

Indigenous Values and the Law of the Sea

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I. Introduction

For over a thousand years, Native Hawaiians have based their relationship with and governance of neighboring seas and oceans on principles of sustainability and stewardship. The international law of the sea, however, arose from Eurocentric principles of sovereignty and dominion. Only nation states have a voice. Indigenous people were, in most cases, not recognized as nations. The international law of the sea excludes the possible contributions of indigenous peoples. Once Native Hawaiians lost their nation, they lost the opportunity to apply their indigenous concepts to the governance of the neighboring oceans and seas.

The law of nations and the principles of territorial sovereignty defined a nation's internal waters as solely subject to that nation's authority. Waters beyond national control were open waters where the principle of freedom of the sea prevailed. Historically, those waters belonged to no one and thus were not subject to regulation.² Freedom of the open sea became, over time, a freedom to abuse and consume.³

Recently, there has been greater recognition that traditional and customary practices of indigenous peoples, such as Native Hawaiians and the Maori, could provide a more viable, sustainable law of the sea if incorporated into the current law.⁴ In a system still dominated by principles of national sovereignty, however, historically disenfranchised and stateless indigenous peoples have no platform from which to speak.

This article proposes that Native Hawaiians reclaim sovereignty over the waters and islands of the Northwestern Hawaiian Islands. The islands, also known as

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² See Christopher Stone, *Mending the Seas through a Global Commons Trust Fund*, in FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 171, 172 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison, eds., 1993).

³ See *Introduction* to FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 3, 3 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison, eds., 1993) ("an anything goes attitude has been accepted as appropriate when dealing with the ocean and its resources.").

⁴ See Elizabeth Pa Martin, *Ocean Governance Strategies Governance in Partnership with Na Keiki O Ke Kai, the Children of the Sea*, in OCEAN GOVERNANCE FOR HAWAII (Thomas A. Mensah ed., 1995) 173, 173.

Papahānaumokuākea, are currently managed by two agencies of the United States and the State of Hawai`i as a National Monument comprising some 140,000 square miles.⁵ Sovereignty or a quasi-sovereign trusteeship over those islands and waters would give Native Hawaiians the power to implement their concepts of ocean governance.

This article proceeds in three parts. First, it examines the deficiencies of the present law of the sea and discusses how the contributions of indigenous cultures could address or ameliorate these deficiencies.

Second, this article deals with the central problem of incorporating indigenous principles into the law of the sea. It answers the question: how can undeveloped and vague indigenous ocean customs, such as the view that the sea is a living treasure, be useful in resolving modern problems such as pollution or overfishing? This article proposes that indigenous values and customs can achieve modern applicability if indigenous peoples are given political power in the form of sovereign lawmaking institutions.⁶

The third part of this article narrows the focus to Hawai`i. This section explains how and why the United States should take steps, in light of the Akaka Bill,⁷ to vest Hawaiians with either ownership or trusteeship over the Northwestern Hawaiian Islands.

II. Visions of the Ocean

The concept of nation-state ownership dominated the development of the law of the sea and continues to control the principles under which it operates. Under the current law of the sea, the ocean is zoned based on various degrees of ownership. Internal waters within a country's straight baselines are the equivalent of that state's land base.⁸ The territorial sea is part of the state's sovereign territory, but is still governed by certain standards under international law, such as the requirement to allow innocent passage of ships.⁹ In the Exclusive Economic Zone, a state has sovereign rights to the natural

⁵ Proclamation 8031 Establishment of the Northwestern Hawaiian Islands National Monument, 71 Fed. Reg. 36444 (June 26, 2006).

⁶ See R. P. Anand, *Changing Concepts of Freedom of the Seas: A Historical Perspective*, in FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 171, 172 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison, eds., 1993) (describing how Asian traditions have been ignored).

⁷ Native Hawaiian Government Reorganization Act of 2010, H.R. 2314, 111th Cong. (2010).

⁸ United Nations Convention on the Law of the Sea art. 8, Dec. 10, 1982, 1833 U.N.T.S. 561.

⁹ *Id.* arts. 2, 17.

resources within such waters, but not to the waters themselves.¹⁰ Finally, the high seas are free for navigation, fishing and other forms of exploitation.¹¹

The Western concept of land, sea, and property rights has trapped the law of sea in a binary paradigm distinguishing the owned from the un-owned. That which is owned is protected, cultivated, and cared for, while that which is not owned is free to be exploited. This model ignores the possibility that the un-owned should, nonetheless, be cared for.

The Native Hawaiian vision of the ocean never fell victim to this binary view. Native Hawaiians did not implement a Western conception of property rights until the middle of the 19th Century.¹² Before that time, relationships governed Hawaiian society.¹³ People lived, worked, and cultivated taro in a certain place and in a certain manner according to their status as stewards of the land.¹⁴ A *konohiki*, or lesser chief, administered the resources of these political units.¹⁵ A Native Hawaiian's status as a kind of steward governed his or her interaction with land and ocean. It was status, not ownership, which conferred rights of use.

A. The Current Problem: Ownership and the Tragedy of the Commons

In the Western view of the world, there are only two possible types of resources--- owned and not owned. Ownership of private property, in the Western mindset, drives competition and progress.¹⁶ Conversely, the lack of ownership leads to the freedom to abuse and behave badly. The oceans have historically been free, beyond the narrow

¹⁰ *Id.* art. 56.

¹¹ *Id.* art. 87.

¹² Beginning in 1848, the Kingdom of Hawai'i adopted a Western model of private ownership of land, when the land had previously been publically owned. Hawaiians registered plots of land where they lived and cultivated. This process was called the "great" *Māhele*. See generally LILIKALĀ KAME`ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992).

¹³ See *In re Application of Ashford*, 440 P.2d 76 (1968); *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (1973), *aff'd*, 517 P.2d 26 (1973); *County of Hawaii v Sotomura*, 517 P.2d 57 (1973); *State v. Zimring*, 566 P.2d 725 (1977); *Robinson v Ariyoshi*, 568 P.2d 287 (1982); *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745 (1982).

¹⁴ See *Reppun v. Board of Water Supply*, 656 P.2d 57, 64 (1982) (describing the taro cultivation in Hawai'i as a system based on a "spirit of mutual dependence").

¹⁵ *Id.* (citing ANTONIO PERRY, A BRIEF HISTORY OF HAWAIIAN WATER RIGHTS 7 (1912)) (describing the authority of the *konohiki* to allocate waters for taro cultivation based on stewardship not ownership).

¹⁶ See, e.g., Ronald Coase, *The Problem of Social Cost*, 3 JOURNAL OF LAW AND ECONOMICS 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAP. & PROC. 347 (1967).

limits of the territorial sea.¹⁷ As an un-owned resource, the oceans and the territorial seas have been depleted.¹⁸

When Garret Hardin first explained the concept of the tragedy of the commons, he saw only two alternatives to the freely abused commons.¹⁹ Both alternatives involved ownership. Either the government had to own the resource or it would have to be divided and privatized. The overexploitation of fisheries, as a commons, is well known.²⁰ For years, the law ignored the possible contribution of communities, such as Native Hawaiians, who have successfully managed common property resources without Western concepts of ownership.²¹

The principle in international law of “freedom of the seas” exacerbated the deterioration of the open seas. This freedom to use was governed by the principle of “reasonableness.”²² Any use was reasonable so long as there was no interference with the sovereignty of another nation. The principle of reasonableness permitted state actors to behave, on the open sea, in a manner otherwise prohibited within their own territorial waters. For example, the use of the oceans to transport slaves was deemed reasonable even when slavery was impermissible under the domestic law of the flag state.²³ Dumping and pollution, illegal within domestic waters, became permissible on the open ocean.²⁴ Even the testing of nuclear weapons, as well as the disposal of radioactive wastes, was reasonable.²⁵

Such practices were permitted unless they infringed on the sovereignty of a nation. Only nations had standing to complain. The ocean itself had no representative.

¹⁷ See generally Jon Van Dyke, *The 1982 United Nations Convention on the Law of the Sea*, in OCEAN AND COASTAL LAW AND POLICY 375 (Donald C. Baur et. al. eds., 2009).

¹⁸ See generally CALLUM ROBERTS, *THE UNNATURAL HISTORY OF THE SEA* (2007) (an overview of the human history of overexploiting the natural resources of the ocean, leading to their current collapse).

¹⁹ Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE, 1243 (1968).

²⁰ See H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 THE JOURNAL OF POLITICAL ECONOMY, 124 (1954) (explaining the economic drivers the inevitably lead to fisheries decline, predating Hardin’s seminal paper on the tragedy of the commons).

²¹ Scholarship on common property resources has since realized that privatization and government control are not the only ways to successfully avert a tragedy of the commons. See e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

²² See Moana Jackson, *Indigenous Law and the Sea*, in FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 41, 42 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison, eds., 1993).

²³ See *id.* at 42.

²⁴ See *id.*

²⁵ See *id.*

It had no voice.²⁶ With no one speaking for the ocean or standing guard against pollution and dumping, the open ocean became both sewer and sink.²⁷ These and other threats to the Northwestern Hawaiian Islands, such as hazards from vessels, alien and invasive species, sea temperature change, marine debris and other illegal activities, emphasize the need for a different, more proactive, protective regime than exists today.²⁸

Who should speak for the ocean? This article proposes that in culturally significant areas, indigenous people should be allowed to apply their customary and traditional practices to protect the ocean.²⁹ In particular, this article urges that Native Hawaiians be given either ownership or a trusteeship over the 140,000 square miles of territory of the Northwestern Hawaiian Islands.

This proposal combines the ideas of both legal philosopher Christopher Stone and Maori activist and attorney Moana Jackson. Stone argues that a guardian should be appointed for the ocean to advocate for its interests.³⁰ The ocean should have a guardian just as other voiceless, underrepresented or powerless elements of society have guardians appointed for them.³¹

Stone advocated the use of scientists as guardians.³² However, Jackson's writings strongly suggest that indigenous people should be the guardians of the ocean because the only means of rectifying the international law of the sea is by incorporating indigenous customary values.³³ Therefore, this article proposes that Native Hawaiians should be appointed as guardians of their near territorial waters.

²⁶ Stone, *supra* note 2, at 172. Stone argues that the interests of the open seas have not been represented in international law: "This unownedness is one key factor contributing to the degradation of the global commons. Customary international law (international law unsupplemented by special treaty) has taken the position, in effect that just as the commons is unowned for purposes of wealth exploitation, so too does no one have to answer for deterioration."

²⁷ *See id.*

²⁸ *See* NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. FISH AND WILDLIFE SERVICE & STATE OF HAWAII, THE NORTHWESTERN HAWAIIAN ISLANDS: A CITIZEN'S GUIDE 16, *available at* http://papahanaumokuakea.gov/PDFs/Citizens_Guide_Web.pdf [hereinafter CITIZEN'S GUIDE].

²⁹ *See* EPELI HAU`OFA, WE ARE THE OCEAN: SELECTED WORKS 57 (2008) ("I have said elsewhere that no people on earth are more suitable to be the custodians of the oceans than those for whom the sea is home. We seem to have forgotten that we are such people. Our roots, our origins, are embedded, in the sea.").

³⁰ *See* Stone, *supra* note 2, at 173.

³¹ *See id.*

³² *See id.*

³³ *See* Jackson, *supra* note 22, at 42.

Moreover, establishing indigenous guardianship would return power to native groups that have been disempowered.³⁴ The same international legal regime that destroyed indigenous cultures has led to the deterioration of ocean resources. Jackson goes as far as to argue that it is impossible to rectify the legal abuse of the ocean without rectifying the legal abuse of indigenous people. There is justice in such a proposal.

B. Polynesian Practices: A Relationship with the Ocean

This section examines the difference between Western and Polynesian understandings of the ocean as well as the diversity of view among the Polynesian peoples, specifically highlighting the views of the Maori and Native Hawaiians.

1. Western and Polynesian Views of the Ocean

The difference between the Western and Polynesian (for the purposes of this article Maori and Hawaiian) understandings of the ocean is primarily the difference between the view that the ocean is a non-living resource or commodity and the view that the ocean shares a common genealogy with humanity. Polynesian cultures view the ocean as 'kin' and thus part of the extended human family (called *ʻohana* in Hawaiian). The ocean is also viewed as the source and residence of other non-human beings that have deep spiritual significance. In both senses, the ocean itself is deserving of the protection and respect accorded members of an extended family. The ocean is also deserving of the stewardship necessary to respect a divine being. It is more than a resource; it is "a living being, a home for other living beings and a home of living gods."³⁵

Poka Laenui explains the traditional Hawaiian view of the world as an interconnected whole in terms of a kinship between humans and nature. Native Hawaiians care for nature, not because it is a subordinate other, a non-living resource or a commodity. Instead, nature, land, and ocean are kin, part of the family, sibling, brother, sister or cousin.³⁶ This is the strong message of the *Kumulipo*, the Hawaiian creation chant.³⁷ The *Kumulipo* teaches that all life arises from the mating of an original couple.

³⁴ See HAU`OFA, *supra* note 29, at 55 ("Our most important role should be that of custodians of the ocean; as such we must reach out to similar people elsewhere in the common task of protecting the seas for the general welfare of all living things.").

³⁵ See Poka Laenui, *An Introduction to Some Hawaiian Perspectives on the Ocean*, in FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 91, 91 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison, eds., 1993).

³⁶ See *id.* at 92-93 ("In the Hawaiian way. . . we are born on the same genealogical line as the sea cucumber, the *limu* (seaweed), the starfish, the slug, the shark, the dolphin, and the whale. We are part of, and kin to, the ocean and all of its living partners.").

³⁷ Laenui, *supra* note 35, at 101 n.1 (citing RUBELITTE KAWENA JOHNSON, *KUMULIPO: THE HAWAIIAN HYMN OF CREATION* (1981)).

Their offspring are not only the people, but also the taro root, the various islands, and by extension, the ocean as well.³⁸

This equivalence - that people, land, and ocean are on the same evolutionary plane - establishes the framework for human behavior. One treats the land and the ocean as though each were a revered relative. To Hawaiians, the ocean is not merely metaphorically alive; it is truly alive.³⁹ It is a being, an entity endowed with human-like characteristics. In an evolutionary sense, the land and the ocean are not simplistic organisms but human-like personalities. In the Hawaiian cosmology the ocean and its living beings are not only an extension of man, as kin, but also an extension of family in an ancestral and original sense.⁴⁰ A Native Hawaiian engages the ocean with a sense of respect; the same attitude he or she would have in addressing an elder. One would not offend or disrespect such a relative. In the same vein, a Native Hawaiian respects the ocean. He or she would no more pollute the ocean or waste ocean resources than insult an ancestor.

Thus, for Native Hawaiians and other Polynesians, such as the Maori, the ocean has an additional dimension. Native Hawaiians refer to the ocean as *ke kumu* (the source).⁴¹ In this sense, life itself arises from the ocean much as a person's individual identity arises from family and culture. *Ke kumu* is the source of nourishment by which humans ultimately flourish. *Ke kumu* is akin to a mother and her milk. It also embodies a Hawaiian sense of cause and effect - a mother being cause and her child being effect. In the same sense, the ocean is the cause and humankind is the effect. Most of all, *ke kumu* is not the name of a thing, but the description of a relationship: one coming into being because of the other, human beings born of the ocean.

In the Native Hawaiian view of the world, the idea of the ocean as source (*ke kumu*) gives the ocean a second role in the *Kumulipo*.⁴² The creatures of the land and the ocean are, at once, kin to human beings, but also the original primordial material from which all life evolves. The ocean is both kin and family, ancestor and life-giver.

³⁸ See Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849, 857 (1992) ("Thus, in the epic of Papa, Wakea and their daughter, the taro plant, the people, and all the islands are siblings.").

³⁹ See Elizabeth Pa Martin, *Ocean Governance Strategies: Governance in Partnership with Na Keiki O Ke Kai, the Children of the Sea*, in OCEAN GOVERNANCE FOR HAWAII 172 (Thomas A. Mensah ed., 1995).

⁴⁰ See Laenui, *supra* note 35, at 98-101.

⁴¹ See *id.* at 94 ("The ocean is the source for a multitude of things beyond economics security or transport. It is the source of food to island peoples and the source of health, providing a variety of medicines for physical and emotional well-being. It is also the source for cleansing, healing, and nourishment of the spirit and a place to learn the ways of nature").

⁴² Laenui, *supra* note 35, at 101 n.1 (citing RUBELITTE KAWENA JOHNSON, *KUMULIPO: THE HAWAIIAN HYMN OF CREATION* (1981)).

Polynesians speak of people as born of the sea.⁴³ The Hawaiian people, including the “original couple” come from the primordial stew of the ocean. Thus, ocean and humans are kin, but the ocean is also the original ancestor of all life.⁴⁴

This insistence on the essential equivalence of humans and nature has led some, like Poka Laenui, to critique Western doctrines such as “stewardship” and the “public trust,” even though these represent advances in environmentalist thinking.⁴⁵ To Laenui, these concepts contradict the indigenous view of nature, wherein humans and nature exist on the same plane. The concepts of stewardship and the public trust arise from a view that humankind is “in charge of” or a “trustee” of a subservient, implicitly non-living natural world. These concepts imply that people have an elevated position as caretakers of a weaker, more vulnerable natural world. Moreover, the concept of stewardship implies protecting the ocean as if it were inferior, derivative of, and less significant than human beings.

2. Maori and Native Hawaiian Practices

Hawaiian ocean practice is not codified in rules. Rather, all activities in the ocean are governed by having the “right attitude.” A Hawaiian approaches the ocean and its resources with a proper perspective --- with the kind of respect due elders and ancestors. As such, rules become hard to distinguish from customs. For example, one may be required to throw back smaller fish or to not over-fish. Is this a rule or custom?⁴⁶

However it is classified, it is a practice that arises from a certain state of mind, due to internalized values. The proper categorization of such a practice is not as important as understanding that it all follows from a particular internal state, like removing one’s hat in church. People act in a way that is attuned to the situation. With the hat in church, the practice comes from a certain understanding of what is respectful and appropriate. To Native Hawaiians, right practice when caring for the ocean also arises from the proper internal sense of respect and appropriateness.

Compared with Native Hawaiian practice, Maori indigenous ocean custom and traditions actually rely upon rules for the ocean. Those rules indicate that the underlying premises are very similar to the Hawaiian ethos.

⁴³ See HAU`OFA, *supra* note 29, at 56 (citing Albert Wendt, *Towards a New Oceania*, in READINGS IN PACIFIC LITERATURE (Paul Sharrad ed., 1993) (“I belong to Oceania—or, at least, I am rooted in a fertile portion of it --- and it nourishes my spirit, helps to define me, and feeds my imagination.”)).

⁴⁴ See Laenui, *supra* note 35, at 94.

⁴⁵ See *Id.*, at 92 (“The word ‘stewardship,’ which is much used in today’s environmental protection parlance, suggests that the relationship of humankind to the ocean is that of benevolent despot. . . . But what that means is that while human are in charge, they are separate from and superior to that of which they are the steward.”).

⁴⁶ See H.L.A. HART, *THE CONCEPT OF LAW* 9 (1961) (asking a similar question about the practice of removing one’s hat during church).

Moana Jackson begins by describing four fundamental precepts of the Maori law of the sea, also known as *Te Tikanga o Te Moana*. First, the whole of the world's environment is interconnected. The sea is an integral part of that connectedness; it is an essential part of the resources of the Earth. Second, the Earth is mother of the sea, which is a *taonga* [treasure]. Third, that sea, as treasure, must be nurtured and protected. Fourth, the sea must be used in such a manner that it will remain bountiful and its resources will be sustained.⁴⁷

These Maori concepts of “interconnectedness” and “treasure” emphasize that, in the Polynesian experience, humans and the ocean are on the same plane. Humans are not above nature; humans are not “in charge” of nature, but rather people are a part of and kin to nature, the ocean and all its living partners. Therefore, this relationship requires the same kind of protection and respect that human relationships require.

3. Differing Visions of Oceans and Islands

Another inherent bias is that Westerners are grounded in a land-based view of the world. Westerners derive their view of the ocean as “other” contrasted with the center or core, which is “land.” Westerners view the world as if posed on shore, on continents, on land, peering out at the oceans. Islanders view the world as if coming from the oceans (the source).⁴⁸ Western concepts of land and ocean overvalue the importance of internal waters and territorial seas. Western concepts view the vast ocean as empty beyond the territorial sea.

Another island writer, Epli Hau`ofa speaks of the Western view of the Pacific, as “islands in a sea” and contrasts that with the islander's view of the Pacific, as a vast “sea of islands.”⁴⁹ When viewed from a Western perspective, in which the land base is central, the Pacific is a vast and huge ocean with small and isolated islands, unconnected and distant from each other. When viewed from the perspective of the sea, the Pacific is an “aquatic continent.” The Oceanian “sea of islands” is a “vast connected continent much as if the water were the land itself.” As Hau`ofa notes:

There is a world of difference between viewing the Pacific as “Islands in a Far Sea” and as a “sea of islands.” The first emphasizes dry surfaces in a vast ocean far from the centres of power. Focusing in this way stresses the smallness and

⁴⁷ See Jackson, *supra* note 22, at 47 (“For the Maori people *te tikanga o te moana*, or the law of the sea, is predicated on four basic precepts deeply rooted in Maori cultural values. First, the sea is part of a global environment in which all parts are interlinked. Second, the sea, as one of the *taonga*, or treasures of Mother Earth, must be nurtured and protected. Third, the protected sea is a *koha*, or gift, which humans may use. Fourth, that use is to be controlled in a way that will sustain its bounty.”).

⁴⁸ *Id.* at 93.

⁴⁹ Epli Hau`ofa, *Our Sea of Islands, in ASIA/PACIFIC AS SPACE OF CULTURAL PRODUCTION* 86, 91 (Rob Wilson & Arif Dirlik eds., 1995).

remoteness of the islands. The second is a more holistic perspective in which things are seen in the totality of their relationships.⁵⁰

Both Laenui and Hau`ofa emphasize the connection between islands and oceans. It is impossible to have the one without the other. To do so, states Laenui, “is to have night without day, body without spirit”⁵¹ Roman Bedor, a Palauan, states that the Pacific Islander is a person with one foot on land, the other in the ocean.⁵² One is impossible without the other. Remove one and the person cannot stand. Remove one and the person does not exist.

Thus, indigenous principles of ocean governance present a manifestly different view of the relationship between humans and resources. It is a view that can provide a much-needed legal basis for the protections of oceans. It is a view that is needed in light of the present deterioration of seas and oceans.

III. Applying Indigenous Principles to Contemporary Disputes

The nature of indigenous ocean law raises the central problem of how to apply culturally specific principles to a legal framework developed independently of that culture. How can concepts such as *taonga* [treasure], *mālama`aina* [caring for the land], *pono* [harmony], and *kuleana* [responsibility] be incorporated into the law of the sea? How can the concept that the ocean is treasure result in a decision regarding the competing claims of different fishing fleets? How can the concept of *mālama`aina* draw a line between permissible and impermissible uses of the ocean? Surely, the four Maori goals of ocean management reach deep into the psyche and touch a mythic sense of the importance of the ocean. However, can such rules actually be used to make discrete ocean resource decisions? Can concepts of “interconnectedness” or “treasure” actually be determinative in deciding difficult cases of pollution or over-use?

At first glance it may appear that these concepts are simply too vague, too open-ended, and too imprecise to function as determinative legal principles. The values that underlie indigenous practice and custom can be just as determinative as those used under present international law. Indigenous peoples are lacking only a sovereign forum in which to do so.

On further examination, the same was true of Western legal concepts when first employed. Just as *mālama`aina* may appear indeterminate, due process, when first applied, had the same indeterminacy. Due process may have started as a concept so vague that we only “know it when we see it.” Yet, that is all that is necessary to begin the process of collecting examples or extensions of the meaning of due process. Words

⁵⁰ *Id.*

⁵¹ Laenui, *supra* note 35, at 93-94.

⁵² *Id.* at 94.

gain meaning through repeated uses in various contexts. We learn a pattern by sorting instances of when a term applies and when it does not.

This is how parents teach their children colors. Parents teach colors not by first defining a color—say “green.” Of what help would it be to a child to define green as the combination or mixture of the two primary colors, yellow and blue? Parents teach colors by pointing - to green shirts, to green cars, and so forth.⁵³

Similarly, in the beginning we may have had no knowledge of due process other than a very basic one, which allowed us to point out the cases where due process was absent. We lacked the ability to articulate its meaning. Nonetheless, if each successive generation of judges points out enough examples, one gains a sense, over time, of what all the indicated examples have in common. Eventually, due process became shorthand for a deeper body of knowledge, a network of cases and rules that future judges could draw upon and point to in order to make decisions.

However, even for such a fundamental legal concept as due process, meaning was not established initially. Initially, all that could be said was that due process was the process that was due. Similarly, in the beginning all that can be said for the meaning of the Native Hawaiian concept of *mālama`āina* [caring for the land] is that the *`āina* should be *mālama*-ed [the land should be cared for].⁵⁴

Then how can *mālama`āina* be the basis for adjudicating environmental cases? Suppose we establish a group of five *kūpuna*, Hawaiian elders with knowledge of

⁵³ See Stephen P. Schwartz, *Introduction to NAMING, NECESSITY AND NATURAL KINDS* 13, 29 (Stephen P. Schwartz ed., 1977). “Thus, for example, when teaching someone the meaning of color words, I may say: ‘By green we mean the color of that car over there.’ The description ‘the color of that car over there’ is meant to fix the reference of ‘green’ but not to give its meaning in the sense of supplying as synonym for ‘green.’ It does not follow from the way I have fixed the reference of ‘green’ that is analysis or necessary that the car is green. I did not mean that ‘green’ is defined as whatever color that car over there happens to be. If I had meant this, then if someone painted the car a different color, say red, then ‘green’ would refer to red, since that happened, then, to be the color of the car. When I fix the reference of the term, I give a description that is to be taken as giving the referent of the term, not the meaning in the traditional sense.”

⁵⁴ Some may argue that historical indigenous practices fell short of responsible stewardship of the land. Two hundred years ago, the Hawaiian interpreters of *mālama`āina* found overfishing and the overuse of bird feathers to be acceptable. At that time in the West, however, concepts like due process and cruel and unusual punishment were also very different than the current concepts. Public executions were commonplace, whereas now they are unacceptable. Broad legal concepts evolve with the times. Cruel and unusual meant something different in the nineteenth century because social conditions at the time were very difficult. As social conditions improved, our understanding of cruelty changed accordingly. Similarly, the concept of *mālama`āina* can evolve with our understanding of the needs of the lands.

traditional and customary Hawaiian practices, as an environmental tribunal. We give them the responsibility of sorting out those practices that are in keeping with or contrary to *mālama`āina*. The *kūpuna* are also charged with the enforcement of the principle of *mālama`āina*.

The first case is whether dynamiting as a means of fishing is a violation of *mālama`āina*. The *kūpuna* all agree. Dynamiting as a means of fishing, with the consequent destruction of coral reefs, is a violation of *mālama`āina*. In the second case the *kūpuna* are given the case of a defendant who throws a banana peel and other organic waste out of a car window. Technically, this is littering under the county's criminal code. Is it also a violation of *mālama`āina*? The *kūpuna* decide: no, it is not. In the third case the *kūpuna* must decide whether geothermal drilling into the crater at Kīlauea is *mālama`āina*. In the fourth case they must decide whether clearing existing taro patches to build a hospital is *mālama`āina*. In the fifth case they must decide whether limited bottom fishing in the Northwestern Hawaiian Islands is *mālama`āina*. In the sixth case they must decide whether the construction of astronomical observatories on Mauna Kea and Haleakalā are violations of *mālama`āina*. In the seventh case they must decide whether the use of depleted uranium shells in the training of a Stryker brigade at Pohakuloa is a violation of *mālama`āina*. In the eighth case they must decide whether windmill farms on Moloka`i violate *mālama`āina*. And so on.

In some cases this tribunal will decide there is a violation. In others it will hold that the practice meets the standards of *mālama`āina*. In some cases it will be unanimous. In other cases there will be a majority opinion and a dissenting opinion. In some cases the dissenters will be silent. In others they may vigorously protest. Some cases will reverse earlier decisions. In other cases the dissents may predict the future decisions of a newly constituted majority. The point is that such a process is identical to the common law system.

Each additional use of *mālama`āina* as the basis of a decision would make the meaning of the principle more evident. Over time *mālama`āina* can, in this fashion, become a precise and meaningful concept. Imagine thousands of decisions on *mālama`āina*, just as there are thousands of decisions on due process. From that mass of data, one can draw a line between *mālama`āina* as practiced and as violated. From that mass, we can discern a majority view and a minority view. From that line we can discover, in hindsight, those decisions that must be discarded and those of central importance. In this fashion, meaning is established.

The West has been fortunate to come to know the meaning of due process by the hundreds (if not thousands) of cases that have ruled one way or the other on the existence or absence of due process. It is the common law system, in which courts are endowed with the power of finality arising from sovereignty that gives us the factual examples of due process and that develop its meaning. Legal concepts gain meaning through a judicial system that produces final decisions and has the ability to enforce those decisions with sovereign power. At first, one may know the color green or know that *mālama`āina* means that the land should be cared for, but one learns no pattern of behavior.

If the weight of consequence is not attached to a term, it is difficult to translate that term into a pattern of behavior. If our definition of *mālama`āina* does not match up with the nuanced definition given by thousands of cases adjudicated by the *kūpuna*, each person will maintain his or her own simplistic meaning of the term. Without the power to give consequence to a term and give it a complex legal history, it will remain at the level of the *`āina* that should be *mālama*-ed and nothing more. It would be as though our parents told us that green means the color of grass without pointing to any other examples. Green would remain limited to grass, leaving out the green of lima beans, the green of algae, the green of the forest, the green of a streetlight, and robbing us of the ability to apply the term to a previously undiscovered shade. Similarly, the lack of the ability for a legal system to “point” to instance of *mālama`āina* robs Native Hawaiians of the ability to apply the term in a predictable way that can mold behavior.

Therefore, when indigenous peoples lost their sovereignty, they lost their ability to apply their indigenous concepts in a manner that allowed such concepts to evolve. The loss of adjudicatory sovereignty denied indigenous peoples the ability to build the same mass of instances, the same body of data, the same number of examples, by which concepts such as due process gained credibility and usefulness. The sovereignty of indigenous peoples should be restored so that, when applied, their values can infuse contemporary international law. Island people, in particular, should be granted sovereignty and stewardship over their territorial and culturally meaningful seas.

IV. Restoring Dominion: Establishing a Native Hawaiian Trusteeship over the Northwestern Hawaiian Islands

Native Hawaiians need land or water over which to be sovereign in order to give meaning to their principles of ocean governance and to inject indigenous values into the law of the sea. Current proposals to grant Native Hawaiians sovereignty do not include a land base for Native Hawaiians. Granting Native Hawaiians dominion over the Northwest Hawaiian Islands and surrounding waters would both provide a suitable geographical-base and a place to practice and develop indigenous values that speak for the ocean.

A. Hope for Sovereignty: The Need for a Territorial Base

The United States is directly responsible for depriving the Kingdom of Hawai`i of its national sovereignty.⁵⁵ If the United States had not intervened to assist in the overthrow of the Kingdom of Hawai`i, that nation might still exist today. The Kingdom had absolute sovereignty over its laws. If that sovereignty had continued, indigenous values such as *mālama`āina* may have been incorporated into the law of the sea. Instead, the overthrow and ultimate annexation of Hawai`i as a territory and now, the admission of Hawai`i as a state of the United States has prevented indigenous principles from maturing into working legal concepts of governance.

⁵⁵ Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993).

Despite the incorporation of Hawaii's indigenous people into the American way of life, the sovereign aspirations of Native Hawaiians are alive and well.⁵⁶ There is a strong and growing Native Hawaiian sovereignty movement. These perspectives have found their way into international forums through activities of non-governmental organizations (NGOs).⁵⁷

The still-vibrant indigenous consciousness, together with recent sympathetic activity in the Congress of the United States, allows for the possibility of a new indigenous political empowerment.⁵⁸ The future of that empowerment depends, in large part, on whether Native Hawaiians will have a land base.

The United States has recognized the critical importance of land as an element of sovereignty. In 1993, the U.S. Congress passed and the President signed the Apology Resolution in which the U.S. government acknowledged its role in the illegal overthrow of the Kingdom of Hawai'i and apologized to Native Hawaiians for that illegal action.⁵⁹ Among its findings, the Apology Resolution recognized that "the health and well being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."⁶⁰ The Apology Resolution also manifests an understanding that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions. . . ."⁶¹ Most importantly, the Apology Resolution recognizes that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum. . . ."⁶² Congress stated that the purpose of the bill is to

⁵⁶ See Laenui, *supra* note 35, at 95.

⁵⁷ Hawaiian perspectives have been adopted by the largest international indigenous nongovernmental organization (the World Council of Indigenous Peoples) and have been promoted before international organizations such as the World Commission on Environment and Development, the United Nations Working Group on Indigenous Populations, and the International Labor Organizations Committee of Experts for the purpose of redrafting of its Convention Concerning the Protections and Integration of Indigenous and other Tribal and Semi-Tribal populations in Independent Countries (Convention 107). See *e.g.*, Laenui, *supra* note 35, at 95.

⁵⁸ Native Hawaiian Government Reorganization Act of 2010, H.R. 2314, 111th Cong. (2010).

⁵⁹ Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993) ("Joint Resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.").

⁶⁰ *Id.* at 1512 (emphasis added).

⁶¹ *Id.* at 1512-13.

⁶² *Id.* at 1512 (emphasis added).

provide a “proper foundation for reconciliation between the United States and the Native Hawaiian people. . . .”⁶³

The proposed act, commonly known as the Akaka Bill, explicitly builds on the contrition of the Apology Resolution. The bill proposes federal recognition of the Native Hawaiians, giving them the same rights and privileges granted to tribes of the mainland United States.⁶⁴ The tribes that are currently federally recognized possess limited sovereignty as “domestic dependent nations.”⁶⁵ Thus, the passage of the Akaka Bill could restore some of Native Hawaiian sovereignty as a nation.

While the bill itself does not immediately grant Native Hawaiians a land base, the importance of such a land base to Native Hawaiians is recognized in the bill.⁶⁶ Thus, the bill would provide “a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a single unified Native Hawaiian governing entity for the Native Hawaiian people and their lands. . . .”⁶⁷ Moreover, foremost among those sovereign rights would be the ability to negotiate with the U.S. government over the status of various lands which have been held in trust for Native Hawaiians,⁶⁸ but which “have never been completely inventoried or segregated”⁶⁹

Congress itself has already acknowledged the mistake of granting recognition to indigenous groups without a concomitant award of territorial sovereignty. In 1983, Congress recognized the self-governance of the Timbisha Shoshone Tribe, but failed to award it any land over which to govern.⁷⁰ In 2000, the 106th Congress of the United

⁶³ *Id.* at 1513.

⁶⁴ Native Hawaiian Government Reorganization Act of 2010, H.R. 2314, 111th Cong. (2010).

⁶⁵ *See e.g.* Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

⁶⁶ Senator Akaka has explicitly stated that the bill does not allow for the establishment of lands that are exclusively held by Native Hawaiians and subject to Native Hawaiian laws. Daniel Akaka, *Native Hawaiian Federal Recognition*, DANIEL KAHIKINA AKAKA: U.S. SENATOR OF HAWAII, <http://akaka.senate.gov/issue-native-hawaiian-federal-recognition.cfm> (last visited Sept. 25, 2010). “The Native Hawaiian Government Reorganization Act: does not allow Hawaii to secede from the United States; does not allow private lands to be taken; does not authorize gaming in Hawai`i; does not create a reservation in Hawaii.”

⁶⁷ H.R. 2314 § 20 (emphasis added). The resolution also states, “despite the overthrow of the Government of Hawaii, Native Hawaiians have continued to maintain their separate identity as a single distinctively native political community through cultural, social, and political institutions, and intends to give expression to their rights as native people to self-determination, self-governance, and economic self-sufficiency. . . .”

⁶⁸ *Id.* § 8(A).

⁶⁹ *Id.* § 8(C).

⁷⁰ Pub. L. No. 106-423, 114 Stat. 1875 § 2(3) (2000) (codified at 16 U.S.C. 410aaa note (2000)).

States sought to rectify the earlier omission by vesting some 7,700 acres of land in trust for the Timbisha Shoshone tribe.⁷¹

Congress acknowledged the need to give the tribe a land base in order to better coexist and manage the resources of Death Valley National Park, the area where the Timbisha Shoshone reside.⁷² The Bureau of Land Management report on the proposed transfer of land noted: “For millennia the Timbisha Shoshone have been a people inextricably tied to the beautiful but austere desert landscape. It has been their home and the source of their sustenance for countless generations. The Timbisha have an immense attachment to the land and a strong sense of responsibility for it.”⁷³ The report continued by recognizing that those ancient cultural ties also related to contemporary pragmatic necessities. “Unless the Tribe secures a land base of sufficient size to ensure sustainable development, its long term economic prognosis is dramatically diminished, as well as its social and cultural integrity.”⁷⁴

Much like the Timbisha Shoshone, Native Hawaiians have a deep attachment to and special relationship with the land. Both the Timbisha Shoshone and Native Hawaiians were adversely affected by their contact with the United States. The United States reconciled with the Timbisha Shoshone by conveying title to what was formerly lands of a national park to the Timbisha Shoshone. This conveyance benefitted both parties and establishes a strong precedent for a similar act of restitution for Native Hawaiians.

The Akaka bill also cites to the Apology Resolution as recognizing the deep attachment of Native Hawaiians to the land. The language used is very similar to that of the report concerning the Timbisha Shoshone:

Upon the reaffirmation of the special political and legal relationship between the United States and the Native Hawaiian governing entity, the United States and the State of Hawai`i may enter into negotiations with the Native Hawaiian governing entity designed to lead to an agreement or agreements addressing such matters as . . . the transfer of State of Hawai`i lands and surplus Federal lands,

⁷¹ *Id.* § 5(b).

⁷² *Id.* § 2(5)-(6).

⁷³ THE TIMBISHA SHOSHONE TRIBAL HOMELAND REPORT: A DRAFT SECRETARIAL REPORT TO CONGRESS TO ESTABLISH A PERMANENT TRIBAL LAND BASE AND RELATED COOPERATIVE ACTIVITIES, part 2(a), <http://www3.iwvisp.com/blm/report> (last visited Sept. 13, 2010) (a report prepared to satisfy requirement that the tribe and the relevant federal agencies conduct a study to identify land suitable for a reservation outlined in the California Desert Protection Act. 16 U.S.C. § 410aaa-74(b) (1994)).

⁷⁴ *Id.* at part 2(d).

natural resources, and other assets and the protection of existing rights related to such lands or resources. . . .⁷⁵

B. A Culturally Worthy Geographical Base

The Northwest Hawaiian Islands would serve as an appropriate land base for both practical and cultural reasons. They would grant Native Hawaiians lands over which to have dominion and thus true sovereignty. Additionally, their nature as a sea of islands will give Native Hawaiians the opportunity to practice indigenous ocean management traditions and infuse their values into the law of the sea.

The Northwest Hawaiian Islands are part of the Hawaiian archipelago, extending a total of 1,500 miles northwest of the eight human-populated islands and designated a national monument by presidential order in 2006.⁷⁶ They received the Hawaiian name Papahānaumokuākea on Feb 28th, 2007.⁷⁷ These islands are currently managed by three trustees: The National Oceanic and Atmospheric Administration, the Fish and Wildlife Service, and the State of Hawai`i.⁷⁸ There is precedent for granting a land base to an indigenous group from publically managed lands; the Timbisha Shoshone's reservation was created in Death Valley National Park, land subject to even more stringent protections than a National Monument such as Papahānaumokuākea.⁷⁹

Native Hawaiians have a long history of territorial dominion over the Northwestern Hawaiian Islands. Native Hawaiians historically claimed title to these lands during the Kingdom of Hawai`i.⁸⁰ As early as 1000 A.D., Polynesians in double-hulled canoes arrived in the islands and various chiefs and members of Hawaiian Royalty have visited the islands since that time.⁸¹ Title to the Northwestern Hawaiian Islands

⁷⁵ Native Hawaiian Government Reorganization Act of 2010, H.R. 2314, 111th Cong. (2010).

⁷⁶ Proclamation 8031 Establishment of the Northwestern Hawaiian Islands National Monument, 71 Fed. Reg. 36,443 (June 26, 2006). *See also* 50 C.F.R. 404 (2010) (federal regulations governing the monument).

⁷⁷ Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007).

⁷⁸ Proclamation 8031 Establishment of the Northwestern Hawaiian Islands National Monument, 71 Fed. Reg. at 36,444.

⁷⁹ Pub. L. No. 106-423, 114 Stat. 1875 § 2(3) (2000) (codified at 16 U.S.C. 410aaa note (2000)).

⁸⁰ *See generally* MELODY MACKENZIE & B. KAIAMA, OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN CLAIMS TO THE LANDS AND NATURAL RESOURCES OF THE NORTHWESTERN HAWAIIAN ISLANDS(2003) (Title to the islands and waters was vested in the Kingdom of Hawai`i throughout the 1800s).

⁸¹ *See* 1 U.S. FISH AND WILDLIFE SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION & STATE OF HAWAII, PAPAHAANAUMOKUAKEA MARINE NATIONAL MONUMENT MANAGEMENT PLAN 46 (2008) [hereinafter Management Plan].

was held by the Kingdom of Hawai`i until the Kingdom was illegally⁸² overthrown with the aid and intervention of the United States.

The Northwestern Hawaiian Islands are of great cultural importance to Native Hawaiians. Papahānaumokuākea is home to many *wahi kūpuna* (Hawaiian sacred places).⁸³ The islands also contain many archaeological sites that show evidence of the pre-contact Native Hawaiian way of life. The Island of Mokumanamana is of particular significance. It played a central role in Hawaiian ceremonies and practices, because it is on the northern limit of the path the sun makes throughout the year. Thus, Mokumanamana is between two important spatial and cultural lines---the line or dimension of *po* (darkness and afterlife) and *ao*, (light and existence).⁸⁴ Significantly, on the longest day of the year, the sun travels directly over Mokumanamana.

The Northwestern Hawaiian Islands also play an important role in Hawaiian mythology. Papahānaumokuākea is named to celebrate birth, the volcanic creation of islands from the union of the earth mother (Papahānaumoku) with the sky father (Wākea).⁸⁵ The goddess Pele migrated to Hawai`i to escape a conflict with her sister, a deity of the sea. The journey led Pele through the Northwestern Hawaiian Islands, where she left her younger brother on the island of Nihoa. Her journey continued, island to island, down the chain until she eventually found a home in the Halema`uma`u crater on the island of Hawai`i.⁸⁶

Incorporating the Northwestern Hawaiian Islands into the Akaka Bill as a land base would allow an emerging Hawaiian nation the sovereign territory over which it could exercise adjudicatory authority. This process would infuse an island understanding into the development of the law of the sea. Jurisdiction over Papahānaumokuākea would provide a place for developing such concepts as *mālama`aina* because Western concepts of property have never been applicable to Papahānaumokuākea. Furthermore, jurisdiction over Papahānaumokuākea could allow a Hawaiian judiciary or similar adjudicatory body the finality that all sovereign communities need in order to develop and concretize their key principles of law.

V. Conclusion

At this historical moment, both Native Hawaiians and the ocean lack a sovereign voice. Even though Native Hawaiians might participate in contemporary dialogue on sovereignty with the United States, without federal recognition and a sovereign territory, the Native Hawaiian point of view is not given weight in an international system

⁸² Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993) (acknowledging that the overthrow of the Kingdom of Hawai`i occurred with the active participation of agents and citizens of the United States).

⁸³ Management Plan, *supra* note 81, at 13.

⁸⁴ *Id.* at 48.

⁸⁵ *Id.* at 5.

⁸⁶ See MARTHA BECKWITH, HAWAIIAN MYTHOLOGY 170-71 (1970).

dominated by nation-states. The ocean has been subordinated to the dominion of nations, but also suffers from the tragedy of being largely unowned in a system in which only ownership demands protection.

Native Hawaiians can speak for the ocean because, for the Hawaiian people, the ocean is not a subordinated other, but a valued family member, a living thing, the realm of gods, as well as the source from which all life springs. The oceans now face a tragedy of over-exploitation. Native Hawaiians can demonstrate how an island people value and respect the water that ties the oceanic continent together. They only need the full force of sovereignty to give that voice weight and transform vague concepts into concrete, enforceable legal principles.

But the ocean is more than a voiceless resource that needs a steward to dominate it. The ocean is truly *ke kumu* [the source], because it can give Native Hawaiians territory over which to be sovereign. Sovereignty, in turn, can give Native Hawaiians the voice to protect the ocean. Thus, once again, the ocean is cause and human beings are the effect. The ocean, which both bore the Native Hawaiian people to the Hawaiian Islands and culturally defined them, can give to them once more. And in that process, the dialogue over ocean governance can be transformed from one of ownership into one of respect.