary.”

However, all is not well. These decisions based on Hawai‘i `ōiwi custom benefitted the general public, but not Hawai‘i `ōiwi per se. All the people of Hawai‘i, “including the various immigrant groups that now predominate, share in the benefit of [Hawai‘i `ōiwi] customs in such areas as beach access and water use.” Some see this as yet more exploitation of Hawai‘i `ōiwi for the benefit of non-Hawai‘i `ōiwi. However, I find hope in the belief that, “If law can destroy culture, it can also preserve it.” And to do this we must analyze the needs of our current Hawai‘i court system.

129 Id.
130 Id.
131 50 Haw. 314 (1968).
132 Matsuda, supra note 23, at 141.
133 Kama‘aina means “native-born.” Pukui & Elbert, supra note 17, at 124.
134 Matsuda, supra note 23, at 141. In an interview with a biographer, Chief Justice Richardson commented on the case, stating:

If I had my way, the public would have even greater access to water and shoreline property. Hawaiian kings, I’m sure, intended to give their subjects more public seashore lands than we now allow. No one but a fool would leave his canoe at the vegetation line and let the waves wash it out to sea! The kings really must have intended to extend public property to that area on the beach where canoes could be left without danger of being washed away. With a broad smile, Richardson would then say: But there’s no point in drawing blood from my critics!

Id.
135 Id. at 142.
136 Id.
137 Id.
138 Id. at 143.
III. NĀ MEA E PONO AI: NEEDS IN HAWAI‘I COURTS

Today, Hawai‘i ʻōiwi continue to struggle in their homeland. Currently, there are approximately 401,162 Hawai‘i ʻōiwi in Hawai‘i and the U.S. continent.\footnote{Office of Hawaiian Affairs, Native Hawaiian Data Book 17 (2006). For the first time ever, the U.S. Census Bureau permitteded individuals to “select more than one race for Census 2000” and thus gave a more accurate count of Hawai‘i ʻōiwi. Id.} In Hawai‘i, Hawai‘i ʻōiwi account for over 239,655 of Hawai‘i’s population.\footnote{Id. at 39.} The total area of Hawai‘i’s eight major islands is approximately 4,112,388 acres,\footnote{Id. at 39.} yet land tenure in Hawai‘i is “highly concentrated” among a few owners.\footnote{Id. The “government (federal, state, county) owns approximately 38% of the land, while six private landowners own 36% of the remaining 62% of the total land.” Id. “The Department of Hawaiian Homelands, the state office that administers land set aside for the use and benefit of [Hawai‘i ʻōiwi], administers 201,660 acres of homestead lands.” Id.} In education, as of 2000, only 9.4% of the Hawai‘i ʻōiwi population of twenty five years or older have attained a Bachelor’s degree.\footnote{Id. at 39.} And only 3.2% have attained a Graduate or Professional degree.\footnote{Id. at 48.} In 2004, Hawai‘i ʻōiwi accounted for only 7.9% of enrolled credit students at the University of Hawai‘i’s Mānoa campus.\footnote{Id. at 91.} Furthermore, Hawai‘i ʻōiwi represented only 8.4% of all University of Hawai‘i instructional faculty and community college personnel in the fall semester of 2003.\footnote{Id. at 87.} At the University of Hawai‘i at Mānoa, Hawai‘i ʻōiwi instructional faculty accounted for only 0.4%.\footnote{Id. at 91.} These are very dismal figures in a society that equates education and knowledge with power.

Hawai‘i ʻōiwi rank among the poorest in health. It has been observed that “[d]isease incidence and mortality are strongly associated with lifestyle and risk factors.”\footnote{Id. at 97.} Therefore, it is not surprising that Hawai‘i ʻōiwi are “the racial group with the highest proportion of risk factors leading to illness, disability, and premature death.”\footnote{Id. at 97.} In 2003, the proportion of Hawai‘i ʻōiwi in the “poor” category of general health status overshadowed all other ethnicities.\footnote{Id. at 97.} In terms of socio-economic status, Hawai‘i ʻōiwi “rank among the highest in negative social indicators” (e.g., income, employment, and public assistance).\footnote{Id. at 113.} Regarding economic development, only 25% of Hawai‘i ʻōiwi are in a managerial or professional occupation as compared to 34% of the United States population.\footnote{Id. at 139.} Nearly 62% of Hawai‘i ʻōiwi in Hawai‘i have household incomes lower than $50,000,\footnote{Id. at 113.} and Hawai‘i ʻōiwi “represent the highest percentage of homeless in Hawai‘i.”\footnote{Id. at 113.} This fact “has prompted the phrase, ‘homeless in their own land.’”\footnote{Id. at 113.}

By far the most troubling figure is the high concentration of Hawai‘i ʻōiwi in correctional facilities. Among all ethnic groups in Hawai‘i, Hawai‘i ʻōiwi represent “approximately 40% of all inmates incarcerated
in Hawai'i and contracted facilities on the continent.”155 Furthermore, Hawai'i ʻōiwi youth are a “disproportionate minority in the juvenile justice system” and represent “approximately 36% of all juveniles arrested for index and part II offenses” in Hawai'i.156 Just four years ago, Hawai'i ʻōiwi males made up 37% and Hawai'i ʻōiwi females made up 44% of the inmate population in Hawai'i's correctional facilities.157

In light of these social indicators, Hawai'i ʻōiwi in the legal profession have voiced concerns and recommended possible changes to the current judicial system. Melvin Soong, a Hawai'i ʻōiwi and former Hawai'i Circuit Court judge, commented that he would like to see “more civil matters resolved by [h]o’oponopono, or our cultural way of resolving disputes.”158 He also believes that this “could be expanded to non-[Hawai'i ʻōiwi] as long as they understand and agree to abide by these cultural guidelines.”159 He noted that “mediation is becoming [a] part of Small Claims court and its system but...[h]o’oponopono better resolves the conflict and better soothes relationships, especially for [ʻ]ohana members.”160 During an interview, Judge Soong candidly shared that as a judge he was always concerned with fairness to all parties and to Hawai'i as a whole.162 He described a case involving the murder of a young Tongan man by a young Sāmoan man. The father of the victim, a minister, spoke before the court and asked that a traditional Tongan practice be implemented. The father had forgiven the young man who killed his son because he knew the young man was remorseful. As result, the father of the victim felt that the accused should not be sent to jail. Judge Soong, respectful of this cultural practice, also had to balance the interest of the state in prosecuting a murder case. The case proceeded and the young man accused was convicted. But the case raised questions of how a court in Hawai'i balances the traditions and customs of all residents.

Another Hawai'i ʻōiwi in the legal profession expressed concerns about the courts’ failure to understand and acknowledge Hawai'i ʻōiwi history. Moses Haia, III, a Hawai'i ʻōiwi attorney, commented that the “single greatest hindrance in the Hawaii’i legal system is a complete ignorance of [Hawai'i ʻōiwi] history.”163 He opined that judges would be better suited to deal with the unique needs of Hawai'i ʻōiwi if they knew more about Hawai'i's history.164

Another concern raised the issue that some current court processes were not pono.165 During an interview with Moses, I asked him if he thought that anything in Hawai'i's court system could be changed to make

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155 Id. at 169.
156 Id. The majority of the crimes committed by Hawai'i ʻōiwi youth are: burglary, larceny, assault, marijuana drug use, and status offenses (i.e. runaways). Id.
157 Id. at 171.
158 E-mail from Melvin Soong, Board Member, Native Hawaiian Bar Association, to author (Oct. 23, 2008, 11:18 HST) (on file with author) [hereinafter E-mail from Melvin Soong].
159 Id.
160 'Ohana means “family, relative, kin group.” PUKUI & ELBERT, supra note 17, at 276.
161 E-mail from Melvin Soong, supra note 158.
162 Interview with Melvin Soong, Board Member, Native Hawaiian Bar Association, in Honolulu, Haw. (Mar. 11, 2009).
163 E-mail from Moses Haia, III, Staff Attorney, Native Hawaiian Legal Corporation, to author (Jan. 22, 2009, 02:15 HST) (on file with author).
164 Id.
165 Pono has been translated as “righteous,” “proper,” and “correct.” PUKUI & ELBERT, supra note 17, at 340. However, according to Dr. Lilikalā Kame'eleihiwa, although this word is often translated to mean righteous in English, it “actually denotes a universe in perfect harmony.” KAME’ELEIHIWA, supra note 23, at 25.
things pono. He answered my question with a hypothetical: A Hawai‘i ʻōiwi responds to a notice for a quiet title action on a soon-to-be-developed property because an ancestor’s name is listed on the notice. This Hawai‘i ʻōiwi has a strong feeling that he or she may have an interest in this land as a descendant and an answer is filed within twenty days. However, this Hawai‘i ʻōiwi only has a small interest and ends up losing the case. Now, as a result of responding to a notice containing the name of a relative, the individual must pay a significant portion of the developer’s attorney fees. This is not pono.

On the criminal end of the Hawai‘i judicial spectrum, Kanale Sadowski, a Hawai‘i ʻōiwi attorney and former Hawai‘i State Public Defender, stated that many things concerned him as a Hawai‘i ʻōiwi. First, he noticed a disproportionate rate of prosecution of serious crimes in Wai‘anae than other areas of O‘ahu. He asked, “Why do we accept that there are more criminals in one area of the island (which happens to be higher percentage of Hawai‘i ʻōiwi) than others?” Kanale also explained that the homeless and mentally ill are also disproportionately prosecuted and more of those individuals happen to be Hawai‘i ʻōiwi. Moreover, children from areas of high Hawai‘i ʻōiwi concentration “are prosecuted at a higher rate.” For him, the legislature and the judiciary are “set up to be reactive, rather than proactive.” In other words, individuals who need help in society must either have money to treat their problems or commit a crime and be institutionalized to receive treatment.

Is jail becoming a part of Hawai‘i ʻōiwi culture in certain areas? In our interview, Kanale also shared a specific story of a young Hawai‘i ʻōiwi from Wai‘anae. As a public defender, Kanale was with his client and the young Hawai‘i ʻōiwi’s parole officer. All were hungry and decided to go to McDonald’s. Kanale and the parole officer thought it a good idea to go through the drive-thru, but the young man disagreed. This young Hawai‘i ʻōiwi male in a jumper suit, chains, and shackles wished to enter the restaurant. As they strolled in, Kanale observed that the young man looked proud of what he was wearing and in a way, “strutted his stuff.” Kanale thought, could this be the same young man who was terrified of going to jail?

166 Interview with Moses Haia, III, Staff Attorney, Native Hawaiian Legal Corporation, in Honolulu, Haw. (Feb. 24, 2009). Moses also discussed how the Native Hawaiian Legal Corporation (“NHLC”) may file on behalf of claimants to preserve their interest in quiet title actions. Id. However, this is done prior to a thorough fact finding analysis. Id. Often times though, the interested party only has a small interest in the land and therefore it would not be feasible for NHLC to represent them in the action. Id.

167 E-mail from Kanale Sadowski, Counsel, United States Army Corp of Engineers Honolulu District Office, to author (Oct. 13, 2008, 10:29 HST) (on file with author) [hereinafter E-mail from Kanale Sadowski].

168 Id. Kanale specifically questioned the disproportionate number of prosecutions for statutory rape (i.e. where both partners are under the age of consent) cases from Wai‘anae and Hawai‘i Kai. Interview with Kanale Sadowski, Counsel, United States Army Corp of Engineers Honolulu District Office, in Honolulu, Haw. (Jan. 7, 2009) [hereinafter Interview with Kanale Sadowski].

169 E-mail from Kanale Sadowski, supra note 167.

170 Id.

171 Id.

172 Id.

173 Interview with Kanale Sadowski, supra note 167.

174 Id. Kanale also shared that almost all the males in this clients immediate family were either in jail or had served jail time. Id.

175 Id.
Another Hawai‘i ‘ōiwi attorney voiced concerns about the lack of ‘ōlelo Hawai‘i access in Hawai‘i’s court system. Summer Kūpau, a Hawai‘i ‘ōiwi and current Hawai‘i State Public Defender, represented a Hawai‘i ‘ōiwi client charged with driving under the influence (“DUI”). The client was initially pulled over for weaving within the lines on the road. Upon being pulled over, the client spoke only in ‘ōlelo Hawai‘i and requested an interpreter. There were Hawai‘i ‘ōiwi police officers present and one reported that, as a Kamehameha graduate, he was disturbed by the behavior of Kūpau’s client. After a moment, the client was deemed uncooperative and belligerent and was arrested and hauled to the police station. At the station, the client continued to speak in ‘ōlelo Hawai‘i and claimed to be taunted by the police officers. This incident at the police station was recorded on a video camera, but the tape mysteriously disappeared when Kūpau requested it. As a result, the case was dismissed. Although Kūpau was not able to argue a language rights claim when challenging the DUI charge, Judge William A. Cardwell’s court would have entertained the argument. However, Kūpau repeatedly requested an ‘ōlelo Hawai‘i court interpreter for her client but none showed up. According to Kūpau, using ‘ōlelo Hawai‘i in court is not just an “individual right,” it is a cultural right. Interestingly, ‘ōlelo Hawai‘i is an official language of the State of Hawai‘i.

Hawai‘i’s court system is in need of change. The concerns voiced by these Hawai‘i ‘ōiwi legal professionals – about the lack of culturally appropriate dispute resolution practices, the absence of court knowledge of Hawai‘i ‘ōiwi history, and the inability of Hawai‘i ‘ōiwi to use ‘ōlelo Hawai‘i in court – illustrate real disparities and injustices for Hawai‘i ‘ōiwi. These issues are not novel and have been addressed in different ways by the three other hālau: Hopi, Navajo Nation, and Republic of Palau. We now turn to these three hālau to receive their ‘ike.

177 Telephone Interview with Summer Kūpau, Staff Attorney, State of Hawai‘i Public Defender, in Mānoa, Haw. (Mar. 12, 2009).
178 Id.
179 Id.
180 Id.
181 Id.
182 The Hawai‘i State Constitution states that “English and Hawai‘ian shall be the official languages of Hawai‘i.” Haw. Const. art. XV, § 4. See generally Walk, supra note 176 (exploring the history, legal rights and legal implications of ‘ōlelo Hawai‘i in Hawai‘i).
IV. NĀ HĀLAU: HOPI, NAVAJO, AND PALAU

A. Hopi

The Hopi are “one of the oldest native cultures in North America.” They are descendants of an ancient people, known as the Hisatsinom, and older Hopi villages are thought to be one thousand to ten thousand years old. In 1882, an Executive order created the Hopi Reservation – consisting of 2,439 square miles – which is bounded by the Navajo Reservation. Presently, Hopi consists of twelve villages and “[e]ach of the older Hopi villages is made up of a hierarchy of clans based on their order of arrival to the area.” In 2000, the Hopi population was estimated to exceed 12,000.

According to the Hopi, Masau’u, a Hopi deity, holds original claim to all Hopi lands, but control or stewardship over village lands was granted by Masau’u to the original clan’s leader. The modern villages and clan leaders “trace their authority and right in land to these original sources.” For instance, the Bear clan “tends to be regarded as the first and highest ranking clan in a number of the villages with the male head of the clan serving as the village chief or ‘Kikmongwi.’”

The Hopi people have an internal governance structure passed down through generations. As explained by Professor Pat Sekaquaptewa, a Hopi attorney and scholar, “[a] Hopi clan is best described as a group of Hopi families, the females of which derive their clan through their mother’s line.” In a typical traditional household, daughters and their families would remain in their mother’s home for life. In contrast to traditional Western gender roles, both male and female Hopi perform important societal tasks. For instance, the "female clan heads ‘own’ the central clan homes and the male clan heads oversee a clan's ceremonial responsibilities to the village." Furthermore, these female and male clan heads are often responsible for determining clan member land use rights. However, the Taha, or maternal uncle, is the traditional disciplinarian and counselor within each clan household. As discussed below, this ancient system – in place since time immemorial – was dramatically changed by the United States federal government.

184 Id.
185 Id.
186 Id.
187 Id. Of approximately 12,000 Hopi and Tewa, “just over half (approximately 6,590) continue to call the Hopi reservation their primary residence.” Justin B. Richland, Arguing with Tradition: The Language of Law in Hopi Tribal Court, 28 (2008).
188 Sekaquaptewa, supra note 183, at 762.
189 Id.
190 Id. at 762-63.
191 Id. at 763.
192 Id.
193 Id.
194 Id.
195 Id.
1. The Hopi Tribal Government & Constitution

In 1934, the United States passed the Indian Reorganization Act of 1934. At that time, John Collier, the Commissioner of Indian Affairs, sent a representative “to Hopi country to convince the villages to establish a central Hopi Tribal Council and to adopt a tribal constitution.” The traditional leaders “opposed the plan, as it would jeopardize already established village government with its complex clan and religious organization.” Nevertheless, even with “the controversy surrounding the origins of the constitution and council,” the modern Hopi electorate has revised and re-adopted the Hopi Constitution three times since 1936, legitimizing the constitutionally defined powers and authority of the Hopi Tribal Council.

The Hopi Tribal Council has the power “to represent the Tribe in all matters and dealings with federal, state, and local governments, and other tribes; employ lawyers; prevent the sale or encumbrances of tribal lands and property;…remove or exclude non-members whose presence is harmful to the Tribe” and many other powers. Under the Hopi Constitution, the Hopi Tribal Council is the only branch of government. Each recognized village sends a number of representatives to serve on the Tribal Council. However, reserved in the constitution is the “village jurisdiction over family disputes and relations, the inheritance of property of village members, and the assignment of farming land.” The Hopi Constitution also allows villages to adopt their own constitutions. The contemporary village governments have administrative officers (e.g., governors or community service administrators) that manage the daily business and service demands of a village.

2. Hopi Judicial System

According to Professor Sekaquaptewa, “[a] judicial system with well fleshed out judge made law, or common law, is one that promotes fairness, consistency, and a respect for local values.” The central Hopi Tribal
Council created the Hopi Court system and separated it into three courts: Trial court, Children's court, and Appellate court.208

In 1972, the Hopi Tribal Council established the Hopi Trial court.209 The court is “housed in a modern courthouse/police headquarters complex on the Hopi reservation near Keams Canyon, Arizona.”210 Three associate lay judges and an attorney serving as Chief Judge comprise the trial court. All trial court judges are Hopi.211 This court has general authority, “guided by the Indian Civil Rights Act, to decide nearly every type of case, subject to the limitations of the Hopi Constitution, By-laws, and tribal ordinances.”212 In particular, the Hopi Trial court handles civil matters such as probate matters, torts, commercial contracts, property disputes, employment rights, and marital disputes.213

The Hopi Children's court is a court of limited jurisdiction over “minors who are shown to be dependent, minors who are in need of emergency care, and minors who are shown to be delinquent.”214 Civil jurisdiction of the Hopi Trial and Children’s court extends to both Indian and non-Indian litigants.215 However, criminal matters are limited to Indian-committed offenses on the reservation and usually include only misdemeanor crimes.216

The Hopi Appellate court was established in 1972.217 This court is “comprised of a three-judge panel of attorneys, which meets to hear oral arguments and deliberates two to three times per year.”218 A joint “tribal-non-profit-university sponsored law clerking project” assists the Hopi Appellate Court.219 This court's jurisdiction and mandate extend to reviewing final trial court civil decisions.220 This court also reviews trial court orders exceeding fifty dollars in fines or thirty days in jail.221 Furthermore, the Appellate court may also issue advisory opinions given certified questions of law from: (1) tribal agencies, (2) tribal departments, and (3) other judicial forums (including village forums).222 The next hālau – the Navajo – are close neighbors to the Hopi, but very different in history and judicial structure. As described below, the 'ike gathered by both courts will assist in understanding the function and purpose of a future Native court in Hawai‘i.

B. Navajo

Today, the Diné, or Navajo Nation, is the largest Indian nation in North America and covers Arizona, New Mexico, and Utah.223 The Dine Bikeyah land base, “Navajoland,” is 17,627,262.80 acres – “larger than Ireland

208 Id. at 766-67.
209 Id. at 766.
210 Id.
211 Id.
212 Id.
213 Id.
214 Id.
215 Id.
216 Id.
217 Id.
218 Id. The Hopi Appellate court convenes at “the Hopi court facility in Keams Canyon, Arizona.” Id.
219 Id. This project is “housed at the University of California at Berkeley’s school of law.” Id.
220 Id. Which includes “the review of the trial court certification of decisions made by the nine, constitutionally recognized Hopi villages.” Id.
221 Id.
222 Id. at 766-67.
223 James W. Zion & Robert Yazzie, Indigenous Law in North America in the Wake of Conquest, 20 B.C. INT’L & COMP.
and almost the size of the state of South Carolina.”\textsuperscript{224} Yet their customs and traditions are what truly make the Navajo unique.\textsuperscript{225}

1. Traditional Navajo Thinking & Resolution

The “Navajo norms, values and moral principles are stated in the Navajo language and preserved in Navajo creation scripture, origin stories, ceremonies, songs, stories, and maxims.”\textsuperscript{226} These “Navajo social stories about mythic creatures, particularly Coyote and Horned Toad, are another means to record values as legal principles.”\textsuperscript{227}

Traditionally, the Navajo had two types of leaders: war leaders and civil leaders.\textsuperscript{228} The traditional civil leaders, selected by group consensus, only remained in authority while beneficial to the group.\textsuperscript{229} Their authority is “not coercive, but persuasive.”\textsuperscript{230} For instance, the traditional civil leader “compels others through urging and example, not through power and force.”\textsuperscript{231} The traditional civil leader is a naa’taanii, or “justice planner.”\textsuperscript{232} Navajo planning, or naa’taah, is “very pragmatic and a plan is the product of considering every aspect of a problem through talking it out in a group setting.”\textsuperscript{233}

When a dispute arises the person claiming injury demands nalyeeh which translates to mean “restitution” or ‘reparation,’ but it is an action word which demands compensation for an injury and an adjustment of relationships between an ‘offender’ and a ‘victim.’”\textsuperscript{234} Also, the naa’taanii is not the judge, the individuals involved in the dispute are.\textsuperscript{235} In contrast to Western jurisprudence, relatives and clan members of the parties have “standing” by being within the ‘zone of dispute’ in Navajo common law.”\textsuperscript{236} “Talking things out” is the procedure used to resolve the dispute.\textsuperscript{237}
The “trial” is set into motion when the person demanding “nalyeeh seeks the assistance of a relative to get a naat’aanii to summon the participants to talk things out.” Often times the naat’aanii will be a clan or blood relative. The session always begins with a prayer because it “brings in the supernaturals, not simply as witnesses (as with the European oath) but as participants and agents for action.” After the prayer, each person in the group may speak because the “opinions and feelings of both the ‘victim’ and the ‘perpetrator’ are important, as are those of their relatives.” For example, in a talking out session discussing the paternity of a child, “the child’s grandparents resolved the putative father’s denial of paternity by pointing out that they (as the parents of the couple) knew about the sexual relationship all along and there was no doubt the child was theirs.”

Following the discussions, the naat’aanii expresses an opinion about the dispute in “the lecture,” which is more than just a lecture. Instead, the lecture “often relates to Navajo creation scripture through its many examples and maxims of the right way to do things.” However, unlike, American Alternative Dispute Resolution techniques, “a Navajo naat’aanii is not a ‘neutral’…because he or she is summoned to guide the parties, not as a decision-maker, but as a guide or a teacher.” The lecture is a very important process for “naat’aah or planning.”

The first step in plan making is carefully identifying the problem or “monster.” The Navajo believe that a “‘monster’ is something which gets in the way of life, a barrier, an impediment, or an obstacle to be overcome.” It is the job of the naat’aanii to help those involved to correctly “identify the causes of trouble and [use] Navajo wisdom and experience in the lecture to guide them.” Following the identification of the problem, a plan of action is developed by the parties “to end the dispute through consensus and agreement.” The “end goal and the result is hozho nahasdlii, which is the new relationship and attitude of the parties.” Hozho nahasdlii is also a term that concludes prayers. In contrast to amen, the European prayer-termination word, “it does not mean ‘may it be so’ [but]…. ‘It is so.’ This end goal “uses values of k’e solidarity and respect to reach a conclusion or state of being among everyone where each one interrelates

238 Id. “The Navajo word for ‘trial,’ ‘ahwiniti, means ‘where they talk about you.’” Id.
239 Id. “There are approximately 210 Navajo clans.” Yazzie, supra note 232, at 48.
240 Zion & Yazzie, supra note 223, at 78.
241 Id.
242 Id.
243 The translation is misleading because “the lecture is not an abstract sermon but a form of teaching.” James W. Zion, The Dynamics of Navajo Peacemaking, in NAVajo Nation Peacemaking: Living Traditional Justice 95 (Marianne O. Nielsen & James W. Zion, eds., 2005).
244 Zion & Yazzie, supra note 223, at 78. The teachings are “in fact a kind of case law in which the naat’aanii can point to similar disputes or problems in the past, relate who went through them, and show how the situation was resolved.” Zion, supra note 243, at 95.
245 Zion & Yazzie, supra note 223, at 78. According to traditional Navajo culture, “the concept of a disinterested, unbiased decision maker was unknown.” Tso, supra note 224, at 33.
246 Zion & Yazzie, supra note 223, at 78.
247 Id. at 79. The Navajo word for this first step is nayee, which translates into “monster.” Id.
248 Id.
249 Id.
250 Id. The plan of action also describes “the duties of each participant to mend relationships.” Id.
251 Id.
252 Id.
253 Id.
in a proper way with the others.”\textsuperscript{254} The relatives involved in the final agreement are very important because they serve as “traditional probation officers.”\textsuperscript{255} With these traditional and customary practices in place, the Navajo Nation’s courts were established.

2. The Navajo Judicial System

“[T]raditional Navajo law, or Navajo common law,” makes no distinction between criminal and civil actions.\textsuperscript{256} A wrong was a wrong. After traveling a long road,\textsuperscript{257} the traditional Navajo resolution of wrongs has gained the attention of many in the legal field. Although the Navajo already possessed “a rich peacemaking tradition,” the Navajo were “victimized by federal government efforts to impose the Anglo American legal system on them through the CFR courts.”\textsuperscript{258} In 1982, Navajo court judges “adopted a new kind of court system that blended traditional Navajo methods of mediating disputes with regular court operations.”\textsuperscript{259} During the 1980s, Navajo judges continued to reform their judicial system until the Peacemaker Court was established.\textsuperscript{260} In 1992, the Navajo Nation judges consciously decided “to reinstitutionalize the traditional Navajo legal procedure in the formal court system.”\textsuperscript{261} Each judicial district of the Navajo Nation has an associated Peacemaker court.\textsuperscript{262} As of 1997, there were “over 250 peacemakers in the 110 chapters or local governmental units of the Navajo Nation.”\textsuperscript{263}

\textsuperscript{254} Id.
\textsuperscript{255} Id. at 79-80. They are probation officers “in the sense that if they pay valuable goods to a victim and that person’s family, they will ‘keep an eye on’ the offender to prevent future misconduct.” Id. Also, “Navajos do not believe in punishment for its own sake.” Robert Yazzie & James W. Zion, “Slay the Monsters”: Peacemaker Court and Violence Control Plans for the Navajo Nation, in NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE 189 (Marianne O. Nielsen & James W. Zion, eds., 2005). The Navajo “believe it is better to identify reasons for misconduct and deal with them.” Id.
\textsuperscript{256} Zion & Yazzie, supra note 223, at 79 n.151.
\textsuperscript{257} In 1892, the “first modern courts were introduced to the Navajo Nation.” See Yazzie, supra note 232, at 43. The present Navajo Nation courts “were created in 1959 and reconstituted in 1985.” Id.
\textsuperscript{258} Robert B. Porter, Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies, 2\textsuperscript{8} COLUM. HUM. RTS. L. REV. 235, 302 (1997). In 1883, the Courts of Indian Offenses, “the first formal Western-style courts on Indian land,” were established by the Bureau of Indian Affairs (BIA). See Elizabeth E. Joh, Custom, Tribal Court Practice, and Popular Justice, 25 AM. INDIAN L. REV. 117, 119 (2000) (citing Joseph A. Myers & Elbridge Coochise, Development of Tribal Courts: Past, Present, and Future, 79 JUDICATURE 147 (1995)). These courts were called “CFR Courts” as a reference to the Code of Federal Regulations that were used. Id. In 1900, at their peak, approximately two-thirds of “reservations and territories constituting Indian Country” operated under CFR courts. RICHLAND, supra note 187, at 11.

For the Navajo, according to Chief Justice Emeritus Robert Yazzie, “[t]he intent of the CFR courts was to destroy the traditional Navajo legal system and destroy both Navajo values and the Navajo way of life.” Howard L. Brown, The Navajo Nation’s Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum, 24 AM. INDIAN L. REV. 297, 300 n.21 (2000).
\textsuperscript{259} James W. Zion, The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New, in NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE 65 (Marianne O. Nielsen & James W. Zion, eds., 2005).
\textsuperscript{260} Porter, supra note 258, at 302. Peacemakers are the persons that “actually conduct mediation and arbitration.” See Zion, supra note 259, at 75.
\textsuperscript{261} Zion & Yazzie, supra note 222, at 80.
\textsuperscript{262} Porter, supra note 258, at 302.
\textsuperscript{263} Zion & Yazzie, supra note 223, at 80.
K. Kaʻanoʻi Walk

At the first stage of peacemaking, after the district court receives all complaints, the appropriateness of the dispute for peacemaking is determined.264 If the dispute is appropriate for peacemaking, the Peacemakers Court is assigned the matter for resolution.265 If peacemaking is successful, a judgment is entered and the results are recorded, but if not, the case proceeds to trial in the district courts.266 As mentioned by one scholar, “[e]vidence to date suggests that the Navajo Peacemakers Court has been a tremendous success.”267 The present and future courts of Hawai‘i may look to the Navajo peacemaking process and learn ways to smoothly incorporate traditional Hawai‘i ʻōiwi dispute resolution practices into their court system.

C. Palau

With an approximate population of 18,000, the Republic of Palau is “one of the world’s smallest and newest independent nations.”268 Its rich traditions, customs and values have endured through the “art of story telling.”269 Three important stories, in particular, illustrate the origins of Palau’s rich customs and traditions: the Legend of Dirrengas, the Legend of Dilodaol, and the Legend of Mesaodngerel.270 These legends have “long been used in Palau to explain dispute resolution techniques.”271

The Legend of Dirrengas is named after Dirrengas, the “fourth-highest ranking woman in Irrai.”272 She was responsible for mediating disputes and maintaining the peace.273 Dirrengas was “quite successful… because she listened to the parties in each dispute and provided reasoned and fair orders.”274 Importantly, her power came from her tongue and judgment.275 In the Legend of Dilodaol, when the villages of Palau were warring, “Chief Ibedul of Korror launched an attack against Airai…. [but] Dilodaol, an old woman from the Esuroi Clan of Airai, was [the only one] left behind.”276 When “Dilodaol saw Ibedul, she asked

264 Porter, supra note 258, at 302. Murder, rape or other sexual crimes “can be and are dealt with in peacemaking.” See Zion, supra note 243, at 97. Furthermore, “[r]ather than [attempting] to establish categories of the kinds of cases that can or cannot be handled, peacemaker rule revisions assume that anything can be dealt with in peacemaking, and if it does not work, the usual adjudication methods are available.” Id.
265 Porter, supra note 258, at 302.
266 Id.
267 Id. Furthermore, “the rules of the court division essentially provide for court-annexed ‘mediation’ and ‘arbitration,’ but the traditional processes…are generally used.” Zion & Yazzie, supra note 223, at 80.
268 Colin P.A. Jones, Law and Investment in Palau: A Brief Overview for Prospective Foreign Investors, 17 IND. INT’L & COMP. L. REV. 49 (2007). The Republic of Palau is “comprised of more than 200 islands,” of which only nine are inhabited. Wali M. Osman, Bank of Hawaii, Republic of Palau: Economic Report 4 (2000). Koror, Palau’s capital, makes up “only 4.2 percent of the country’s total land area but is home to more than 70 percent of the total population.” Id.
269 Office of Court Counsel, Supreme Court of the Republic of Palau, The Quest for Harmony: A Pictorial History of Law and Justice in the Republic of Palau 1 (1995) [Hereinafter Quest].
270 Id.
271 Id. at vii.
272 Id. at 1.
273 Id.
274 Id. at 1-2.
275 Id. Dirrengas power was not derived from the “spear or money.” Id. at 2.
276 Id.
him to ‘chop her neck and spare the village’” but she did not literally mean this.²⁷⁷ Instead, Dilodaol meant for Ibedul to “cut off the exceptionally large piece of Palauan money (kedam) which she wore around her neck.”²⁷⁸

The Legend of Mesaodngerel is still closely associated with the modern day government. According to tradition, a snake god resided on the island of Anguar.²⁷⁹ This snake god “began to teach the whispered secrets of ancient law (kelulau) to the local chiefs.”²⁸⁰ These “teachings included the sacredness of political leadership, the heavy responsibility of civic duty, the importance of keeping confidences and respect for diplomatic interchange.”²⁸¹ Eventually, a great Koror man successfully returned to his island with the snake to learn the ancient law.²⁸² The snake “designated a place for whispering (ongeluluul)” in each village and instructed the people to build stone platforms at those sites.²⁸³ The platform contained four stone backrests for the chiefs to sit, discuss and apply the kelulau.²⁸⁴ Today, the Olbiil Era Kelulau (Palau’s National Congress), preserves this story and the kelulau.²⁸⁵

1. Traditional Palau Government
From the beginning, Palauans recognized the importance of achieving communal harmony.²⁸⁶ The “ralm el kelulau, a principle of maintaining harmony, is among the fundamental principles and policies, or kelulau, by which each successive generation of Chiefs governs and leads the people.”²⁸⁷ Even before contact with foreign nations, a proficient political and legal structure was present.²⁸⁸ The chiefs (rubak) of each village collectively formed a council of chiefs (klobak) that “would meet in an elaborate meeting center (bai er a rubak) erected on a special stone platform.”²⁸⁹ This platform was considered the “most important building in the village” because laws were created and administered there.²⁹⁰ The bai er a rubak, or meeting center, operated as the court house.²⁹¹ As for enforcement, “[e]ach bai housed a club (cheldebechel), which served as the village police, labor force and military.”²⁹² The traditional government hierarchy consisted of beluu, larger units, and renged ra beluu (satellite hamlets), smaller units.²⁹³ The chomiich a llach, the traditional government’s judicial structure,
“has played an important role in restoring and preserving this sense of harmony, by providing a forum for adjudicating disputes, resolving conflicts, and maintaining adherence to the laws that preserve peace and order.”294

Each community set specific rules to maintain village harmony, and “the display of respect for the chiefs.”295 Communities also formed rules to keep the peace. For instance, parents of an excessively noisy child could be fined “a small piece of Palauan money.”296 Also, rules concerning participation in village projects were formed.297 Upon payment of Palauan money, “criminal proceedings were brought to the council of chiefs.”298 Unlike the Western form of jurisprudence, the “[p]roceedings would be against the whole family of the accused,” and the defendant “would often not be present but would be represented by the rubak of his clan.”299 Furthermore, evidence was not usually collected by the council.300 Although the accused could claim innocence, there was “no opportunity for appeal.”301

Traditionally, the payment of Palauan money to village chiefs was the most common form of punishment.302 This money was “held in common by clans, and the clan would pay for the transgressions” of clan members.303 Although monetary fines varied with the severity of the offense, money could be used to avoid a death penalty.304 These complex traditions and customs of Palau would eventually be disrupted by multiple invading powers.

2. Palau and Foreign Laws

The islands of the Republic of Palau were conquered by Spain, Germany, Japan, and the U.S. at different periods of time.305 Each subsequent government created judicial systems that were foreign to Palau’s traditional practices. Under Japan, three local courts and an appellate court formed the South Seas judicial system.306 At that time, the only Palauans working at the Japanese Appellate Court were Yaoch, a court clerk and translator, and Boisek Emaudiong, a court assistant.307 At the end of World War II, Japanese rule ended and American rule began. After the United States defeated the Japanese, the United States Navy assumed administrative control over Palau and other islands,308 and established a new court system in Palau. On November 18, 1946, local

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294 Wisdom, supra note 286, at 1.
295 Quest, supra note 269, at 5. For instance, a person had to bow “when a chief was within six arm spans.” Id. Persons passing village piers by canoe had to also “show similar signs of respect to the local chiefs.” Id.
296 Id.
297 Id. “If a village member failed to work on an agreed village project, the member could be required to provide food for the others who worked on the project.” Id.
298 Id. at 6.
299 Id.
300 Id. The reasoning for this is because “the chiefs met every day and knew virtually everything that happened in the village.” Id.
301 Id.
302 Id.
303 Id.
304 Id. Killings committed during war, self-defense, or by accident were not punished. Id. “Large fines of Palauan money were imposed on murderers.” Id.
305 Id. at 9-18. First, Spain annexed Palau in 1885 and later sold it to Germany in 1899 “after Spain’s defeat in the Spanish American War.” Osman, supra note 268, at 5. In 1914, Japan “assumed” control of Palau and in 1920 “the League of Nations gave Japan a mandate over Micronesia.” Id.
306 Quest, supra note 269, at 19.
307 Id. at 20.
308 Id. at 22.
He Waʻa Hou: An Alter-Native Court for Hawaiʻi

courts were formed in each community pursuant to a military government order. However, only after January 10, 1947 did the local courts administer “native justice.” As a result, “[w]hen the military first announced this system of local courts in the Pacific Islands, the only ‘higher native court’ in existence was the High Court of Palau.” Also, in 1947, the Trust Territory of the Pacific Islands (TTPI) was established and the Court of Appeals, the District Court, the Superior Court, the Justice Court, Community Courts, and other Legal Services were formed. Under the TTPI administration, community courts only had jurisdiction “over the indigenous population where the particular community court was located.” On July 1, 1951, the administrative duties of the Trust Territory shifted from the United States Navy to the United States Department of the Interior. The administration by the United States Department of Interior continued until 1994 when the Republic of Palau became a sovereign nation.

3. Republic of Palau Court System

In 1979, the Palau Constitutional Convention “formalize[d] a major conceptual shift in the government of Palau, which is now based on an American system of separation of powers among an executive, bicameral legislature and unified judiciary.” Two years later, the Republic of Palau, a constitutional government, was formed and the Palau Supreme Court was created. Chief Justice Mamoru Nakamura became the first Chief Justice of the Republic of Palau in 1981. The current Palau judicial system, with broad powers to decide “all matters in law and equity,” draws upon aspects of the American-style courts that operated before Palau’s independence, yet remains a uniquely Palauan institution designed and run by and for Palauans. Currently, there are a total of nine judges on the bench, and all but one are Palauan.

The Republic of Palau’s Supreme Court is a court of general jurisdiction and hears most types of civil and criminal cases. The exceptions are small claims and misdemeanor cases filed in the Court of Common Pleas and land disputes filed in the Land Court. Pursuant to Palau’s Constitution, the Palau Supreme Court is separated into a Trial Division and an Appellate Division. In the Trial Division, cases may be

309 Id. at 26.
310 Id. This was done pursuant to a Navy directive. Id.
311 Id. at 27. The High Court of Palau “had jurisdiction over more serious offenses and civil actions within Palau.” Id.
312 Id. at 28-32. The Trust Territory of the Pacific Islands (TTPI), a trust of the United Nations, was administered by the United States. Osman, supra note 268, at 5.
313 Quest, supra note 269, at 29.
314 Id. at 33.
315 Id. at 79. On this same date, the Compact of Free Association (the Compact), a fifty year “political, strategic and economic treaty between the Republic of Palau and the United States, took effect.” Osman, supra note 268, at 6.
316 Quest, supra note 269, at 74.
317 Id. at 46.
318 Id. at 47.
319 Wisdom, supra note 286, at 1.
320 E-mail from Lourdes Materne, Associate Justice, Supreme Court of the Republic of Palau, to author (Nov. 25, 2008, 02:08 HST) (on file with author) [hereinafter E-mail from Lourdes Materne]. In September of 2000, Kathleen M. Salii was sworn in as the first woman to serve as a full-time Associate Justice on the Palau Supreme Court. Wisdom, supra note 286, at 61.
321 Id. at 2.
322 Id.
323 Id. at 5.
heard by one judge, but in the Appellate Division, at least three judges must sit. The Supreme Court consists of one Chief Justice and at least three Associate Justices. However, the Palau Constitution prohibits any judge who presided in a Trial Division hearing to hear the same case in the Appellate Division. Land Court judges or Part-Time Associate Judges may preside over appeals if one of the Supreme Court Justices is conflicted. According to statute, the Chief Justice first reviews all cases filed and then decides which cases should be heard in the Court of Common Pleas or the Trial Division. All proceedings in the courts of Palau are conducted in both Paulauan and English, with translators if necessary.

In 1982, the Court of Common Pleas was established by the Olbiil Era Kelulau (“OEK”), Palau’s Congress, to hear common civil and criminal cases. For instance, “small claims, traffic citations and other minor cases.” The proceedings are usually held in Palauan rather than English and are less formal than the Trial Division; therefore, parties usually forgo securing an attorney and appear in court on their own behalf.

Like the Court of Common Pleas, the Land Court was created by statute. Traditionally, customary land ownership was the system, and land was usually controlled by the village council and the clan. However, this traditional structure was disrupted by the presence of Germans, Japanese, and Americans in Palau. As a result, the OEK created the Land Court to resolve disputes to lands and “establish a thorough and accurate system of land registration.” The OEK “recognized that claimants are likely to represent themselves in claiming ownership of lands before the Land Court.” As a result, “[t]he rules of procedure [and] evidence in the Land Court are somewhat lax and ‘hearsay’ evidence is allowed.”

Usually, “most claims of ownership are based on stories about how a claimant’s ancestor acquired ownership of a particular piece of land over fifty years ago and how the claimant’s ancestors have used and farmed the land over an extended period of time.” As of 1996, a mediation session is required prior to the

324 Id.
325 Id. However, the Palau Constitution prohibits the Supreme Court from having more than six Associate Justices. Id.
326 Id.
327 Id.
328 Id. at 20.
329 Id. at 2. The Palau court staff is also equipped with interpreters for the Tagalog, Chinese, and Bahasa Indonesian languages. Id.
330 Id. at 20. For civil cases, the dispute must $10,000 or less and in criminal cases, the maximum penalty must be a fine of $2,000 or less or a prison sentence of five years or less. Id.
331 Quest, supra note 269, at 53.
332 Id.
333 Wisdom, supra note 286, at 20.
334 E-mail from Uduch Senior, Attorney, Republic of Palau, to author (Nov. 19, 2008, 01:00 HST) (on file with author) [hereinafter E-mail from Uduch Senior]. Senior is a former Associate Judge of the Palau Land Court. Wisdom, supra note 285, at 49. When she was sworn in on June 11, 1999, she became the “first female Full-Time Judge in Palau.” Id.
335 Wisdom, supra note 286, at 45.
336 Id.
337 Id.
338 E-mail from Lourdes Materne, supra note 320.
339 Id.
340 Id. Also, for instance, claims may involve inheriting property as a customary heir or inheriting property through services rendered to the owner. E-mail from Lourdes Materne, supra note 320.
hearing of each case to “promote settlement and reduce the number of hearings.” This law was amended in 1999 to require all mediators to be: (1) Palauan, (2) at least thirty years of age, (3) a resident of Palau for at least seven years, (4) legally trained or possess expertise in customary matters, and (5) a recognized leader or intellectual in the community. Because the land disputes are often between families, mediation allows some families to work the dispute out while maintaining a “pleasant relationship.” The majority of the land claims turn on a “credibility judgement by the presiding judge.” For instance, several claimants may raise customary right claims as clan members to the land and others may argue a right to the land in accordance with modern statutes.

Apart from the justices that sit in these courts, there are also Part-Time Associate Justices and Special Judges. The Special Judges have a unique role in murder cases because “two Special Judges sit along side the presiding Justice and participate in the fact finding and sentencing functions of the Court.” Therefore, the “Special Judges have equal responsibility for determining the guilt or innocence of defendants charged with murder.” Our future Hawai‘i ʻōiwi court may draw from Palau’s land court mediation experiences to handle present and future Hawai‘i ʻōiwi land claims.

341 Wisdom, supra note 286, at 46. The Micronesian Legal Services Corporation’s attorneys have observed that mediation is “an important procedure for Land Court because there are so many claimants and so much confusion.” Micronesian Legal Services Corporation, Annual Report: Palau Office Report 3 (2003). In some cases, two family members may be claiming unknowingly for the same family. Id. The Micronesian Legal Services Corporation (MLSC), a non-profit corporation, was established to “provide low income persons in Micronesia with free legal assistance in civil matters.” MicronesiaLawHelp.org, About Micronesian Legal Services Corporation, http://www.mlscnet.org/FM/StateAboutUs.cfm/County/%20/City/%20/demoMode/%3D%201/Language/1/State/FM/TextOnly/N/ZipCode/%20/LoggedIn/0 (last visited Sept. 9, 2009).

342 Wisdom, supra note 286, at 52.
343 Id.
344 Id. at 47.
345 Id.
346 Quest, supra note 269, at 51.
347 Id. However, the “presiding justice is solely responsible for ruling on issues of law.” Id.
V. NĀ ‘IKE HĀLAU: POSITIVE ASPECTS OF THE HOPI, NAVAJO, AND PALAU COURTS

Each court system, described above, is unique. Each also offers lessons and best practices. The following sections highlight some of those best practices – or positive aspects – to help guide Hawai‘i ‘ōiwi discussions about a future court system.

A. Hopi

The first positive aspect of the Hopi court system is that its judiciary recognizes reserved village powers, because this promotes differences between villages. Under Article III, Sections 2 (c) and (d) of the Hopi Constitution, the power to regulate inheritance of property and to assign farming land is reserved in the recognized villages.348 Furthermore, under Article VII, Section 1, the constitution states that "the assignment of the use of farming land ‘shall be made by each village according to its established custom, or such rules as it may lay down under a village Constitution. ‘”349

In Ross v. Sulu,350 a dispute arose over the use of land. The trial court ruled contrary to the Constitution's requirement that certain land disputes be "resolved under traditional village procedures.”351 The Hopi Appellate Court vacated the lower court's order and held that "the power to assign farming land was reserved to the 'Village of First Mesa.'”352 Under the Hopi Constitution, each village is "free to adopt modern constitutions and governmental organization[s], but unless they do," they are considered a traditional Hopi organization with the Kikmongwi as village leader.353 The Village of First Mesa did not adopt a village constitution and therefore remained under the traditional Hopi organization.354 As stated by the Hopi Appellate Court, the “underlying dispute here is between two clans of the same, traditionally organized village.”355 Therefore, "when the Tribal Court became aware that the case turned on an intravillage [sic] dispute between clans over a matter reserved for village decision, it should have dismissed the case for lack of jurisdiction, requiring the parties to seek resolution of the dispute through established customary village procedure.”356 The Hopi Appellate Court rightfully honored traditional Hopi practices in the modern court setting.357

348 Sekaquaptewa, supra note 183, at 769 (citing Hopi Const. art III, § 2).
349 Id. (citing Hopi Const. art VII, § 1). However, any "[u]noccupied land beyond the clan village holdings…shall be open to the use of any member of the Tribe, under the supervision of the Tribal Council." Id. Lastly, “[n]othing in this Article shall permit depriving a member of the Tribe of farming land actually occupied and beneficially used by him at the time of the approval of this Constitution.” Id.
351 Sekaquaptewa, supra note 182, at 770. Under the Hopi Constitution, “the proper exercise of village jurisdiction turns on whether the land in question is being probated, on whether it is ‘farming land’ versus ‘land beyond the clan village holdings,’ or whether the land was ‘occupied and beneficially used in 1936.’” Id.
352 Id.
353 Id. at 770-71.
354 Id. at 771.
355 Id.
356 Id. Furthermore, the Trial court’s "attempt to decide this dispute pursuant to its own procedures and substantive standards violated the expressly reserved constitutional right of the village to resolve the matter according to its established custom.” Id.
357 Hopi Appellate Court case law illustrates the application of these analytical tools:
The second positive aspect of the Hopi courts is that they promote fairness and legitimacy by respecting traditional concepts of fairness in village decision-making processes. In Honie v. The Hopi Tribal Housing Authority, a dispute over land arose between a clan leader and village member. The key issue in the case was “whether and how the tribal court may recognize and enforce village decisions.” The Appellate Court held that the “trial court must hold an evidentiary hearing to determine whether all interested parties have been provided with a fundamentally fair opportunity to participate in the village decision-making process before the trial court could recognize and certify the village decision.” At the very minimum, the court determined that “all interested parties should be provided with adequate notice and a meaningful opportunity to be heard in the village decision-making process.” As a result, the Hopi Appellate Court adopted a procedure for certification hearings.

First, “the party requesting certification must provide adequate notice to all interested parties by publication and posting of such request.” Second, the trial court must “set the hearing no earlier than sixty days from the date of notice.” Third, “at the hearing, the burden is on the petitioner (the party requesting certification) to establish that the village has provided all interested parties with a fundamentally fair opportunity to assert their interests before the village makes its decision.” Professor Pat Sekaquaptewa, a Hopi lawyer and scholar, commented that “[a]lthough the Appellate Court did not elaborate, it was clearly concerned with basic concepts of Hopi fairness in the use of the Tribe’s court orders and police officers to enforce village decisions.” It is presumed that the “Court wished to preserve traditional or existing dispute resolution process[es] at the village level, as a matter of local government choice.”

The third positive aspect of the Hopi courts is their reliance on custom, tradition and culture, above federal or state foreign laws, in creating culturally appropriate Hopi common law. As specified by Hopi Tribal Resolution H-12-76, Section 2(a), “the tribal courts are mandated to consider the applicable law in a precedent order of authority.” Therefore, in deciding matters of both substance and procedure, the courts “shall look to and give weight to: (1) the Hopi Constitution and Bylaws; (2) the ordinances of the Tribe; (3) recognizing that Hopi is comprised of multiple legal levels – thus recognizing that no one judge may have the capacity to take judicial notice of tribe-wide custom where it varies from village to village and perhaps within clans; (2) setting up a custom-law-finding-hearing process for the reliable identification of relevant local custom where the villages decline to handle disputes in their own way; (3) recognizing traditional authorities and respecting their decision-making powers and authoritative statements on the applicable local custom and/or tradition; and (4) carefully considering the application of custom to dissenters and reformers, including the underlying rationales and impact to the tribe, villages, clans and individuals.

359 Sekaquaptewa, supra note 183, at 771.
360 Id. at 772.
361 Id. (citing Honie v. Hopi Tribal Hous. Auth., 96AP000007, at 7-8 (Hopi App. Ct. 1998)).
362 Id. (citing Honie, 96AP000007, at 8).
363 Id. (citing Honie, 96AP000007, at 8).
364 Id. at 772-73. (citing Honie, 96AP000007, at 8).
365 Id. at 773. However, Professor Pat Sekaquaptewa also recognizes that “Honie is purely procedural.” Id.
366 Id.
367 Id. at 778.
the resolutions of the Tribe; (4) the customs, traditions, and culture of the Tribe; (5) the laws, rules and regulations of the federal government and the cases interpreting them; (6) the laws and rules of the state of Arizona and the cases interpreting them; and (7) the common law.” An example of this may be found in child custody arrangements. In Hopi culture, it is “widely understood...that children belong to their mother’s clan and that the child is expected to engage in clan activities at certain times of the year.” "This ‘custom’ would be highly relevant in establishing a common law custody standard, or as a factor in determining what is best for the child.” Most likely, a judge would take judicial notice of this Hopi custom.

The Hopi Appellate Court also applied Hopi tradition and custom in Hopi Indian Credit Association v. Thomas. In that case, the Hopi Credit Association brought a civil suit against a Hopi businessman for a defaulted loan. The businessman moved to dismiss based on a statute of limitations argument. The Hopi Rules of Civil and Criminal procedure do not include a civil statute of limitations and custom and tradition exclude the application of such limitation. This custom is based on the reciprocal giving between a bride’s family/clan and the groom’s family/clan which could take years to complete. The Hopi Appellate court reversed the trial court’s dismissal and remanded the matter for a hearing on the existence and relevance of the asserted custom. The Hopi Appellate court reprimanded the trial court for ignoring Hopi traditions and customs: “in effect, the trial court would look to authorities listed in H-12-76, section 2(a), in descending order until it reached the resolutions of the Hopi Tribal Council, then it suggested it should skip over customs, traditions and culture of the Hopi Tribe and apply federal and state law.”

The Hopi Appellate Court not only determined that the trial court’s interpretation was incorrect but stated that the “customs, traditions and culture of the Hopi Tribe deserve great respect in tribal courts, for even as the Hopi Tribal Council has merged laws and regulations into a form familiar to American legal scholars, the essence of Hopi law, as practiced, remains distinctly Hopi.” As a result, the Hopi Appellate Court set out procedures for pleading and proving up of customs. First, the party seeking “to raise an issue of unwritten custom, tradition or culture shall give notice to the other party and the court through its pleading or other reasonable notice.” Second, the proponent of Hopi traditions, customs, and culture shall then: (1) “plead them to the court with sufficient evidence to establish the existence of such custom, tradition or culture, and then (2) show that the recognized custom, tradition, or culture is relevant to the issue before the

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368 Id.
369 Id. at 777.
370 Id.
371 Id. at 777-78. Specifically, that it is “a Hopi custom for the child to be with his clan at a certain time of the year.” Id. For instance, “there may be a presumption of custody with the Hopi mother at bean dance (February) or at homegoing dance time (July).” Id. at 78.
373 Sekaquaptewa, supra note 183, at 778.
374 Id.
375 Id.
376 Id. For example, the giving of food and gifts could take years to complete. Id.
377 Id. at 779.
378 Id. (quoting Hopi Indian Credit Ass’n v. Thomas, AP-001-84 *, at 3-4 (Hopi App. Ct. 1996)).
379 Id. (quoting Hopi Indian Credit, AP-001-84 *, at 3-4).
380 Id. at 779 (quoting Hopi Indian Credit, AP-001-84 *, at 5-6).
There is no presumption of relevancy of Hopi custom, tradition, or culture in any legal matter. However, “[a] court may dispense with proof of the existence of a Hopi custom, tradition or culture if it finds the custom, tradition or culture to be generally known and accepted within the Hopi Tribe.”

The fourth positive aspect of the Hopi courts is their encouragement of non-adversarial procedures to admit custom and tradition into the court proceedings, which invites the cooperation of the village and elders. In Smith v. James, the Hopi Appellate Court established procedural and evidentiary rules for holding fact-finding hearings of applicable custom. This case centers on a familial dispute over land between a niece, who remained on the Hopi reservation, and an aunt, who married outside of the tribe and moved away. At the hearing, the judge took testimony from witnesses selected by both parties concerning custom and tradition. The judge asked questions in Hopi and the witnesses responded in Hopi and “attorney questioning or cross-examination was [not] permitted.” In reversing the ultimate decision of the trial court, the Hopi Appellate Court determined that more was needed to elicit testimony on custom:

1. the village was not involved in the selection of witnesses who would be testifying on the applicable village custom;
2. although the trial judge appropriately solicited testimony from the witnesses in a non-adversarial manner, the parties were not permitted to submit additional questions following initial testimony; and
3. the trial court committed error in holding the “trial type” evidentiary hearing before it held the hearing to find the customary law.

According to the Hopi Appellate Court, the village should be more involved to ensure an accurate representation of customs and local practices. However, the Court praised the trial judge for the “non-adversarial nature of the hearing…since many elders might be fearful of undergoing cross-examination.” The Hopi Appellate Court determined that village participation in the hearings might have been hindered in “an adversarial atmosphere.”

Although the origins of the Hopi Tribal Council and the Hopi Constitution may be controversial, the

381 Id. at 779-80 (quoting Hopi Indian Credit, AP-001-84 *, at 5-6).
382 Id. (quoting Hopi Indian Credit, AP-001-84 *, at 5-6).
383 Id. (quoting Hopi Indian Credit, AP-001-84 *, at 5-6).
384 Id. (citing Smith v. James, 98AP000011 (Hopi App. Ct. 1999)).
385 Id. at 781.
386 Id. (citing Smith, 98AP000011, at 8-9).
387 Id.
388 Id. at 782 (quoting Smith, 98AP000011, at 9-10).
389 Id. (quoting Smith, 98AP000011, at 9-10). However the court did agree that “the parties should have been afforded an opportunity to request further questions after the initial testimony in order to ensure that there are not substantial gaps in the law being found.” Id. (quoting Smith, 98AP000011, at 9-10).
390 Id. at 783. Oliver La Farge, officer to the Bureau of Indian Affairs Commissioner John Collier, was sent to the Hopi reservation in 1936 to create a Hopi Constitution. Richland, supra note 186, at 32. La Farge reported:

It is very significant that even after the subject of the constitution had been discussed throughout the villages for two months, general meetings were very badly attended. In no case did ten percent of the voting population of a village attend one…. Opposition is expressed by abstention. Those [Hopis] who are against something stay away from meetings at which it is to be discussed and generally refuse to vote on it.

Id. Furthermore, the IRA’s requisite thirty percent vote by eligible Hopi falls “just short” of the IRA’s constitutional ratification requirements. Id. at 32-33.
Constitution has been amended and re-adopted by the modern Hopi electorate “as a declaration of sovereignty, and in an act of self-determination.” As a result, the Hopi courts have (1) recognized reserved village powers, (2) ensured traditional fairness in village decision-making processes, (3) affirmed the use of custom, tradition and culture above foreign laws, and (4) established a non-adversarial approach to admitting custom and tradition into court. Prof. Sekaquaptewa warns all to remember that “no one's culture is static and many who would coerce Hopis to emulate the past usurp Hopi control over its future.”

B. Navajo

The first positive aspect of the Navajo Nation court is the formation of the Navajo Peacemaker Court that incorporates traditional dispute resolution practice into their court system. The Navajo peacemaking legal procedure “is not only a process to achieve a group decision, but also to solve problems.” In other words, “it gets at the heart of the matter and educates people to guide them to adjust their relationships.” Yet Navajo peacemaking is not simply another kind of alternative dispute resolution or mediation. More appropriate names would be “replicative justice” or “participatory justice.” It is a Navajo process—a “form of conflict resolution that is rooted in Navajo culture and practices but...modified to take into account present-day issues and resources.” Individuals can practice it as a way of life or as an alternative court process.

The Navajo peacemaking process addresses these aspects of disputes: (1) denial, (2) minimalization, and (3) externalization. Denial occurs when an individual “refuses to admit he or she has a problem or caused harm to another.” Minimalization occurs when an individual “excuses an action by saying it is not a big deal.” Externalization is “blaming.” Also, when peacemaking is sought by consenting parties, criminal disputes are converted into civil cases.

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391 Sekaquaptewa, supra note 183, at 783.
392 Id. at 783-84.
393 Zion & Yazzie, supra note 223, at 80. “Unlike the contemporary adversarial system, which focuses on punishing the guilty to prevent future crime, peacemaking instead tries to reduce deviance by reintegrating offenders into society and reestablishing harmony both within the individuals and between offenders and those around them.” Jon'a F. Meyer, Bil Hááázígh ("I Am His Brother"): Can Peacemaking Work With Juveniles?, in NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE 125 (Marianne O. Nielsen & James W. Zion, eds., 2005).
394 Zion & Yazzie, supra note 223, at 80.
396 Id. (citing James W. Zion, Monster Slayer and Born for Water: The Intersection of Restorative and Indigenous Justice, 2 Contemp. Just. Rev. 359, 359-82 (1999)).
397 Id.
398 Id.
399 Zion & Yazzie, supra note 223, at 81. All are addressed “in ways the state systems cannot do.” Id.
400 Id.
401 Id.
402 Id.
403 Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. Rev. 225, 252 (1994). Pursuant to Navajo law, “[e]ven if the matter remains a criminal action,...the court can [nevertheless] order punishment for the offender and compensation for the victim.” Id. The Navajo criminal code “continues the Navajo custom that required the offender to compensate the victim and the clan of the victim.” Id. at 252-253. In a Navajo civil case,
Navajo peacemaking has broad applicability in all legal settings. In Western “criminal systems with the privilege against self-incrimination, defendants cannot be compelled to discuss motives, attitudes, addictions or causes of misconduct.”404 However, in Navajo peacemaking, “which does not utilize punishment, people are free to ‘talk out’ the problem fully and get at the psychological barriers which impede a practical solution” through the use of immunity.405

The United States Department of Justice has supported and funded peacemaking “to implement the Male Minority Project.”406 This program is “a diversion program whereby persons accused of drunk driving are sent into peacemaking…. [and] have ‘use immunity’ for anything they say, and thus they are free to talk.”407 In this setting, if a “defendant claims not to have a drinking problem, he or she says it to a spouse, parents, children and others who know the person well.”408 Through peacemaking, the values of the individual are corrected and clarified by those who know him or her well and know the true facts.409 In a domestic violence case, “a wife-beater attempted to deny and excuse his actions, and his sister immediately corrected him…. [and] told him that he was an abuser with an alcohol problem.”410 She then offered to help her brother and his wife to “lead a new life to avoid abuse.”411

Navajo peacemaking also has contemporary applications.412 In 1994, visitors from the Parliament of Namibia visited the Navajo Nation and while the Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation “explained Navajo justice concepts, the group’s tour guide protested that what Yazzie said was all very fine for a traditional, [homogenous] society…where everyone spoke the same language, but it wouldn’t work for people with cultural or language differences.”413 Chief Justice Emeritus Yazzie then shared a story that illustrates the cross-cultural application of Navajo peacemaking. A young Navajo child was pushed into a clothes dryer and scorched to death at a laundromat. The wrongful death suit was brought by the child’s parents against the laundromat and “a products liability action against the manufacturing company for negligence in manufacturing the dryer.”414 The defendants’ attorney determined that it was impossible to predict

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404 Zion & Yazzie, supra note 223, at 81.
405 Id. Under use immunity, “nothing which is said in peacemaking can be used against a defendant if the case returns to court for adjudication and punishment.” Id. at n.153.
406 Id. at 81.
407 Id.
408 Id.
409 Id. at 81. This is reinforced further by the naa’aanii who is present to “correct unrealistic attitudes.” Id. at 81-82.
410 Id. at 82.
411 Id.
412 Robert Yazzie, Chief Justice Emeritus of the Navajo Nation, also opines that “there are lessons in Navajo peacemaking for those who want to approach old problems in sensible new ways.” Robert Yazzie, Foreword to Marianne O. Nielsen & James W. Zion, Navajo Nation Peacemaking: Living Traditional Justice ix (Marianne O. Nielsen & James W. Zion, eds., 2005).
413 Zion & Yazzie, supra note 223, at 82.
414 Id.
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the outcome of a jury verdict and requested peacemaking. Consequently, the child’s parents and representatives of the laundromat and the manufacturer “talked out” the unfortunate event. The parents stated that their suit was not motivated by money, but was simply a process to deal with the loss of their child. At the conclusion of the peacemaking session, all parties agreed upon a settlement sum that could have been expected “from a rural jury in the Arizona court system.” Although traditional Navajo peacemaking uses only a few legal procedures and principles, it works because “Navajos value relationships and respect the traditions which are expressed in the Navajo language and religion.”

The second positive aspect of the Navajo Nation courts is the use of traditional principles and customs in law to create and promote a Navajo court. According to a 1995 survey of tribal court cases in the Indian Law Reporter, “the Navajo Nation alone accounts for 8 (40 percent) of the decisions in which a tribal court relied upon traditional principles.” The Navajo Nation courts have used traditional principles for such issues as jailing, family law, and the marital privilege rule.

On the issue of jailing, the Navajo Nation Supreme Court ruled in accordance with Navajo traditions that the preferred method of redress is restitution. As observed by a former Navajo Nation attorney, convicted Navajos are not referred to as “inmates” or “prisoners.” Rather, they are called “trustees to the tribe” with responsibilities and duties to the tribe. Regarding family law, traditional principles are most frequently invoked when “interpreting the ‘best interests of the child’ standard.” In the area of political responsibility and fundamental fairness, decisions by the Navajo Nation Supreme Court have addressed: the “tribal government[s]’ responsibility to undertake public consultations prior to decision-making, the right to equitable access to public housing, the right to adequate notice and an opportunity to be heard in civil proceedings, and freedom of speech in the workplace.” Regarding a marital privilege rule, the Navajo Supreme Court acknowledged that, although the rule is borrowed from the federal system, it rejects one of the marital rule’s historical principles: “that the wife had no separate legal existence from her husband because a marital unit was one legal party and ‘the husband was the one.”

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415 Id.
416 Id. at 83.
417 Id.
418 Id.
419 Id. at 80.
421 Id. at 82 (citing Navajo Nation v. Blake, 24 Indian L. Rptr. 6017, 6018 (Navajo 1996)).
422 Telephone Interview with Andrew Sprenger, Staff Attorney, Native Hawaiian Legal Corporation, in Kāneʻohe, Haw. (Dec. 17, 2008) [hereinafter Telephone Interview with Andrew Sprenger]. Sprenger worked for Legal Services on the Navajo Nation reservation. Id.
423 Id.
424 Barsh, supra note 419, at 83 (citing Davis v. Means, 21 Indian L. Rptr. 6125, 6126 (Navajo 1994)). In particular, the “child’s right to knowledge and enjoyment of its cultural heritage.” Id.
425 Id. (citing Rough Rock Cmty. Sch. v. Navajo Nation, 25 Indian L. Rptr. 6059, 6061 (Navajo 1998)).
426 Id. (citing Atcitty v. Dist. Court for the Judicial Dist. of Window Rock, 24 Indian L. Rptr. 6013, 6014 (Navajo 1996)).
427 Id. (citing Johns v. Leupp Schs., Inc., 22 Indian L. Rptr. 6039 (Navajo 1995); Ben v. Burbank, 24 Indian L. Rptr. 6001 (Navajo 1996); Lee v. Tallham, 24 Indian L. Rptr. 6034, 6036 (1996)).
428 Id. (citing Navajo Nation v. Crockett, 24 Indian L. Rptr. 6027, 6028, 6030 (Navajo 1996)).
429 Valencia-Weber, supra note 403, at 253 (Navajo Nation v. Murphy, 15 Indian L. Rptr. 6035 (Navajo 1988).
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this Western principle has no customary support in Navajo tradition and culture, this aspect of the rule was rejected by the Court.430

On the issue of agricultural permits and land, Navajo law implements the “customary trust.”431 This unique Navajo innovation “requires the appointment of a trustee to hold the productive property for the benefit of the family unit.”432 The probate system of the Navajo Nation, achieves fairness among heirs through custom.433 One scholar observed, “I have dwelt at some length on Navajo decisions because they take traditional principles seriously as an alternative paradigm of justice and not as mere boilerplating.”434

The third positive aspect of the Navajo Nation court system is that it is a bifurcated court that offers alternative options to its participants. In the Navajo Nation courts, both the old and new paths to justice coexist. Incorporating a bifurcated tribal judicial system is a pragmatic approach “to acknowledge [the] informal practices and address the difficult problem of weaning off the Anglo-American legal tradition.”435 Thus, while the Navajo judicial system accommodates the resuscitation of their peacemaking tradition, the courts also accommodate “the non-homogenous nature of modern Navajo society.”436 For example, peacemaking can handle cases in which relationships may be important and litigation can handle cases in which the parties are strangers.437

The fourth positive aspect of the Navajo Nation court system is the fortification of culture and language through the selection, qualification, and role of the Navajo Nation judges. The seventeen Navajo judges, including the three Navajo Supreme Court judges, are appointed by the elected Navajo tribal council.438 Following a two-year probation period, “Navajo judges may be appointed permanently to serve until the age of seventy.”439 As for qualifications, Navajo law requires that a tribal judge be: (1) fluent in the Navajo language, (2) knowledgeable in Navajo customs, (3) experienced in a law-related area for at least two years, and (4) over the age of thirty.440 Importantly, the judges are not limited to formal, black letter law. When a judge needs to make a decision, he or she sits as the conscience of the community and tribe.441 The judge then decides the outcome of the proceeding while weighing the equity issues of the community and/or tribe.442 This allows the judge to make decisions that are best for the community, traditions and culture, rather than being straight-jacketed by the law.

430 Id. at 254 (citing Murphy, 15 Indian L. Rptr. 6035, at 6036). To the Navajo, a matrilocal and matrilineal society, “the woman’s role is revered.” Id.
431 Id.
432 Id. (quoting In re Estate of Wauneka, 13 Indian L. Rptr. 6049, 6050 (Navajo 1986)).
433 Id. In one case, “the Navajo Supreme Court relied on the custom that parents should ‘view’ each of their children equally.” Id. (citing In re Joe Thomas, 15 Indian L. Rep. 6053, 6054 (Navajo 1988). Furthermore, proven Navajo custom controls the distribution of intestate property. In re Estate of Wauneka, 5 Navajo Rptr. 79, 82 (Navajo 1986). Custom also takes priority over Navajo rules of probate in cases of conflict. Id.
434 Barsh, supra note 420, at 84.
435 Porter, supra note 258, at 302.
436 Id.
437 Id.
439 Id. This “insulates the Navajo judiciary from politics.” Id.
440 Id. at 322.
441 Telephone Interview with Andrew Sprenger, supra note 422.
442 Id.
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The fifth positive aspect of the Navajo Nation courts is the creation of Navajo common law, which adds to the credibility and predictability of the court. Title 7, Article 204 of the Navajo Nation Code “not only recognizes custom as a source of law, but provides the courts with a process for its authoritative determination.”

Each year the Navajo Supreme Court hears cases argued by attorneys who repeatedly refer back to past decisions. The Navajo judges also speak of Navajo common law and “regard themselves as participating in its elaboration and development.” One scholar, commenting on tribal courts, stated that “[s]ome aspects of the common law processes are at work in all of the tribal courts that we visited, but it seems to us that few – possibly only Navajo – have a formal common law process like those found in state courts.”

“Indian justice is ‘justice’ for Indians when the state cannot or will not respond in its systems of adjudication.” According to former Navajo Supreme Court Associate Justice Raymond D. Austin, although Indians have gone “down hill” since the arrival of Columbus, “[n]ow that Indians are consciously reviving their traditional justice methods and ways of doing things, they will recover.” The Navajo Nation is certainly in the forefront of this jurisprudential movement of incorporating traditions and customs to a modern court setting.

C. Palau

The first positive aspect of the Palau courts is their respect for alternate forums of dispute resolution used in different Palau states. Although no traditional leaders participate in the judicial processes of the Palau courts, several states have created alternate forums of traditional dispute resolution. Both states, Kayangel and Ngarchelong, have created an alternate forum to resolve traditional disputes. In Kayangel, the Council of Chiefs resolves traditional disputes. In Ngarchelong, a Court of Traditions and Customs was created to hear and decide cases involving Ngarchelong traditions and customs. Palauans have also discussed the possibility of a “customary court [specifically designed] for customary or traditional matter[s] with local

443 Cooter & Fikentscher, supra note 438, at 323. This Navajo law states that “[i]n all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts.” Navajo Nation Code tit. 7, § 204, available at http://www.navajocourts.org/Tit7.htm#204. Furthermore, the “Courts shall utilize Diné bi beenaház’áanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations.” Id.

444 Id. at 328. These published Navajo court decisions are “stored in an impressive library.” Id.

445 Id. The Supreme Court has stated that “[t]he soul of this Court is to apply Navajo Tribal law, especially where our custom and tradition are appropriate.” Sells v. Sells, 5 Navajo Rptr. 104, 108 (Navajo 1986). Furthermore, “uniformity, consistency and predictability” needs to be promoted by Navajo judges in developing Navajo law. Id.

446 Cooter & Fikentscher, supra note 438, at 328.

447 Zion & Yazzie, supra note 223, at 84.

448 Id. at 83. He also describes this return to traditional law as going “back to the future.” Id. at 83.

449 In 1996, United States Supreme Court Justice Sandra Day O’Connor endorsed Navajo peacemaking “as a legitimate and acceptable justice method to a prominent national Indian law conference.” Nielsen & Zion, supra note 395, at 167.

450 PCS, supra note 293, at 12.

451 Id.

452 Id. However, their judgment may be appealed to the appropriate national courts of the Republic of Palau. Id.

453 Id.
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chiefs or chiefess’ sitting as judges.” Furthermore, the Palau Constitution permits the establishment of inferior courts of limited jurisdiction. With the support of local leaders, these courts could be implemented nationally.

The second positive aspect of the Palau courts is their caution in resolving disputes of custom or customary law, because custom may be disputed. The jurisdiction of Palau courts extends to hearing cases solely based upon custom. According to statute, customary practices have “the full force and effect of law” and thus, reside “within the scope of ‘all matters in law and equity.’” However, although the courts have jurisdiction to hear such cases, customary law cases require a higher standard of proof. A party seeking to rely upon a custom or customary law must prove by clear and convincing evidence the existence and content of the customary law. Expert witnesses are called into court, but do not always agree. They may disagree on the details required of the custom, how it has evolved over the years, and its application in the case at hand. In these circumstances, the conflicting testimony must be carefully weighed by the Court “to determine the aspects of customary law that have been proven clearly and convincingly.” Upon the court’s issuance of a decision recognizing the custom or customary law, the custom is “formally recorded as part of the modern case law” and will be applied in later cases. The Palau court system affirmatively provides a forum for “recording expert testimony about customary laws” and giving them binding effect in subsequent cases. This preserves centuries-old customs in the courts’ annals.

The Palau courts have “warned parties of the dangers of rushing to the courts too quickly without first attempting to resolve disputes through customary means.” The Palau Supreme Court has stated that it will attempt to minimize its interference with custom in order to “avoid disrupting customary processes.” As a result, the court has attempted to strike an appropriate balance between providing full authoritative effect to customary law, and allowing customary matters to work themselves out without hasty judicial intervention.

The third positive aspect of the Palau courts is their credibility and fairness. The judiciary of Palau has a reputation for impartiality and fairness. Both private attorneys and government officials “have a high

454 E-mail from Lourdes Materne, supra note 320.
455 Id. (citing PALAU CONST. art. X, § 1).
456 Id.
457 PCS, supra note 293, at 4 (citing Espangel v. Diaz, 3 ROP Intrm. 240 (1992)).
458 Id. (quoting Espangel, 3 ROP Intrm. at 243).
460 Wisdom, supra note 286, at 3.
461 Usually, the expert witnesses called are either “rubaks and mechas who are members of the Palau Society of Historians or [those] who have otherwise been trained in Palauan history, custom, and tradition through their Clans and Lineages.” Id. There are currently “16 members of the [H]istorian [S]ociety, representing the 16 states of Palau.” E-mail from Lourdes Materne, supra note 320.
462 Wisdom, supra note 286, at 3.
463 Id.
464 Id.
465 Id.
466 Id.
467 Id.
468 Id. at 3-4.
469 Donald R. Shuster, Transparency International Australia, National Integrity Systems: Transparency
regard for Palau’s judiciary. Furthermore, the Palau courts are not hesitant to pursue such issues as corruption in government. For example, fifteen of the sixteen members of the National Congress’ House of Delegates were investigated by the SP in connection to misuse of public funds. Through the years, approximately thirty police officers have been “sued, tried, and found guilty of misconduct in office.” These actions have fostered admiration by the general public for the judiciary’s integrity. Former President Kuniwo Nakamura commented that “[w]hile there may always be someone who is disappointed with the results of the Court’s deliberations, no one can deny that the decisions are the result of carefully balanced, independent, rational, intelligent, and supremely honest and thorough consideration by the members of the Court.” In 2001, a United States Ninth Circuit Court panel of judges reviewed the Palau courts and the courts received very high marks. The review was based on the current Chief Justice, the quality of the court opinions, and the respect of the community.

The fourth positive aspect of the Palau courts is the support of customary resolutions prior to court involvement, which encourages perpetuation of customary dispute resolution avenues. In Sers v. Edward, a clan dispute regarding money distribution reached the national courts. However, the plaintiffs, unhappy with their received amount, brought suit in the Palau Supreme Court before utilizing their clan’s customary means of money distribution. In that case, the court made it clear that “traditional matters should first be reviewed under the traditional systems of adjudication, before being brought to the formal court system.” The court stated:

Under custom, these clan matters should be decided by a consensus of the senior strong members of the clan. Here, those members have utterly abdicated that responsibility. After holding one short meeting and failing to reach a consensus, the members walked out into the night with cries of “see you in court” ringing in the air. Instead of holding further discussions with a view towards reconciliation and compromise, they spent five days in a courtroom with the meters of two attorneys running.


470 Id.
471 The SP, or Special Prosecutor, is a key component to Palau’s “anti-corruption mechanisms” and has been instrumental in investigating and punishing corrupt practices in the Republic of Palau. Id. at 5. For example, the SP accused almost all of Palau’s Congressmen of illegally using funds for travel expenditures from 2002 to 2003. Id.
472 Id. at 14.
473 Id.
474 Id.
475 Wisdom, supra note 286, at 7.
476 Telephone Interview with Barry Michelsen, Attorney, Coates & Frey, LLLC, in Kāne‘ohe, Haw. (Nov. 1, 2008). Barry Michelsen is a former Associate Justice of the Supreme Court of Palau. Id.
477 Id.
478 PCS, supra note 293, at 4 (citing Sers v. Edward, 6 ROP Intrm. 355 (1997)). In particular, “members of a clan in Angaur took their chief to [court]…to solve a dispute over the distribution of money.” Id.
479 Id.
480 Id. (citing Sers, 6 ROP Intrm. at 359).
481 Id. (quoting Sers, 6 ROP Intrm. at 359).
The court placed great emphasis on the “fact that clan customs should not be dismissed by clan members so easily, since customary practices are an important part of what makes up the traditional culture of Palauans.”482 Furthermore, the court cautioned that through the loss of these practices, Palauan culture would be destroyed “in a way that no suit for monetary damages could repair.”483 The court ultimately issued an injunction ordering a halt on the distribution of money until the proper customary procedures were followed.484

On a national scale, all Land Court claimants are required to take part in a mediation session prior to appearing before a judge in a hearing.485 As observed by Uduch Senior, a former Palau Land Court judge, “in a large number of cases, claimants resolve their disputes during mediation and enter into a settlement.”486 She also observed that mediation works best in cases where “all claimants are closely related to one another.”487 Following a successful mediation session, the Land Court issues a determination of ownership based on the settlement.488

The fifth positive aspect of the Palau courts is the active engagement of traditional law and custom as the legal foundation of Palau. Under Article V, Section 2 of the Palau Constitution, statutes and traditional law are equally authoritative in court.489 Supreme Court Associate Justice Lourdes Materne also commented that Article V, Section 2 “is our way of bridging the [A]merican style of justice with the traditional system by mandating the courts to uphold customary or traditional practices.”490 Furthermore, in a case of conflict between a statute and a traditional law, the statute shall only prevail “to the extent it is not in conflict with the underlying principles of the traditional law.”491 As a result, traditional law cannot simply be disregarded and cast aside in favor of modern statutes. Although the courts of Palau are modeled after the American system, Supreme Court Associate Justice Materne expressed that, “customary law and traditional notions or concepts are still a very big part of our daily lives here in [P]alau and we here at the court are mandated by the [P]alauan constitution to uphold such laws.”492

In a recent criminal case, the court clarified and upheld the nature of customary law. Garth Backe, a criminal attorney in Palau, recently “challenged Palau’s incest statute as being unconstitutionally vague.”493 The statute states that it is illegal to “have sexual intercourse with someone you could not legally marry ‘under the law or custom.’”494 Backe argued that “there was no codification of what was illegal under custom” and therefore, criminal defendants were provided insufficient notice as to what is actually illegal.495 The trial

482 Id. at 4-5.
483 Id. at 5.
484 Id. at 5. The court “refused to let the clan leadership abdicate its responsibilities to the Court.” Id.
485 Wisdom, supra note 286, at 52.
486 E-mail from Uduch Senior, supra note 334.
487 Id.
488 Id.
489 E-mail from Lourdes Materne, supra note 320 (citing PALAU CONST. art. V, § 2).
490 Id.
491 Id.
492 Id.
493 E-mail from Garth Backe, Criminal Attorney, Republic of Palau, to author (Nov. 12, 2008, 01:11 HST) (on file with author).
494 Id.
495 Id.
judge denied Backe's motion relying upon Article V, Section 2 of the Palau Constitution.\textsuperscript{496} Noting that notice exists inherently in a custom, the judge determined:

The Supreme Court of Palau has found consistently that the existence of custom must be determined by clear and convincing evidence, case-by-case, and may produce varying and even inconsistent outcomes depending on the facts of each case. Typically, customs are determined by expert testimony in court. Thus, in no custom case is a litigant put on notice before coming to court. To decide otherwise would conflict with this Court's history and warrant implementation of a written book of customs to put everyone on notice of their existence. Instead, the Court declares that Due Process is not violated simply because a custom is unwritten. Notice exists inherently in a custom; a custom is a traditional practice, and those living in Palau should already have the knowledge [which] exists without a book telling them the same.\textsuperscript{497}

The judge in this case recognized custom as a living law that cannot and should not be confined to words within a book.

The Republic of Palau's courts continue to create a distinct legal system that offers the best of modern jurisprudence and traditional concepts of justice. This 'ike from the Palau courts, as well as the Hopi and Navajo courts, should be used in establishing the purposes and functions of a future Hawai‘i ‘ōiwi court – the wa‘a.

\textsuperscript{496} Id. \textit{See supra} note 489 (citing Palau Const. art. V, § 2).
\textsuperscript{497} Id. (citations omitted).
VI. NĀ HANA A KA WA‘A: FOUR VALUES

The establishing first the purpose and function of the wa’a is important because the log may arrive later. Likewise, the discussion of the purpose and functions of a future Native court in Hawai‘i is needed and should not be postponed because of political uncertainty. The ‘ike or positive aspects of the Hopi, Navajo, and Palau courts highlighted in the previous section may help to inform the discussion on how Hawai‘i ʻōiwi tradition and custom may be incorporated into and reconciled with modern jurisprudence. Drawing upon the previous section’s findings, I have defined a set of values that should be implemented by that future Native court. The Native court of Hawai‘i should value: (1) the differences of ahupua’a, moku or mokupuni; (2) the transition and evolution of justice in Hawai‘i; (3) community expertise and involvement; and (4) the strengthening of Hawai‘i ʻōiwi language and culture.

The differences of ahupua’a, moku, or mokupuni should be respected by the court. Prior to the ali‘i system in Hawai‘i, the ahupua’a and their ‘aha (councils) governed areas according to the needs and peculiarities of their people. The future government of Hawai‘i will likely decide the jurisdiction of these areas, but the courts should respect the dispute resolution practices from each area – both traditional and tradition-based. Whether these districts are separated by ahupua’a (smaller land divisions), moku (larger land divisions), or mokupuni (island), the court must show deference to the different traditions and customs of Hawai‘i ʻōiwi. Like the Hopi and Palauans, these land divisions may serve as “villages” or “states” that operate through their individual customs and traditions. However, as with the Hopi, if a district does not establish a dispute resolution process, the court, when required, should use cultural norms to resolve issues. More research within the Hawai‘i ʻōiwi community may be needed to reestablish traditions and customs specific to different areas of Hawai‘i that currently lie dormant. Even so, the Native court should not impose a predetermined national view of culture and tradition. The districts should be given the right to create their own processes or accept a default model.498 At the same time, the courts should be responsible for maintaining the fairness of these district processes.

The court should also value the history and evolution of justice in Hawai‘i. Similar to the Navajo Nation courts, this court may also offer a bifurcated judicial system that not only recognizes traditional processes of justice, but embraces modern ones as well. As expressed by Colin Kippen, a Hawai‘i ʻōiwi attorney and former Suquamish tribal court judge, a real concern for tribal courts is the perception of predictability and credibility by non-tribal members.499 Depending on the political landscape of Hawai‘i’s future, this may or may not be relevant. However, many Hawai‘i ʻōiwi are accustomed and perhaps more comfortable with the Western processes of justice. By initially creating a bifurcated court, non-Hawai‘i ʻōiwi and Hawai‘i ʻōiwi may choose the process with which they feel most comfortable. This bifurcated judicial system may eventually be phased out, but during a period of transition, this approach should be implemented to ease participants’ fears.

The use of a jury system also bears consideration. Currently, State of Hawai‘i residents are accustomed to the state jury system. In the Navajo Nation courts, “juries must be comprised of a fair cross-section of the

498 This would be similar to the Hopi law that allows villages to create their own modern constitution and governmental organizations. See Sekaquaptewa, supra note 352 and accompanying text. However, if the Hopi village does not create their own constitution, the Hopi courts will recognize the traditional Hopi organization of the village. Id.
499 Telephone Interview with Colin Kippen, Executive Director, Native Hawaiian Education Council, in Kāne‘ohe, Haw. (Mar. 19, 2009) [hereinafter Telephone Interview with Colin Kippen].
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community and non-Indians must be included in tribal court jury pools.\textsuperscript{500} I recommend that jury trials continue in the future Hawaiʻi ʻōiwi court system because Hawaiʻi ʻōiwi have become accustomed to it. However, as scholarly research on traditional dispute resolution practices and customs continue, Hawaiʻi ʻōiwi may phase out the jury system and incorporate a traditionally based alternative.

The creation of a Hawaiʻi ʻōiwi common law is also important. As observed by one scholar, “the need to codify, document, and publish is [increasingly] recognized because the development of a law system provides the benefits of precedent, predictability, and notice to those subject to the law.”\textsuperscript{501} The future Native court should likewise pursue recording and publishing court opinions, to create a distinct Hawaiʻi ʻōiwi common law.\textsuperscript{502} Indeed, judges of the Native court must be consciously active, like the Navajo, in creating a Hawaiʻi ʻōiwi court common law.

The court should value community expertise and involvement. Non-adversarial approaches to the admission of evidence should be implemented to encourage the involvement of kūpuna, or elders, in the courts. As in the Hopi case, our courts may implement rules that allow elders to speak in court without being cross-examined by attorneys.\textsuperscript{503} The knowledge of the elders is culturally important and should be incorporated now and in the future. In the Palau Land Court, which deals frequently with custom and tradition, there are no restrictions or rules of evidence, and hearsay is regularly admitted.\textsuperscript{504} This illustrates the Palau courts’ efforts to elevate the value of community expertise on tradition and custom over formal rules and procedures. These are procedures for Hawaiʻi’s future court to consider.

The court should value strengthening Hawaiʻi ʻōiwi language and culture. In the Navajo Nation courts, all judges must be fluent in Navajo and be knowledgeable about Navajo customs.\textsuperscript{505} The Honorable Robert

\textsuperscript{500} Christopher B. Chaney, \textit{The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction}, 14 BYU J. PUB. L. 173, 183 (2000). In fact, “in the areas of right to counsel, jury trial rights, and right to a speedy trial, Navajo Nation courts are more protective of the rights of criminal defendants than federal courts are.” Id.

\textsuperscript{501} Valencia-Weber, \textit{supra} note 403, at 249.

\textsuperscript{502} The official decisions of both the Navajo Nation Supreme Court and district court are reported in the Navajo Reporter. Howard L. Brown, \textit{The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum}, 24 AM. INDIAN L. REV. 297, 298 n.9 (2000). James W. Zion, scholar and former Solicitor General to the Navajo Nation Courts, discussed the importance of the Navajo Reporter in creating Navajo common law:

This book is significant not only because of its importance to judges and lawyers, but because it of itself is one of many foundation stones in the structure which is Navajo sovereignty and self-determination. These opinions are prepared and published in this form in order to develop and preserve Navajo common law. These all are decisions by Navajo judges, interpreting and applying Navajo law and building the Navajo common law. Each volume of law reports hastens the day when a large and [accessible] body of Navajo law will guide the conduct of those carrying out their lives and work here. If you want some sign of Indian self-determination, look here.

James W. Zion, Preface to 3 \textsc{Navajo Rptr.}, xii (1983).

\textsuperscript{503} See Sekaquaptewa, \textit{supra} note 385 and accompanying text (discussing a Hopi Trial court hearing on custom where cross-examination by an attorney was prohibited).

\textsuperscript{504} See E-mail from Uduch Senior, \textit{supra} note 338 and accompanying text (discussing the relaxed procedures of the Palau Land Court).

\textsuperscript{505} See Cooter & Fikentscher, \textit{supra} note 439 and accompanying text (discussing Navajo Nation judge qualifications).
Yazzie, Chief Justice Emeritus of the Navajo Nation, explained the importance of Navajo thinking in the court system:

When I made my journey home as a judge and a Navajo, I learned to insist upon Navajo thinking. We use it in Navajo Nation court decisions, and we use it to develop court policy and make daily decisions. Navajo common law and Navajo peacemaking are not legal philosophies or techniques. They are a way of thinking and living.506

The judges of Hawai’i’s future court should also be fluent in ‘ōlelo Hawai’i and knowledgeable in Hawai’i ‘ōiwi customs. This requirement would strengthen the Hawai’i ‘ōiwi mother tongue, ‘ōlelo Hawai’i, through recognition in the judicial system and official use in court processes. Judges knowledgeable in Hawai’i ‘ōiwi customs will also strengthen the culture through court opinions based on custom. Another way to strengthen the culture is to require that all traditional dispute resolution practices, ho’oponopono or any others, be exhausted by Hawai’i ‘ōiwi prior to court involvement. As mentioned earlier, the various districts may have different traditions and, therefore, should establish dispute resolution practices to meet their unique needs. The courts’ role will then be relegated to enforcing the fairness of these processes. In Palau, the Palau Supreme Court established a similar rule where certain clan dispute resolution customs must be exhausted prior to court involvement.507 Similarly, as observed by a former Navajo Nation attorney, the Navajo Nation “Court rarely made a decision unless it was satisfied that the litigants had exhausted all local-style [] peacemaking which was officiated by an elder or respected tribal leader.”508

506 Yazzie, supra note 412, at ix-x.
507 See PCS, supra note 483 and accompanying text (discussing the Supreme Court of Palau’s opinion that traditional matters should be resolved traditionally before court involvement).
508 E-mail from Andrew Sprenger, Staff Attorney, Native Hawaiian Legal Corporation, to author (Nov. 24, 2008, 08:54 HST) (on file with author).
VII. CONCLUSION

This is what I want my wa’a to do. Hawai‘i’s future court must be based on Hawai‘i ‘ōiwi cultural concepts, views and practices. A common thread strung between the Hopi, Navajo Nation, and Republic of Palau courts is their firm foundation in their cultural views, traditions and customs. The Honorable Robert Yazzie recalls entering law school thinking that American law had all the answers for his Navajo people. He later came to realize “that despite the value of the law [he] learned, if the Navajo Nation courts are to survive and work well, they must be Navajo.”509 Likewise, if Hawai‘i’s future Native court is to survive, it must be Hawai‘i ‘ōiwi.

Although this article highlighted a traditional Hawai‘i ‘ōiwi dispute resolution practice, much more research is required on Hawai‘i’s varying cultural views and concepts of justice – from island to island, and district to district. Oral traditions of families should not be overlooked or discredited, but encouraged. Ho’oponopono has survived and may be used as a template, but much change may be required. The concept that individual rights are more important than our relationship with one another as Hawai‘i ‘ōiwi must change. As in other Native cultures and courts, the concept of being a part of the group is extremely important.

In an interview, former tribal court judge Colin Kippen highlighted the successes of tribal courts, but expressed some concerns regarding a Native court in Hawai‘i. He stated that, through his experience, the tribe was like one big family and that inter-tribal disputes were pleasant, successful, and relatively easy to resolve.511 As a judge, he would infuse the tribe’s culture and tradition into his court by talking with tribal elders and seeking their guidance. However, the cases involving non-tribal members were much more difficult because, among other things, there were stark differences in the parties’ definitions of justice. For instance, the American Constitution creates individual rights and these rights are held superior to the rights of a community or group – or tribe. As a result, Kippen observed commercial transaction cases involving non-tribal members, where the non-tribal litigants disputed the tribal courts’ credibility.512 More often than not, those cases were waived by the tribal court and resolved in federal court.513 However, like the man seeking assistance from the kahuna kālai wa’a, Hawai‘i ‘ōiwi must not hesitate to discuss a future court system because of unpredictability.

509 Yazzie, supra note 412, at ix. He stated:

I entered law school thinking that American law had all the answers I needed as a Navajo who wanted to be a lawyer. The Navajo nation Council thought the same thing when it created the modern Navajo Nation court system in 1959. I became a trial judge in 1985, and over the years, I got a nagging feeling that something was not quite right with the law I had learned. I focused on polishing my Navajo and learning more about my people’s philosophy, spirituality, beliefs, and thinking.

Id.

510 Id. Chief Justice Emeritus Tom Tso believes that the “main reason the Navajos have, by Anglo standards, the most sophisticated and the most complex tribal court system is that [Navajos] were able to build upon concepts that were already present in [Navajo] culture. Tso, supra note 225, at 31.

511 Telephone Interview with Colin Kippen, supra note 499.

512 Id.

513 Id.
Though the political future of Hawai‘i appears cloudy, it is prudent for Hawai‘i ‘ōiwi to examine and define the values that should be adopted by a future court. As discussed above, the future court of Hawai‘i should value differences of separate areas, the history and evolution of justice in Hawai‘i, community expertise and involvement, and the need for ‘ōlelo Hawai‘i and Hawai‘i ‘ōiwi culture in court processes. The article does not stop here; nor does the work and research. This paper merely serves as a first step to begin the discussions about Hawai‘i’s future judicial landscape. No log, no problem. I know what I want my wa‘a to do.