

**THE RIGHT TO CONTROL THE LAND: LAW, HERITAGE AND
SELF- DETERMINATION BY NATIVE HAWAIIANS**

This dissertation is submitted for the degree of Doctor of Philosophy

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DECLARATION AND STATEMENT OF LENGTH

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

This dissertation does not exceed the limit of 80,000 words (or 350 pages) stipulated by the Archaeology and Anthropology Degree Committee and the Board of Graduate Studies at the University of Cambridge.

Signed: _____ Date: _____

Susan Carol Rothenberg Shay

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ABSTRACT

Hawai‘i was once an independent Indigenous sovereign island nation with a distinctive culture, history, and legislative past. The laws of the modern state of Hawai‘i reflect that history as Indigenous heritage has been integrated into state law. However, during the last forty years the laws protecting Native Hawaiian rights have been challenged in Hawai‘i through a series of significant land claim lawsuits. Native Hawaiian struggles for sovereignty are based on the assertion of their heritage rights in lawsuits.

This dissertation explores the use of heritage in land claim lawsuits and the role it plays in the construction of a modern Indigenous identity. It uses Native Hawaiian efforts for land control in Hawai‘i as a case study to explore how involvement in the legal process has impacted both Indigenous identity and heritage. In this dissertation I examine three major lawsuits following one line of legal precedent: traditional and customary access rights. The investigation answers the questions of how legal narrative construction using heritage impacts Indigenous identity; how heritage values are substantiated; what the role is of experts in formulating cases; if there is a measurable change over time in the way that cultural claims are structured; and what the impact is of increased Indigenous political leadership and land control on Native Hawaiian identity and heritage. To complete this research, I applied a mixed qualitative method approach of ethno-historical, socio-legal, and legal narrative analyses with content analysis to examine Indigenous textual production and court performance as forms of social practice. I supported my research with ethnographic semi-structured interviews and participant observation in recognition of Indigenous protocol. The results indicate that Native Hawaiian use of heritage in courtrooms has contributed to Indigenous identity construction by enhancing collective memory, increasing land control, and protecting group rights. The results also provide insight into how such actions by Indigenous peoples can advance upward social mobility, encourage collective identification and civic involvement, regenerate cultural practices, and strengthen group identity. This research provides new insights into how Indigenous heritage can be used as a means of Indigenous empowerment and develops a greater and more complex understanding of the uses of heritage for land

control and sovereignty. These findings may be used by other special interest groups using heritage to achieve common goals.

TABLE OF CONTENTS

| | |
|--|-----|
| DECLARATION AND STATEMENT OF LENGTH | 2 |
| ACKNOWLEDGEMENTS..... | 3 |
| ABSTRACT | 5 |
| CONTENTS | 7 |
| LIST OF TABLES | 10 |
| LIST OF FIGURES | 11 |
| LIST OF ABBREVIATIONS..... | 12 |
| | |
| CHAPTER ONE INTRODUCTION - FINDING THE SITE | 13 |
| 1.1 RESEARCH AIM: NEW USES FOR HERITAGE..... | 13 |
| 1.2 RESEARCH PROBLEM: REGAINING INDIGENOUS AGENCY THROUGH LAND CLAIMS . | 15 |
| 1.3 SIGNIFICANCE OF THE RESEARCH..... | 18 |
| 1.4 ORGANIZATION OF THE DISSERTATION | 20 |
| 1.5 RELEVANCE OF THE STUDY | 22 |
| | |
| CHAPTER TWO HAWAI‘I AND THE LAW - PREPARING THE GROUNDWORK..... | 24 |
| 2.1 HAWAIIAN CULTURE AND THE LAW: A SINGULAR MERGING | 25 |
| 2.2 STAGES OF NATIVE HAWAIIAN HERITAGE TRANSFORMATION | 28 |
| 2.3 THE LAW IN HAWAI‘I AND NATIVE HAWAIIAN HISTORIC LEGAL RIGHTS | 51 |
| | |
| CHAPTER THREE THEORIZING HERITAGE AND LEGAL NARRATIVE - BUILDING THE FOUNDATION | 57 |
| 3.1 NARRATIVE AND ITS USES | 58 |
| 3.2 HERITAGE, NARRATIVE, AND IDENTITY | 60 |
| 3.3 LAW AND LEGAL NARRATIVE | 70 |
| | |
| CHAPTER FOUR METHODS FOR INVESTIGATION - FRAMING THE PROJECT..... | 91 |
| 4.1 RESEARCH PROCESS: METHODS FOR INVESTIGATION | 93 |
| 4.2 LOCATE, DOCUMENT AND CLASSIFY LAND CLAIM LEGAL TEXTS..... | 94 |
| 4.3 INVESTIGATE CULTURAL IMPACT ASSESSMENT REPORTS..... | 98 |
| 4.4 CASE CATEGORIZATION AND SELECTION | 99 |
| 4.5 FIELDWORK: ETHNOGRAPHIC RESEARCH ON HERITAGE AND NATIONALISM | 102 |
| 4.6 CHALLENGES IN DATA COLLECTION..... | 106 |

| | |
|---|-----|
| 4.7 METHODS FOR CASE EXAMINATION AND ANALYSIS | 108 |
| CHAPTER FIVE KALIPI V HAWAIIAN TRUST COMPANY - CONSTRUCTING THE FLOOR | 115 |
| 5.1 AN ERA OF ACTION: THE SOCIO-POLITICAL ENVIRONMENT AND THE KALIPI CASE | 118 |
| 5.2 A ONE MAN OFFENSIVE: KALIPI V HAWAIIAN TRUST CO., LTD. | 120 |
| 5.3 TURNING THE POLITICAL TIDE: THE 1978 CONSTITUTIONAL CONVENTION AND THE JURISPRUDENCE OF CHIEF JUSTICE WILLIAM S. RICHARDSON..... | 130 |
| 5.4 THE PROCESS OF IDENTITY TRANSFORMATION | 134 |
| CHAPTER SIX PELE DEFENSE FUND V PATY - RAISING THE ROOF | 144 |
| 6.1 ACTIVISM AND TRANSITION: THE SOCIO-POLITICAL CONTEXT AND THE GROWTH OF INDIGENOUS CONSCIOUSNESS | 146 |
| 6.2 OUTSIDE THE COURTROOM: BUILDING ALLIANCES FOR POLITICAL RECOGNITION. | 150 |
| 6.3 INSIDE THE COURTROOM: THE CASE OF PELE DEFENSE FUND V PATY | 154 |
| 6.4 TURNING THE POLITICAL TIDE: PROVING HERITAGE CLAIMS AND THE ENDURING INFLUENCE OF JUSTICE RICHARDSON | 162 |
| 6.5 THE PROCESS OF IDENTITY TRANSFORMATION: TAKING BACK THE NARRATIVE.... | 165 |
| 6.6 REDEFINING HAWAIIAN IDENTITY: AN EMPOWERED PERSPECTIVE..... | 170 |
| CHAPTER SEVEN PUBLIC ACCESS SHORELINE HAWAI‘I V HAWAI‘I COUNTY PLANNING COMMISSION - ADDING WINDOWS AND DOORS | 175 |
| 7.1 THE SOCIO-POLITICAL CONTEXT: THE IMPACT OF FOREIGN INVESTMENT..... | 178 |
| 7.2 LEGAL PRECEDENTS AND RELEVANT STATUTES | 180 |
| 7.3 THE CASE AND ITS LEGAL NARRATIVE | 182 |
| 7.4 CASE STRATEGIES: PLANNED AND UNPLANNED..... | 184 |
| 7.5 LEGAL NARRATIVE ANALYSIS | 186 |
| 7.6 IDENTITY TRANSFORMATION: DEFENDING TRADITION AND CUSTOMARY RIGHTS . | 187 |
| 7.7 THE DECISION AND ITS IMPACT..... | 199 |
| CHAPTER EIGHT THE CONCLUDING DETAILS - LETTING IN LIGHT..... | 202 |
| 8.1 INTRODUCTION | 202 |
| 8.2 INDIGENEITY, HAWAIIAN HISTORY AND THE LAW | 203 |
| 8.3 THE METHODOLOGICAL APPROACH..... | 203 |
| 8.4 A SUMMARY OF WHAT THIS THESIS EXAMINED | 204 |
| 8.5 CASE ANALYSIS: NARRATIVITY AND PERFORMATIVITY | 207 |
| REFERENCE LIST | 212 |

| | |
|------------------------------|-----|
| INDEX OF HAWAIIAN WORDS..... | 244 |
| LEGAL TERMINOLOGY | 247 |
| APPENDICES..... | 253 |

LIST OF TABLES

| | | |
|---------|--|-----|
| TABLE 1 | STATE OF HAWAI‘I NATIVE HAWAIIAN CASE ANALYSIS 1978-2012 | 100 |
| TABLE 2 | REGISTERED VOTER INCREASES 1968-1978 (KOSAKI, 1978: 128)..... | 119 |

LIST OF FIGURES

| | | |
|----------|---|-----|
| FIGURE 1 | HAWAIIAN HISTORY TIMELINE | 29 |
| FIGURE 2 | COMPARISON OF CASE CATEGORIES | 101 |
| FIGURE 3 | NATIVE HAWAIIAN SOVEREIGNTY MARCH OF 1993 | 149 |

LIST OF ABBREVIATIONS

| | |
|----------------|--|
| AHD | Authorized Heritage Discourse |
| Blue Ocean | Blue Ocean Preservation Society v Watkins |
| BNLR | Board of Natural Land and Resources, State of Hawai‘i |
| CIA | Cultural Impact Assessment |
| CC | Circuit Court, State of Hawai‘i |
| CCH | Contested Case Hearing |
| Cobo Report | Martinez Cobo Study |
| Con Con | Hawai‘i Constitutional Convention of 1978 |
| DLNR | Department of Land and Natural Resources, State of Hawai‘i |
| EIS | Environmental Impact Statement |
| HCPC | Hawai‘i County Planning Commission |
| HHCA | Hawaiian Homes Commission Act |
| HRS | Hawai‘i Revised Statute (§) |
| Kalipi | Kalipi v Hawaiian Trust Company |
| Hawaiian Trust | Hawaiian Trust Company |
| LUC | Land Use Commission, State of Hawai‘i |
| LRB | Legislative Reference Bureau |
| NAGPRA | Native American Graves Protection Act |
| NARS | Natural Area Reserve System |
| NEPA | National Environmental Policy Act |
| NHLC | Native Hawaiian Legal Corporation |
| OHA | Office of Hawaiian Affairs |
| PASH | Public Access Shoreline Hawai‘i |
| PDF | Pele Defense Fund |
| Pele | Pele Defense Fund v Paty |
| PKO | Protect Kohanaiki ‘Ohana |
| PBS | Public Broadcasting System |
| SC | Supreme Court, State of Hawai‘i |
| UH | University of Hawai‘i |

CHAPTER ONE INTRODUCTION - FINDING THE SITE

We still need to get the facts straight before we make claims that aren't based on truth.

Al Gonzales, Honolulu Civil Beat 2015

This dissertation is an exploration into the uses of heritage, and the role heritage has played in the construction of a modern Indigenous¹ identity in the island state of Hawai'i. In particular, the aim is to understand how the process of Indigenous narrative development for land claims can influence Indigenous heritage and identity. The ultimate objective is to develop a greater and more in-depth understanding of the uses of Indigenous heritage for land control and increased levels of sovereignty. Moreover, this research has the potential to reveal new insights into how Indigenous heritage can be used both as a tool for state power and as a means for Indigenous empowerment.

1.1 Research Aim: New Uses for Heritage

Heritage, memorializing the past for present purposes (Lowenthal 1996: xi), has many uses. It can support and sustain families through shared generational knowledge and values; it can encourage community cohesion with collective history and acknowledged common experience (Smith 2006; Smith and Akagawa 2009; Sørensen and Carman 2009); and it can unify nations with mutual goals, ambitions, values, and identity (Anderson 2006). Heritage can also be a tool for economic, political, social, and environmental change (Fairclough 1992; Kanahele 1986; Mageo 2001; Trask 1999).

Indigenous peoples, in particular, are using their heritage to regain control over their futures. They are struggling to overcome historical injustices wrought by colonialization, marginalization, and cultural appropriation. One common response from Indigenous communities is to bring land claim cases based on heritage into the courts in an effort to

¹ The word 'Indigenous' is capitalized in respect to Native peoples, since the term 'Western' is commonly capitalized in academic writings.

achieve increased levels of self-determination. Such legal challenges have the potential to bring about significant improvements in the lives of Indigenous people. They may also, however, have more subtle and less scrutinized repercussions, such as the illumination of new forms of living culture, the reification of other elements of heritage, and the development of contemporary forms of Indigenous identity.

Using Native Hawaiian² efforts for land control in the State of Hawai‘i as a case study, this dissertation will investigate how involvement in the process of Indigenous land claim action can impact Indigenous identity and heritage. This process is formalized by court rules and regulations. To comply with the normative and specific requirements of legal procedure, including language and presentation, participants in a land claim action, the plaintiffs who bring the case and the defendants who argue against it, present their points of view in arguments called “briefs”. The briefs do not present facts, but a “truth” as constructed by the attorney. This “truth” is prepared in a form of narrative, or story, backed up by evidence and supported by expert testimony.

Narratives are therefore the basic building blocks for court brief presentations. Credible narratives depend on evidence, which in the case of Indigenous land claims, require procedures of investigation and definitions of cultural concepts and terms that may not be easily defined, nor familiar to the court. Building legal narratives using heritage is therefore unusually difficult and complex as it requires community consensus in the choice of information, public identification of practice and belief, and codification and transformation of traditional knowledge into legal language and description. Once built, the narrative must also survive legal scrutiny and be defended in the courts. In the process of building legal narratives, Indigenous claimants may discover previously undocumented and unrecognized values and practices. Such discoveries may reveal heritage previously lost, obscured, or discouraged due to historic discriminatory government policies. This information can enrich communities by revealing new forms of ancestral knowledge, culture, and tradition. Importantly, it can also be used to substantiate claims of traditional practice within the court.

² Native Hawaiians are the Indigenous peoples of the Hawaiian Islands, and for this dissertation the terms Native Hawaiian and Hawaiian will be used interchangeably.

1.2 Research Problem: Regaining Indigenous Agency through Land Claims

Land is an essential part of Indigenous lifeways and worldviews, underpinning spiritual values and social connections which are critical for the survival of unique cultures, language, arts, and traditions. According to the United Nations Permanent Forum on Indigenous Issues:

Land is the foundation of the lives and cultures of indigenous peoples all over the world. Without access to and respect for their rights over their lands, territories and natural resources, the survival of peoples' particular distinct culture is threatened. (cited by Gilbert and Doyle 2011: 4)

The realization of the critical nature of this relationship has inspired movements for Indigenous nationalism and self-determination, encouraging community members to engage in activism for rights to access or control land. These movements have, in turn, fostered concerted efforts for legal enforcement of existing (legal) rights. According to Gilbert and Doyle, central to the realization of these rights are successful Indigenous efforts to ensure the enforcement of those same entitlements (Gilbert and Doyle 2011: 1).

Regaining Indigenous control of Native Hawaiian heritage in Hawai'i is a highly political issue in the state.³ Native Hawaiian heritage has been appropriated by the state for tourism and therefore has great economic value to the government. Native Hawaiian heritage, from traditional practice to values and symbols, has become the narrative of the state, challenging ownership of fundamental components of Indigenous identity. In fact, it has become such an important component of state identity that the Native Hawaiian heritage narrative has been adopted and incorporated into state law. The official State narrative is of ancient and enduring Hawaiian values of *aloha* (peace), *mālama* (respect), and *pono* (righteousness), along with the traditional and customary practices of *hula* (dance), ritual chant, music, surfing, and *luau* (celebration). Elements of the Indigenous heritage narrative are also evident throughout all representations of state government. For example, symbols of Native Hawaiian heritage are presented publicly in the state seal and motto *Ua Mau Ke Ea O Ka 'Āina*⁴. Native Hawaiian

³ For this dissertation, "State" and "state" will refer to the State of Hawai'i. The word "nation" will refer to the national, or federal government of the United States.

⁴ The translation of the official state motto is "The life of the land is perpetuated in righteousness." It is claimed to have been the words spoken by King Kamehameha III of the Kingdom of Hawai'i in 1843.

symbols are also demonstrated through official presentations of flower *leis* (necklaces) in State ceremonies, and are evident in imagery throughout the state website, all of which carry visual and cultural representations of elements of Native Hawaiian heritage and history.⁵ Lawsuits for Indigenous land control based on heritage values and traditional practices are therefore also power struggles for the restoration of authority over appropriated heritage and Native Hawaiian identity.

One critical element of Native Hawaiian heritage and identity shared with other Indigenous peoples is a spiritual and cultural relationship with ancestral lands. This relationship is considered familial and reciprocal. It entails a responsibility for oversight and care of land and natural resources to ensure community health and wellbeing. Public acknowledgment of this sense of Indigenous environmental responsibility is useful for shifting public perception of the inherent value of Native Hawaiian traditional knowledge and in building social capital for sovereignty efforts.

Land has been historically recognized as critical to the survival of the Native Hawaiian people. The present struggle for Native Hawaiian land control is a resurgence of efforts dating back to 1839 when King Kamehameha III of the Nation of Hawai‘i, afraid that foreign economic and political forces were separating his people from their traditional lands, created legal protections for Native Hawaiian access rights for traditional practices. The rights the king sought to protect were based on the customs and practices of the Hawaiian people at that time. His hope was that by ensuring rights to access land, cultural practices would continue, Native Hawaiian identity and heritage would be protected, and the unique culture of the Hawaiian Islands would survive. The king’s efforts were successful, in that every government, from kingdom to republic, republic to US territory, and US territory to US state has recognized the unique relationship between the Hawaiian people and the Hawaiian Islands by incorporating the nineteenth century law protecting Native Hawaiian traditional and customary rights into every version of state governance. Until statehood, the law was not substantially interpreted nor expanded, leaving past values, concerns, and perceptions from bygone eras as justification for contemporary land use practices.

⁵ The portal for the state website is <https://portal.ehawaii.gov/>.

However, during the last forty years the law protecting ongoing Native Hawaiian traditional and customary practices has been challenged in Hawai‘i through a series of significant land claim lawsuits. Efforts have been made to reconcile ancient and modern systems of land use, and ultimately, judicial recognition of ongoing Native Hawaiian traditional and customary rights has been confirmed. In the process, Native Hawaiian heritage has been investigated, documented, and explored to determine the scope of ongoing practices; the relevancy of ancient practices to a modern population; and to define the extent, mode, and obligation of state legal protection. Increasingly Native Hawaiians have become directly involved in the process of case development and have participated in all aspects of the judicial process. In turn, the greater society in Hawai‘i has reacted politically and socially. Judicial rulings on constitutional and statutory provisions have impacted the economic, political, and social capital of the Native Hawaiian population, and have fostered and nurtured a new Indigenous identity.

This dissertation aims to explore how Hawaiian identity is constructed through participation in the land claim process. It will seek to add new understandings of the social, political, and economic impacts of Indigenous participation in the legal process on Indigenous identity and heritage. In this way, it will explore an aspect of heritage that is both immediate, as it has direct relevance to the present; and critical, in that it will respond to sociologist Tim Winter’s (2012) challenge that heritage studies researchers should investigate the socio-political role of heritage in contemporary struggles for Indigenous empowerment, particularly in the face of growing trans- global movements for natural resource extraction and globalization.

In its exploration of Hawaiian heritage and identity, this dissertation will attempt to answer the following research questions:

- 1) How does legal narrative construction using heritage impact Indigenous identity?
- 2) How are heritage values substantiated in the language of the land claims? In particular, what is the role of professional experts in formulating those cases?
- 3) Is there a measurable change over time in the way that cultural claims have been structured?
- 4) What is the impact of increased Indigenous political leadership and land control on Native Hawaiian identity and heritage?

1.3 Significance of the Research

Land claims such as these are employed in struggles for Indigenous sovereignty to reassert control over ancestral land, protect places of traditional and cultural value, safeguard spiritual and religious practices, regain jurisdiction over a contested past (Lowenthal and Gathercole 1990), and provide for a sustainable economic and political future for a marginalized population. Significantly, engagement in the land claim process has the potential to foster Indigenous community involvement and encourage political action, thereby stimulating a new Indigenous nationalist identity.

Increasingly, ownership of the past has become one way for Indigenous peoples to restore traditional, spiritual, and cultural relationships with their ancestral land. In this way, the restoration of Indigenous control of land is essential for Indigenous empowerment as it restores traditional relationships and recovers native agency. For Indigenous peoples, regaining land is intrinsically tied to the rights of self-definition, language, and traditional practice. With renewed self-confidence, political hierarchies of power (the legacy of settler colonial⁶ societies) may be challenged. Indigenous land claims, in particular, are an attempt to regain authority over a colonial past that disrupted the continuity of historical processes resulting in loss of tradition, culture, customs, and history. Such land claims are therefore an attempt to take back the historical record, rejuvenate customs and tradition, and restore the land connection to the people.

This investigation is very timely. Indigenous sovereignty has entered the public discourse on a state, national, and international level. Land, a commodity that is very limited in the volcanic island state of Hawai‘i, is the basis of political and economic strength and is at the center of all discussions. Native Hawaiian leadership has increasingly attempted to divert the balance of this power in the islands by claiming traditional Indigenous rights to access and control of land. Current economic trends in globalization, however, are placing new strains on Indigenous relationships with governments and rights over land. Countries wish to open their borders to foreign investment, and that includes rights for natural resource extraction and increased transnational real estate investment. This creates conditions, particularly in small

⁶ Settler colonialism is a term that refers to a type of colonialism that serves to displace or replace Indigenous, or original populations of a territory with a new settler community.

island communities, of increased conflict over scarce commodities and fragile environments. Gilbert and Doyle (2011) point out that the natural resources in demand are frequently on land that is held or traditionally used by Indigenous peoples. This results in conflicts between the state and potential investors, government and citizenry, Indigenous residents, and transnational investors.

The tension arises because land, to Native Hawaiians, as the Indigenous peoples of the islands, is a basic component of their identity. They share this with other Indigenous peoples all over the world. They have a relationship with land that is so profound that it exists at the core of their society, satisfying and providing a sense of belonging to the earth and to the community (Daes 2001). Professor Robert Williams attempts to illustrate this distinct relationship by stating that from an Indigenous point of view, ‘the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories’ (Williams 1990: 981 cited by Daes 2001: 7). This foundation is so essential to their existence, notes Professor James Henderson, it ‘creates [their] consciousness, not [as] an ideological construct or fungible resource’ but as a part of their personality and sense of self (Henderson. 1995: 196 cited by Daes 2001: 7). The Indigenous sense of “self”, ‘does not end with their flesh, but with the reach of their senses into the land’ (Ibid.). Land is a basic component of Indigenous existence, and, as such, is critical for their cultural survival. Jose Martinez Cobo confirms this in the document that was to become the impetus for the United Nation’s Working Group on Indigenous People, the *Study of the Problem of Indigenous Populations*, also known as “The Cobo Report”. The Report states:

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture ... For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely. (Martinez Cobo 1987: 196-197)

Indigenous relationships to land are manifest in all elements of Hawaiian culture, including in distinctive languages and the arts as well as in everyday modes of communication and

personal expression. For example, place names in the Hawaiian language contain complex natural resource knowledge that has been handed down through generations and is not easily articulated through other means. This knowledge informs resource use and strengthens community bonds through transmission. Maintaining the connection to land is therefore essential for the continuity of Indigenous peoples and their cultures.

This dissertation will explore how public acknowledgement of these processes, practices, and protections may be used to build alliances with other special interest groups using heritage to achieve common goals. Together these alliances may provide the social and political capital needed for increased political recognition and empowerment. This investigation will provide insight into how such actions by Indigenous peoples can advance upward social mobility, increase national sovereignty, encourage collective identification and civic involvement, regenerate cultural practices, and strengthen group identity.

1.4 Organization of the Dissertation

Given that I am an architect, the metaphor of “building a structure” provides a useful and convenient framework to describe the organization of the dissertation. Chapter One through Chapter Four, conceptually *puts the site and structure in place* and *provides framing*, or background information necessary for understanding the complex historical and legal issues involved in this type of research. A review of literature, a presentation of theories, and a description of the methods used for this research are included to accomplish this. In doing so, these chapters provide a window or lens, through which to examine the case studies and explore the importance of narrative in identity construction.

The second group of chapters, Chapter Five through Chapter Eight, *closes in the structural frame*, fills in details, *builds* the discussion, and *lets in light* on a new area of heritage research. These chapters investigate case study lawsuits, and analyze the use of traditional and cultural practices to substantiate heritage values in the courts. The following is a more detailed description of the chapters:

Chapter One, or “Finding the Site”, introduces the topic of the dissertation, explains the research problem, describes the aim [purpose], and identifies the research questions. The

chapter also explains the significance of the research and describes the organization of the dissertation.

Chapter Two, or “Preparing the Groundwork”, provides background on Native Hawaiian heritage, history, and identity. The chapter discusses the historical transformations of heritage values and foundations of traditional land use in Hawai‘i. It explains the cultural relationship between Hawaiians and the land, the transformation of Hawaiian society after Western contact, the transition from common use to private land ownership, and the impact of American law and government on Native Hawaiian cultural heritage and identity. It also explores critical legal issues that significantly impact Native Hawaiian land claims today.

Chapter Three, or “Building the Foundation”, provides a theoretical framework for understanding the difficulties inherent in constructing Indigenous land claim presentations for Western-based legal systems. It contains a review of existing theory and literature on the role of narrative in constructing a sense of belonging and community. It examines the role of narrative as a component of heritage, and how narrative construction contributes to identity construction. To inform the discussion of the challenges inherent in Indigenous presentation of culture in Western courtrooms, the chapter includes a section comparing Indigenous epistemologies of selfhood with those of Western concepts and understandings.

Chapter Four, or “Framing the Project”, outlines the research methods used for investigation, including the development of the mixed method approach and obstacles encountered during data collection. Personal interviews were conducted to provide insight into contemporary views of Native Hawaiian heritage and sovereignty, inform on critical dimensions of a Native Hawaiian sense of belonging, and reveal continuing legal obstacles toward a unified identity.

The next three chapters present the land claim case studies. The law cases are presented in chronological order, since each lawsuit builds on previous legal understandings and is based on judicial precedent in a particular body of law. Each law case is discussed in three parts. The first part presents a socio-historical review of the political, social, and economic factors leading to the filing of the case. The second part describes relevant laws, legal issues and statutes. The third part explores the case itself. It examines the process of case development, changes in perception of heritage values and identity, and the impact of the case on Native Hawaiian identity and heritage.

Chapter Five, or “Constructing the Floor”, introduces the first of the three case study lawsuits: *Kalipi v Hawaiian Trust Company* (or “Kalipi”). This chapter examines the first significant land use case in the state to challenge the existence and relevancy of nineteenth century statutes protecting Native Hawaiian access rights for customary and traditional practices.

Chapter Six, or “Raising the Roof”, introduces the second case study lawsuit, *Pele Defense Fund v Paty* (or “Pele”). The chapter explores the sequential development of the body of law, noting changes in Native Hawaiian involvement in the court proceedings, and in the organization and presentation of a narrative based on heritage. It also reviews the strategic development of an activism plan to build capital in support of Native Hawaiian land claims.

Chapter Seven, or “Adding Windows and Doors” introduces the third case study lawsuit: *Public Access Shoreline Hawai‘i v Hawai‘i County Planning Commission* (or “PASH”). This chapter examines Native Hawaiian resistance to large-scale development in Hawai‘i, as evidenced through greater participation in legal proceedings. It discusses how increased Indigenous court involvement may contribute to shifts in authorized power as well as stimulate increased Indigenous ethnic identification and civic participation.

The final chapter, Chapter 8, or “Letting In Light”, answers the research questions, presents conclusions, identifies the limitations of the research, and provides recommendations for further study. In doing so, it confirms that law, like heritage, is a social process, and reveals how increased participation by Indigenous people in land claims contributes to the development of new forms of empowered Native identity.

1.5 Relevance of the Study

Research in the field of heritage related to this topic supports this dissertation. These investigations have focused on the formation of identity among Indigenous Pacific Island communities (Halualani 2002; Kana‘iaupuni 2005; Linnekin and Poyer 1990; Smith and Akagawa 2009; Smith 2006; Trask 1999), and on the politics of sovereignty and Indigeneity (Barker 2005; Fujikane and Okamura 2008; Smith 2004) in struggles for self-determination. My research will add to this body of knowledge by providing a new understanding of the intersection between heritage, land claims, and Indigenous land control for sovereignty. It will

provide insight into the post-colonial political value of Indigenous heritage by demonstrating how participation in the construction of legal narratives, including investigation into current practices, documentation of traditional knowledge, strategizing for effective presentation, and production of court performance challenges current social norms, empowers communities and impacts perceptions of the past, identity, and relationships to land. The findings of this dissertation, while based on research framed through Native Hawaiian land claims, may also be applicable to other subordinate minority groups in movements for greater political and economic power.

The next chapter will provide the foundation in Native Hawaiian history, culture and tradition, as well as Western Euro-American law, for understanding the arguments in the land claim case studies to follow.

CHAPTER TWO HAWAI‘I AND THE LAW - PREPARING THE GROUNDWORK

Hānau ka ‘āinā, hanau ke ali‘i, hānau ke kanaka. (Born was the land, born were the chiefs, born were the common people.)

Mary Kawena Pukui, *Ōlelo No‘eau, Hawaiian Proverbs and Poetical Sayings*

It has been a mere 238 years since Hawai‘i transitioned from a pre-literate society to a modern American state. It has been an incredibly rapid transition from a subsistence society to a globalized state caught in the crossroads of international trade and finance. During this time, the Indigenous Native Hawaiian people have struggled to survive, their numbers sharply decreasing due to colonization, disease, alienation from land, and rapid changes in social, economic, and political control. Native Hawaiian history is, according to historian Jon Van Dyke (1998), ‘a sad story of the loss of lands and resources and destruction of culture and historical continuity suffered by Hawai‘i’s native people’ (Van Dyke 1998: vii). Despite the historical trauma, links to Hawaiian heritage have survived, notwithstanding efforts by successive governments to suppress them (Ibid.: viii).

Starting in the 1970s, a cultural renaissance began and inspired an interest in Native Hawaiian heritage practices. From this renaissance grew a new awareness of the value of land to Indigenous heritage and identity, as well as the importance of the restoration of land control to Native hands for Indigenous survival. ‘Awareness of history’, Lowenthal (1990) asserts, ‘enhances communal and national identity, legitimizing a people in their own eyes ... Identification with a national past often serves as an assurance of worth against subjugation or bolsters a new sovereignty’ (Lowenthal 1990: 44). Indigenous involvement in lawsuits is an attempt to re-establish ownership and relevancy over the past, thereby asserting authority in the present, and influence over the future (Smith and Waterton 2009: 84). Such legal

actions may result in a redistribution of power, and with this empowerment, new forms of Indigenous identity and perceptions of the value of culture and heritage may emerge.

This chapter will serve to clarify how Hawaiian heritage was transformed by historic socio-political change in Hawai‘i, how culture shaped the law in the modern American state of Hawai‘i (Sproat 2008), and how these processes created what Halualani (2002) calls historical ‘vested articulations of Hawaiian or “native” identity’ (Halualani 2002: xvi). By doing so, it will contextualize the issues involved in the struggle for traditional Native Hawaiian rights, and better clarify expressions of identity in the legal cases to follow.

2.1 Hawaiian Culture and the Law: A Singular Merging

In Hawai‘i, there is a unique relationship between Indigenous culture and the law. According to the seminal legal document, *Native Hawaiian Law: A Treatise*, both US national law and Hawai‘i state law ‘acknowledge a special relationship between Native Hawaiians and their traditional land ... and recognize a legal and political relationship between the federal and state governments and the Native Hawaiian people’ (Mackenzie, Serrano and Sproat 2015: 23).

The two relationships are profoundly different, yet fundamentally bound together. The first relationship, between Native Hawaiians and their land, is based on the Native Hawaiian physical and spiritual connection with their environment, an affiliation that serves as the basis for their cultural heritage (McGregor 2007). Land, or *‘āina*, ‘that which feeds and nourishes’ (Andrade 2008: 6 cited in Chen 2012: 6), is considered a central component of their existence, part of ‘an interdependent, reciprocal relationship between the gods, the land and the people’ (MacKenzie et.al. 2007: 37). Hawaiian epistemology views the earth as the parent of all Hawaiians; imbued with spiritual value throughout all elements of nature (Meyer 2001, 2008); celebrated throughout Hawaiian culture; and expressed in every aspect of life,

including language, religious and cultural practices (MacKenzie 2015).⁷ Each person is linked to the next through genealogy and ‘*ohana* (family)⁸, creating a web-like network traced through legends to particular islands (Kanahele 1986: 80). These social and environmental familial relationships are the basis for concepts of self and community identity (Fujikane and Okamura 2008: 79; Ito 1985: 301; McKubbin and Marsela 2009: 376). This affiliation also nurtures and sustains Native Hawaiian behavior and self-perception (Linnokin and Poyer 1990: 86; Handy and Pukui 1950: 252). So fundamental, in fact, is land to Hawaiians that it is integral in language, religious and cultural traditional practices, and apparent in songs, chants, stories, dances, art, and legends.

Inherent in this relationship is a responsibility and cultural obligation for sustaining, maintaining, and caring for the health and wellbeing of the land through *mālama ‘āina* (care of the land) (Chen 2012; Kanehele 1986; Sproat 2008) and *pono* (righteous behaviour) (Takagi 1999). This implies that the ‘*āina* is alive (Van Dyke 2008), conscious and imbued with *mana* (divine authority) (Blaisdell, Lake and Chang 2005: 373; McKubbin and Marsella 2009), and must be treated, according to a cultural expert interviewed, not as real estate to be conquered or earthwork to be simply used. The land is a member of one’s family, and it is due the respect a member deserves. Thus, each Hawaiian is a steward, not an owner of the land. This belief is confirmed in the Hawaiian proverb, ‘*He ali i ka ‘āina, he kaua ke kanaka*’ (The land is a chief, people are the stewards) (Pukui and Elbert 1986 cited in Sproat 2008: 29). It is this traditional bond that informs all Native Hawaiian land-based lawsuits.

The second relationship, between the federal and state governments and the Native Hawaiian people, reflects a political recognition of historic socio-cultural and

⁷ MacKenzie, M., *The Public Land Trust*, 2015. [Developed for the Native Hawaiian Law Training Course for State Councils, Boards and Commissions presented by Ka Huli Ao Center for Excellence in Native Hawaiian Law and Funded by the Office of Hawaiian Affairs.]

⁸ Pukui and Elbert, *Hawaiian Dictionary* (Honolulu: University of Hawai‘i Press, 1986). [Hawaiian to English definitions are from this dictionary unless noted otherwise.]

political change in Hawai‘i and its impact on Hawaiian culture and law.⁹ As a result of that recognition, in Hawai‘i Indigenous heritage has been thoroughly integrated into State legislation. For example, the Hawai‘i State Constitution, which will be discussed in more length later in the chapter, includes ancient Indigenous “rights”, or legally guaranteed powers in realization of interests¹⁰, to Native Hawaiian customary and traditional heritage practices. Nowhere else in the United States are laws of Indigenous custom and tradition so highly regarded and protected.

Accordingly, contemporary Native Hawaiian struggles for sovereignty through land claims are based on the assertion of the continuation of those legislated “rights” for the return or control of land. However, the law does not define what contemporary “rights” are, nor does it elaborate on what the State Constitution includes as modern practices ‘customarily and traditionally exercised for subsistence, cultural and religious purposes’.¹¹ Instead, the burden of proof is on Native Hawaiians to effectively present information to support the historic record of the traditional use of land, proof of their genealogical lineage to pre-contact Hawai‘i, and evidence of the continued exercise of religious, cultural, or subsistence heritage practices.

The lack of clarification in the law may, in fact, be a strength for Native Hawaiians, as it creates a means of negotiation for a more empowered future. However, in a state where land historically has been the basis of political power (Cooper and Daws 1985: 2), and those who hold land generally occupy the high ground in politics (Perkins 2013: 4), Native Hawaiians must present their proof in the face of significant political, social, and economic opposition. To effectively meet these challenges, Native Hawaiians must be knowledgeable about Hawaiian history, have an understanding of Hawaiian culture and heritage, and be able to effectively present

⁹ *US Code of Federal Regulations Title 25, 83.3(a) 2005*. Under US law, Native Hawaiians cannot be federally recognized as Native Americans. The legislation for federal recognition requires that all tribes seeking recognition must be Indigenous to and located within the continental United States, and must have operated throughout history to the present as an autonomous tribal entity.

¹⁰ WebFinance, Inc., n.d., *legal rights*, [Online] Available at: <http://www.businessdictionary.com/definition/legal-rights.html> [Accessed 11 January 2018].

¹¹ Article number, Section (§) 7 of the Hawai‘i State Constitution. [For this dissertation, the terms “§” and “Statute” will be used interchangeably.]

proof of the continuity of protected traditional heritage practices. As is often quoted by Native Hawaiians, they “must look to their past to find their future”.

2.2 Stages of Native Hawaiian Heritage Transformation

The history of post-western contact Hawai‘i is complex. After the arrival of Captain Cook there were five government regimes, each reflective of a changing demographic and culture, and each responsive to the particular stresses and challenges of the time. The lawsuits to follow allude to this history by tracing the continuity of traditional and customary practices over time. This section will provide a contextual framework for understanding these claims and references. The following timeline highlights relevant historical events and contextualizes the lawsuits:

Hawaiian History Timeline

| | |
|-------------|---|
| 1778 | Captain James Cook arrives in Hawai'i; more Westerners follow |
| 1795 | King Kamehameha unites the Hawaiian Islands, becomes 1 st ruler of unified kingdom |
| 1810 | Sandalwood trade begins to separate people from the land |
| 1819 | Kapu (religious and social order) system abolished |
| 1820 | Missionaries arrive |
| 1826 | Hawaiian language codified in writing |
| 1840 | 1 st Constitution of Nation of Hawai'i, Nation formed; First Supreme Court |
| 1848 | Great <i>Māhele</i> (Division) of land in Hawai'i; private land title instituted |
| 1852 | 2 nd Constitution of Nation of Hawai'i; Chinese laborers begin to arrive |
| 1864 | 3 rd Constitution of Nation of Hawai'i, king could act independently of <i>ali'i</i> (nobles) |
| 1868 | Japanese laborers begin to arrive |
| 1873 | 1 st <i>Ali'i</i> Trust formed – Dedicated to caring for Elderly |
| 1875 | Reciprocity Treaty with US for favorable trade in sugar |
| 1884 | 2 nd <i>Ali'i</i> Trust formed – Bishop Estate/Kamehameha Schools – major landowner in Hawai'i |
| 1887 | Bayonet Constitution – King reduced to figurehead, and Hawaiian voting restricted |
| | Reciprocity Treaty with US for sugar |
| 1890 | Hawaiian sugar duty-free exclusivity ends |
| 1891 | Queen Lili'uokalani ascends the throne |
| 1893 | Monarchy overthrown, Provisional Government formed, request for US Annexation |
| 1894 | Republic of Hawai'i formed as Independent nation; Hawaiian language banned |
| 1898 | Hawai'i annexed as US Territory |
| 1922 | Hawaiian Homes Commission Act (HHCA) passed in US Congress |
| 1941 | December 7 - Pearl Harbor attacked - US brought into WWII; Martial law imposed |
| 1950 | 1 st State Constitution drafted |
| 1959 | Hawai'i becomes US State; Crown and Government Lands transferred to state |
| 1966 | Richardson becomes Supreme Court Chief Justice |
| 1968 | 2 nd Hawai'i State Constitutional Convention |
| 1973 | School of Law at University of Hawai'i created by Richardson |
| 1974 | Native Hawaiian Legal Corporation founded |
| 1975 | World Council of Indigenous Peoples |
| | <u>Kalipi v. Hawaiian Trust lawsuit filed</u> |
| 1976 | Kaho'olawe protests begin – activism to protect 'āina (land) starts |
| 1978 | 3 rd Hawai'i State Constitutional Convention (Con Con) |
| | Hawaiian becomes 2nd language of state |
| 1982 | <u>Kalipi v Hawaiian Trust Company decided</u> |
| 1984 | <u>Pele Defense Fund lawsuit filed;</u> |
| 1990 | Native American Graves Protection Act (NAGPRA), including Native Hawaiians |
| 1991 | Native Hawaiian Rights Handbook published |
| 1992 | <u>Pele Defense Fund v Paty 1 decided</u> |
| 1993 | Apology Bill under U.S. President Bill Clinton; Hawaiian Sovereignty movement activism |
| 1994 | Kaho'olawe Island ownership deed transferred to State with Native Hawaiian/State mgmt. |
| 1995 | <u>Public Access Shoreline Hawai'i by Rothstein v Hawai'i County Planning Commission by Fujimoto decided</u> |
| 2002 | <u>Pele Defense Fund v Paty 2 decided</u> |
| 2003 | UN Convention for the Safeguarding of the Intangible Cultural Heritage |
| | Native Hawaiian Federal Recognition Legislation proposed in U.S. Congress (Akaka Bill) |
| 2005 | Center for Excellence in Native Hawaiian Law, University of Hawai'i, established |

Figure 1 Hawaiian History Timeline

2.2.1 Organic Change: Pre-contact Ancient Hawai‘i

Native Hawaiians are Pacific Islanders, descendants of ancient Polynesian voyagers who colonized Oceania (Denoon 1997: 64). Oral legend and archaeological evidence suggest they lived in a preliterate society (Fuchs 1961: 3-18; McGregor 2007: 23), with extensive knowledge of nature enabling them to live in the most remote archipelago on earth (Flexner 2013). The first group of settlers arrived from the Marquesas sometime between around 600 and 1250 AD (Halualani 2002: 13; Athens, Rieth and Thomas 2014; Dye 2011)¹², and altered the landscape, significantly rerouting waterways by constructing terraces for planting a staple food, *taro*, brought from Polynesia (Whistler 2009: 77-78). A second wave of Polynesians arrived around AD 1000 from Tahiti (Buck 1999: 28), imposing *kapu*, a strict religious legal system of regulations and prohibitions that low-ranking members of society had to observe in the presence of higher ranking members (Davenport 1969 cited in Marshall 2011: 26).

The Tahitians were the first wave of colonizers to drastically impact Hawaiian society. Their arrival heralded a new, darker social order that was very punitive for the commoners. The Tahitians brought priests who instituted ritual practices to ensure continuity and *mana*, the divine sanctity and strength of a new hierarchical chiefly line (McGregor 2007: 25). They instituted a triangular social system that controlled all aspects of life, with the gods at the top and the chiefs and priests below as conduits to the gods (Kame'eleihiwa 1992: 46), all demanding supplication from the commoners in return for benevolence. Penalties for breaking *kapu*, such as looking upon or interacting in any way with the chiefs, were severe and frequently ended in death (Sullivan 1998: 3; Valeri 1985).

At the head of the new social system were hereditary paramount chiefs, *ali‘i nui* or *mō‘ī*, who ruled individual islands with supreme, divine authority (*mana*) (Young 2006: 19). A succession of lower local chiefs, *ali‘i*, operated below them. Each lower

¹² Scholars disagree on the dates for the initial Polynesian colonization of Hawai‘i. See Athens, Rieth and Thomas (2014) and Dye (2011) for discussions of recent scholarly investigations and methods utilized for the development of initial Polynesian settlement dates for the Hawaiian Islands.

chief paid homage to the chiefs above in exchange for land (Chinen 1958; Sahlins 1992). Common people were responsible for serving those who ruled throughout the system. *Mana* (spiritual power) was distributed according to position in the hierarchy, with commoners having none (Kame‘eleihiwa 1992).

Most known customs were positive, but there were other customs that were darker, cruel, and destructive, including infanticide, human sacrifice, and slavery (Sullivan 1998; Valeri 1985). According to Malo (1951), ‘only a small portion of the kings ruled with kindness; the large majority simply lorded it over the people’ (Malo 1951: 87-95 cited in Sullivan 1998: 3). This dark history of ancient Hawai‘i is suppressed by Native Hawaiians today, in lieu of a more harmonious Native Hawaiian past.¹³

To govern the islands, land was divided into smaller chiefdoms, each headed by a lower local chief (Handy 1999: 31). Within each chiefdom, land was divided into wedge-shaped geographic areas, *ahupua‘a*, which extended from the mountain to the sea (Van Dyke 2008: 13). The *ahupua‘a* system of land division is still used by the state for district land designations. However, the identification of specific ancient borders, other than by descriptions of geographic formation, remains clouded and impacts rights discussions in land claim cases.

¹³ As noted previously, there are no written records from the ancient pre-Western contact Hawaiian society. Instead, there are various accounts, from oral heritage narratives to post-contact written descriptions by Western settlers, as well as nineteenth century recalled accounts penned by missionary-educated Native Hawaiians. The Native Hawaiian heritage narrative frequently noted by Hawaiian activists is of an orderly pre-Western contact Hawaiian society where the *ali‘i* and the commoners lived harmoniously through interdependent cooperative coexistence (McDermott and Andrade 2011 :4), and natural resources were used respectfully and sustainably. In this narrative, the divine *ali‘i* physically and spiritually protected the *maka‘ainana* (common people), and in response, the commoners obeyed and honored the royal families.

Alternative historical narratives describe a more nuanced and complex society, with a stricter and more stratified caste system, and highlight the violent and punitive elements of the social system. In these narratives, the *ali‘i* waged frequent violent inter and intra-island wars for control of land and resources. The chiefs’ armies were composed of conscripted commoners, and defeated warriors became slaves or were killed. Ritual human sacrifices functioned to appease the gods, to guarantee victory, to celebrate vanquished enemies, to guarantee bounty, or to perpetuate power relationships (Valeri 1985). The continuation of royal bloodlines was insured through incest and politically arranged unions, with offspring of unacceptable unions slain (Ibid.).

There was no private ownership or interest in land (McGregor 2007: 26). Instead, the chiefs and commoners had a collective, reciprocal interest in the land along with the king, who held all land in trust for the people (Ibid.). Cooperative production and distribution ensured that within the subsistence economy all had access to the resources of the *ahupua'a* in which they lived (Blaisdell, Lake and Chang 2005: 373; McGregor 2007: 28). It follows therefore, as the court determined in the Kalipi case (reviewed in Chapter Five), that 'the traversing of an *ahupua'a* to gather items naturally found there was therefore a matter of practical necessity'¹⁴ (Kalipi 1982).

The social system of the commoners was organized around the communal production of food to sustain large, multigenerational families, *'ohana*, the basic unit of the Hawaiian family (McGregor 2007: 24). Knowledge necessary for production was transmitted orally from generation to generation. Spiritual beliefs and practices were based on 'maintaining harmonious and nurturing relationships with the various life forces, elements and beings of nature as ancestral spirits who were honored as deities' (Ibid.). The commoners had permission to use the land of the chief for food production, and in return, the divinely inspired chief would intercede on their behalf with the spirit world, ensuring fertility and safety (Kanehele 1986: 80). If the chief was unfair, commoners were free to move to another *ahupua'a*, leaving the *ali'i* without tribute, food, and other materials needed for survival. The spiritual relationship to place, organizational methods of food production, and movement of people between *ahupua'a* are all used as evidence in contemporary court arguments to support Native Hawaiian rights to land.

2.2.2 Settler Colonialism: Western Impacts and Religious Transformation

Native Hawaiians, their communities and culture were devastated after Western contact. War broke out among the island chiefdoms. Using Western weapons, the islands were united for the first time under one supreme chief, Kamehameha I (McKubbin and Marsella 2009). To diminish opposition to his leadership, Kamehameha I gave loyal chiefs land to rule on the different islands, thereby

¹⁴ Kalipi, quoting *Palama v Sheehan*, supra, 50 Haw. at 301, 44 P2d.95 referencing In: Re Boundries of Pulehunui 4 Haw. 239.

destroying the traditional *ali'i* hierarchy (Young 2006: 14), and severely impacting the reciprocal relationship between chiefs and commoners. As a result, individual chiefs were no longer dependent on military strength for the maintenance of their positions, and released of their obligation to the commoners below them, they abandoned their patriarchal protective positions and began to act independently for personal gain.

With the increase of foreign ships came commodities from abroad. The royal families were impressed with these new material goods and compelled the commoners to abandon traditional sustainable farming practices and provide sandalwood for trade to China. Famine ensued, and in a further blow to the customary social and religious system, in 1819 King Liholiho¹⁵ extinguished the strict *kapu* system, with its punitive religious hierarchy, divine chiefly authority, and rigid social organization, in favor of democratic ideals (Davenport 1969; Kame'eiehiwa 1992). Moreover, Davenport notes, 'by violating the taboos (*kapu* restrictions), [the monarchy] rejected the religious justification for their political authority; they secularized the political system by nullifying its supernatural order' (Davenport 1969: 1). Discarding the *kapu* was, in effect, an intentional political strategy of 'constitutional reform of a traditional government' (Ibid.).

The effect on the commoners was dramatic, as the foundations of religious and social order were abandoned by those considered divinely inspired and responsible for the spiritual well-being of the islands and the balance of nature. Furthermore, this was not the imposition of a foreign legal order, as is claimed by sovereignty activists in

¹⁵ The abolishment of the *kapu* system of social governance is frequently attributed to King Liholiho, son of Kamehameha I, but credit must also be due to Queen Ka'ahumanu, the widow consort, who was complicit in this dramatic change. Ka'ahumanu declared that she and Liholiho would rule together. According to Dermott and Andrade, shortly after that public declaration, Ka'ahumanu, supported by a group of ruling *ali'i*, organized a feast where woman and men ate together. Their actions intentionally broke the prohibition against the sexes dining communally, the foundation of the '*aikapu* (the bond between the *akua*, or supreme god, and the *mō'i*, or supreme chief) (Kame'eiehiwa 1992: 134). King Liholiho joined the dinner and was viewed as defiling his sacred *mana* by doing so. Perhaps in an effort to be *pono* (righteous), King Liholiho went one step further and decreed the nation free of all sacred prohibitions, thereby abolishing the *kapu* altogether. His actions totally destabilized the population, as the social system had revolved around the protection of *mana* (spiritual power) for the regulations for everyday life. As the regulations were abandoned, commoners mixed with royalty, traditional healers were dismissed, and rules of waste sanitation were abandoned. The result was disorder and increased disease (McDermott and Andrade 2011: 7).

Hawai‘i today, but instead the conscious adoption by *ali‘i* of a Western system of governance. After centuries of obedient cooperation enforced through fear, Hawaiian commoners were in search of new leadership and spiritual guidance, and it arrived at a propitious moment.

Christian missionaries, afforded special status by the chiefs, arrived in 1820 with ideals for improving the lots of the common people by freeing them from idolatry and savagery (Mykkanen 2003). Landing during the early post-contact years they found a Hawai‘i already transformed by the arrival of undisciplined sailors, rum, rival chiefs with access to Western weaponry, and introduced rampant disease. They also found a royalty competing for the material goods thought necessary for a “civilized” way of life to the point where the commoners were taxed to near starvation (Merry 2000: 27). Through their teachings, the missionaries promised a better future. The missionaries focused on creating a stable social environment free of prostitution and alcohol, which had become rampant, and without the traditional Hawaiian practices of incest and open sexual experimentation. Over time, traditional practices of sustainability and mutual support were replaced with Christian values of hard labor for individual material gain and personal salvation (Ibid.). The missionaries codified the Hawaiian language, created schools to teach literacy and Western ways of thought, and discouraged *hula* and chant, the traditional means of knowledge transmission, as being lascivious and primitive (Mykkanen 2003). They considered Hawaiian religious practices honoring and respecting gods of nature and elemental forces pagan and called for their abandonment.

The Hawaiians adopted Christianity willingly, but in addition to, rather than in lieu of, Indigenous spiritual values and beliefs (McGregor 2007: 31). The values that survived included respect for traditional knowledge and authority, collective responsibility for community well-being, humility, respect for age and ancestors, and responsibility to maintain the spiritual and ecological balance of nature. These values form an enduring social bond and have been passed down orally from generation to generation to survive into the twenty-first century (Ibid.).

As law reflects societal change, the legal order also transitioned from the Hawaiian sacred law of *kapu* to a theocratic and Christian system. Socio-legal scholar Sally Engle Merry credits similarities between the two regulatory systems for this conversion: both *kapu* and Protestant law were considered to have emanated from divine authority represented by God's emissaries on earth, and each system was based on a religious authority, such as The Ten Commandments (Merry 2000: 45). Each had a creation story also. The missionaries had the birth of the world in the biblical Genesis and the Hawaiians had the *Kumulipo*, the creation chant. As an important element of Hawaiian culture and identity, the *Kumulipo* has been remembered and protected through political and social change, and it continues to be used as a means of justifying rights to land based on a genealogical connection between the people and the 'āina (Marshall 2011; Kame'eleihiwa 1992).

Following the establishment of mission schools, Hawaiians achieved great literacy, evidenced by the creation of over seventy-five widely distributed Hawaiian language newspapers (Oliveira 2014; Silva 1999, 2004). The regular distribution of written information served to unite the population scattered throughout the islands. Although disruptive to traditional forms of knowledge transmission, the newspapers fostered greater awareness of common concerns, practices, interests, and goals throughout the islands. More importantly, a literate population reading widely distributed newspapers in a common language was necessary to unify the population and create the sense of Hawaiian nationalism essential to support the nascent nation (Anderson 2006). These newspapers, Silva (2004) maintains, have provided a written record to support contemporary claims of the continuity of ancient cultural practice.

Twenty years after the missionaries arrived, the first *Constitution of the Nation of Hawai'i* was drafted (Bederman 2010: 69), replacing the rule of the chiefs with the rule of law (Sullivan 1998), and creating government as an abstract entity separate from the king (Banner 2005: 287). The Hawaiian government hoped to be perceived internationally as civilized and sovereign in order to discourage foreign invasion (Flexner 2013: 70) and demolished the traditional land use system. For the first time, government, crown, chiefly, and commoner rights to land were defined and chiefly control over property was limited (Ibid.). However, rapid Hawaiian depopulation

continued, and forty-three years after contact with Captain Cook the Indigenous community was reduced by at least eighty-three percent through disease and starvation (Kauanui 2008: 81-82; Silva 2004: 24). It was the beginning of a transitional period that would see the loss of sovereignty for the Native Hawaiian people, but also the beginning of the concept of commoner “rights” over land and practices.

2.2.3 The Great (or not so great) Māhele: The Introduction of Private Land Title

Imperial expansion throughout the Pacific ultimately resulted in Indigenous displacement from traditional lands. This was typically the result of European colonizers’ imposition of changes in property rights from traditional communal land use systems to a Western system of exclusionary, alienable fee simple ownership¹⁶. However, in Hawai‘i the situation was different. In the mid-nineteenth century, settlers demanded land ownership, and in response, the Hawaiian monarchy implemented English common law principles and private land title in The Great Māhele of 1848, or “the Māhele” (to divide or share). Although one intention of the Māhele was to ensure Hawaiian access to acreage for traditional farming (Linnekin and Poyer 1990), it instead profoundly, and negatively, impacted Indigenous land usage and heritage. (Kauanui 2008: 75). The Māhele unevenly apportioned land among royalty, chiefs, government, and commoners.

The subsequent Kuleana Act of 1850 was a corrective measure intended to ensure Native tenants’ land and rights for traditional sustainable practices (Sproat 2008).¹⁷ According to Native Hawaiian scholar Carlos Andrade, the Kuleana Act reflected the king’s recognition that land ownership was of little value if farmers, as owners, were limited from producing a livelihood dependent on access and usage throughout the surrounding *ahupua‘a* (Andrade 2008). Ultimately, less than one percent (Kauanui 2008: 77) of the 6,425 square miles of Hawai‘i (Kanahale 1986: 336) ended up in the

¹⁶ Steven Gifis, *Barron’s Law Dictionary*, 6th Edition, (New York: Barron’s Educational Series, 2010), p.214. [Fee simple or fee simple absolute is the most complete form of freehold ownership of land in common law countries. Land owned through fee simple absolute may held for infinite duration and is free of any conditions or limitations, excluding government regulation.]

¹⁷ The Kuleana Act was the basis for Hawaiian Revised Statute §7-1.

hands of the *maka ʻāina* (commoners) (Kauanui 2008: 77; Milner 2006: 150), dispossessing most Hawaiians from traditional land usage, and further devastating the Hawaiian people and their culture (Levy 1975; Native Hawaiian Legal Corporation 1992: 2). Every section of the Kuleana Act was ultimately repealed under the Nation of Hawaiʻi, with the exception of section 7, which has survived as Hawaiʻi Revised Statute section (HRS §) 7-1 (Watumull 1994: 5).

The Māhele also led to indirect consequences. For the first time, commoners were free from the control of the *konohiki*, the traditional overseers, rendering them culturally and socially totally independent of chiefly control (Banner 2005: 291). However, it also severed another link of shared interests. The Māhele provided the royal class ownership of enormous tracks of land, separate from the government, potentially protecting their private interests in the event of a foreign takeover (Ibid.: 278-279.). The *ali ʻi* lands would become the basis for wealthy modern private trust landholdings.

At the time of the Māhele there was resistance from the Hawaiian *maka ʻāinana* (commoners) who were forced to turn to the market economy for funds to lease or rent land (Matsuoka et al. 1996: 51). However, their heritage of obedience and respect for authority rendered them unprepared to deal with the vast social change. Writing petitions, Kona residents pleaded that ‘if the chiefs are to open this door of the government as an entrance way for foreigners to come into Hawaiʻi, then you will see the Hawaiian people going from place to place in this world like flies’ (Banner 2007: 141). Residents from Maui observed that:

Foreigners come on shore with cash ready to purchase land, but we have not the means to purchase lands; the native is disabled like one who has long been afflicted with a disease upon his back. *We have lived under the chiefs, thinking to do whatever they desired, but not according as we thought; hence we are not prepared to compete with foreigners.* If you, the chiefs, decided immediately to sell land to foreigners, we shall immediately be overcome. If a large number of foreigners dwell in this kingdom, some kingdom will increase in

strength upon these islands; but our happiness will not increase; we, to whom the land has belonged from the beginning, will dwindle away. (Banner 2007: 141-142, emphasis added)

As the petitions indicate, the Native Hawaiians were aware that their traditional heritage values of respect and service to a higher authority left them unprepared for developing initiatives for empowerment. Foreigners soon controlled the islands economically and politically. Water was diverted to support large-scale agriculture thus rendering small rural plots of land unsuitable for agriculture. Although not discussed within the Native Hawaiian heritage narrative, the Native Hawaiian aristocracy (*ali'i*) had a significant role in the process of colonization and the eventual overthrow of the crown.

Colonization was hastened through the gradual transfer of land into non-Hawaiian hands. It began after the Māhele, after the *ali'i* were granted control of large tracts of land. By intermarrying with the descendants of missionaries, the *ali'i* placed control of their enormous property interests into non-Hawaiian hands. The new non-Hawaiian landowners accumulated great wealth and power and used it to influence the land policies of the government (Kent 1983: 44) by becoming the trusted advisors of the Hawaiian kings and holding government leadership roles in the legislature.

Eventually King David Kalakaua, the first non-hereditary monarch, was elected to the throne by the legislature in 1874, winning votes through ‘bribery, threats and cajoling’ (Ibid: 45). He won over the objections of the citizenry, who were ninety percent Hawaiian, and preferred Queen Emma, a royal of higher status (Kame‘eleihwa 1992: 313). Distraught over this loss of control over leadership, Hawaiians rioted after the election. Hawai‘i’s foreign minister, an industrial oligarch, requested French and American military forces based on Oahu to crush the mobs. With foreign military interceding to break up the disruption, according to historian Noel Kent, the ‘facade of Hawaiian political sovereignty was irrevocably shattered ... and the ‘external military intervention in Hawaiian affairs disarmed [Native Hawaiian]resistance’ (Kent 1983: 45).

After the riots, Kalakaua continued to pursue his political agenda. He was a friend of many industrialists in Hawai‘i, and he set out on a grand world tour to negotiate US Government free trade agreements for them in a Reciprocity Treaty. Sensing his unstable political position in Hawai‘i, he also sought to build foreign political and economic relationships to protect the Nation of Hawai‘i from International aggression and prevent a hostile takeover.

Kalakaua remains a complicated and controversial figure in Hawaiian history. In recognition of his Hawaiian heritage, he worked to revive traditional Native Hawaiian traditional and cultural practices, and built Iolani Palace, the modern symbol of the Hawaiian sovereignty movement. Nonetheless, he simultaneously promoted the economic and political interests of Hawaiian industrialists, contributing to the shift in political power in the Nation. His promotion of Hawaiian culture and auctioning of an opium license in particular angered the Calvinist missionary faction. Many of this religious community were plantation owners whose ancestors had worked hard to discourage such practices (Kame‘eleihwa 1992: 314-315), and their anger ultimately impacted their political support for his reign. Kalakaua was forced to sign a revised constitution reducing the powers of the monarch and increasing the power of the legislature, which ultimately hastened the overthrow of the Indigenous nation.

In 1893, *haole* (white) sugar barons intent on merging Hawai‘i into the United States to reduce import tariffs, and once again supported by the American military, overthrew the constitutional monarchy. The US President was not supportive, and Hawai‘i did not become a territory. Instead, the Republic of Hawai‘i was formed. The deposed Queen was imprisoned in Iolani Palace while her supporters lobbied the US Congress for the return of Indigenous sovereignty. In 1895, a Native Hawaiian coup was unsuccessful and the Queen reluctantly relinquished future claims to the throne. There was little Native Hawaiian social, economic, or political capital to create a viable resistance movement; the ethnic basis of the population had shifted with the importation of thousands of Asians to work the sugar plantation fields (McGregor 2007: 44; Trask 1999). By 1900, the Hawaiian population had decreased from 1,000,000 pre-contact to 40,000 (Fujikane and Okamura 2008: 5; McGregor

2007: 44; Native Hawaiian Legal Corporation 1992: 6), and it was replaced as the majority ethnic group in the nineteenth and twentieth centuries (Pratt and Smith 2000: 37).¹⁸ Queen Lilioukalani, her image and writings, along with Iolani Palace, became symbols of the lost Native Hawaiian sovereignty.

In 1898 the US elected a new president, and the country needed a refueling port in the Pacific to supply ships fighting in the Philippines during the Spanish American War. Pearl Harbor on the island of Oahu fulfilled this need. The US had an association with Pearl Harbor that began in the nineteenth century, driven by private economic interests in Hawai‘i.¹⁹ Hawai‘i was subsequently annexed to the US. With annexation, the Republic of Hawai‘i “ceded” 1.8 million acres (forty-three percent of the total land area of Hawai‘i) of Government and Crown lands, which had been apportioned during the Māhele, to the Federal Government (Van Dyke 2010: 9). With the loss in sovereignty, the Hawaiian people lost control of the government and land (Goodyear-Ka‘opua 2014: 59), further impacting the traditional spiritual and cultural relationship to the islands. What became known as the “Ceded Land” became federal trust property. Aware of the unusual circumstances of the overthrow of a friendly nation, the US Congress determined that ceded land in Hawai‘i, and the revenue it generated, would be distinguished from other federal trust inventory because of its unique history, land tenure, and use. The Newlands Resolution (1898) states that:

¹⁸ Hawai‘i is the only state without a racial majority. According to the 2010 US Census, the current total population of the State of Hawai‘i is 1.4 million. Of only one race, there are 80,000 Hawaiian and Other Pacific Islander (6%), 336,000 white, and 525,000. However, the state is heavily mixed race, with 356,000 Hawaiian and Other Pacific Islander (25%), 564,000 white, and 781,000 Asian.

¹⁹ In 1873 King Lili‘o‘kalanani first attempted to negotiate a reciprocity treaty for favorable trade tariffs for sugar and offered Pearl Harbor to the US as an inducement to signing. Royalists were afraid that without the treaty wealthy plantation owners would want Hawai‘i annexed to the US as a territory. A Reciprocity Treaty was finally signed in 1875 by the next King, Kalakaua. Kalakaua had been elected by the legislature over the objections of many Native Hawaiians, and facing conflict at home, he wanted US support for his leadership, and tried to renegotiate the Reciprocity Treaty. By 1887 the Treaty was renewed and ratified with Hawai‘i giving the US exclusive rights to use and expand Pearl Harbor for military purposes. For the powerful plantation industry, the Reciprocity Treaty expanded their industry, and provided a small group of wealthy *haole* (white) oligarchs increased political and economic influence and power. It was this group that would reduce the monarchy’s power in a new Constitution and subsequently overthrow the Hawaiian government (Fuchs 1961).

The existing land laws of the United States relative to public lands shall not apply to such land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, that all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, *shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.* (Newlands Resolution, 2nd. Session, 55th Congress 1898: 1, emphasis added)

The transfer of the Ceded Land remains very controversial. The establishment of this trust relationship is viewed by Native Hawaiians as a reluctant and uncomfortable Congressional admission of American complicity in the loss of Native sovereignty (Trask 2000; Osorio 2002). The United States Government would eventually acknowledge in 1993 the takeover and seizure of the Ceded Land as “illegal” and a violation of international law in US Public Law 103-150, otherwise known as the “Apology Resolution”. The Apology Resolution noted that the seizure was done without the approval of, nor compensation to, Native Hawaiians or their government, and did not offer any level of restitution. The Ceded Lands and the government obligation to hold and protect them for the benefit of Native Hawaiians is central to the arguments in the law cases discussed in this dissertation.

2.2.4 Territorial Administration and Imposed Definitions of Belonging

In 1900 Congress created the Non-Self-Governing US Territory of Hawai‘i, to be administered by the US Government. This defined Native Hawaiians as American citizens, even though they widely opposed Hawai‘i’s integration into the nation (Coffman 2003). The new territorial government outlawed Hawaiian language and placed Native Hawaiian children in English-only schools for “Americanization” within the US master narrative of assimilation (Warner 1999; Osorio 2015), further alienating the people from their culture (Denoon et.al. 1997: 403). The territorial government would overwrite records of Hawaiian resistance to the overthrow with American narratives of belonging and inclusion (Goodyear-Ka‘opua 2014: 59).

The practice of forced Indigenous assimilation had concomitant parallels in other parts of the US, in particular among Native Americans (Lowenthal and Gathercole 1990). It was an attempt to fashion a national identity by uniting immigrant and Indigenous communities through common language and practices (Anderson 2006). Instead, it disrupted knowledge transmission between generations; disentangled social networks needed for communal organization, cohesion, and mutual support; and thereby contributed to increased Indigenous social marginalization. Largely poor, many Hawaiians, explained community members interviewed, were embarrassed to identify as members of the Indigenous community. As a result, throughout the Territorial years, Native Hawaiian parents discouraged their children from speaking Hawaiian in the hope that Americanization would bring economic security and advancement (Puhipau 2014: 132-133).

Concerned over the high rates of Hawaiian poverty, the US Congress passed the Hawaiian Homes Commission Act (HHCA) in 1921 in the hope that re-establishing a traditional land stewardship relationship would empower Native Hawaiians economically and socially. The intention was to create leasable homestead properties out of a small portion (200,000 acres) of the Trust-based Ceded Government and Crown lands. By passing this act, Congress assumed a second fiduciary trust relationship over land originally belonging to Native citizens, with Native Hawaiians as the exclusive beneficiaries of the Trust (NHLC 1992).

HHCA's intended rehabilitation of Hawaiians was not successful for several reasons. Historian Lawrence Fuchs (1961) suggests that the required family structure, land system and notions of property needed for American style homesteading were too fundamentally different from familiar, and still accepted, ancient Native Hawaiian customs to succeed. In particular, notions of thrift, necessary for leasing agreements, were based on concepts of private property and were different from traditional practices in Hawai'i (Fuchs 1961: 72). Additionally, extended families wanted to live near each other, but not all members qualified for the program.

To determine eligibility for HHCA homesteads, the US Government created a Native Hawaiian blood quantum, specifying fifty percent “native Hawaiian” ancestry for participation (Halualani 2002: xv). The use of the blood quantum was subsequently extended as a qualifying measure for other federal funding programs. There are currently two federal definitions of “Hawaiian”: “native (small ‘n’) Hawaiian”, as those who qualify for homesteads, and “Hawaiian”, those of less than fifty percent blood who qualify to inherit homesteads (NHSC 1983).²⁰ These definitions were also used in 1959 to certify Indigenous beneficiaries of the 5(f) Trust in the Hawai‘i Admission Act, created when nearly two million acres of Ceded and Government lands were transferred to the state as a condition of statehood (Trask 2000: 379).

The two measures of recognition are considered by Hawaiians to be politically and culturally divisive (Kauanui 2008). Politically, they establish categorical exclusions according to arbitrary and imposed “blood quantum” classifications, negating historical context, and attempting to construct and impose Indigenous identity on the basis of government qualifications. This ignores the rights to self-definition accorded by the UN Declaration of the Rights of Indigenous Peoples (2007) and reduces Native membership to racial assumptions. The Federal definitions are culturally divisive in granting increased social, economic, and political power to selected members of the community, thus causing friction within Hawaiian families, tension over entitlements and benefits, and challenging senses of belonging and inclusion (Osorio 2001).²¹

²⁰ Native Hawaiian Study Commission (NHSC) was a federally mandated study of enquiry tasked with completing an analysis of the overthrow to determine federal complicity. The distinctions between ‘Hawaiian’ and ‘Native Hawaiian’ are incorporated into state law in Hawai‘i Revised Statutes §10-2 (2004), which states:

Definitions. ‘Hawaiian’ means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawai‘i. ‘Native Hawaiian’ means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawai‘i.

²¹ The HHCA (1921) states: ‘Native Hawaiian means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778.’

In contrast, the Admission Act (1900), whereby Hawai‘i became the 50th US state, employs a significantly different definition. The term “Native Hawaiian” means any individual whose ancestors were natives of the Hawaiian Islands prior to 1778’.

Significantly, the blood quantum is seen by some activists as a government attempt to undermine sovereignty efforts: an imposed and authorized barrier to the creation of a cohesive and collective imagined nation (Kauanui 2008; Trask 1999). Other scholars characterize the blood quantum as a colonial way of transforming Indigenous peoples into subordinated minorities by categorizing them according to biological criteria, making issues of struggle racial, and ignoring historical context that resulted in political and cultural issues of colonial domination (Linnekin and Poyer 1990). Anthropologist Jocelyn Linnekin concludes that Indigenous peoples struggle to assert their identity in contrast to such categorizations and in opposition to the “dominant colonial” or post-colonial society (Ibid.). This has contributed, according to Morris Young (2004), an English professor who analyzed the definition of “Hawaiian” in the US Supreme Court case *Rice v Cayetano* (2000), in a move away from ‘cultural nationalism simply as an articulation of cultural identity to the assertion of sovereignty and self-determination’ (Young, M. 2004: 84). It is one example of how government policy may foster resistance and impact Indigenous identity (*Rice v Cayetano* 2000). This theory is discussed in more detail in Chapter Three.

2.2.5 Statehood: Recovery, Empowerment and Self-Determination

With statehood granted in 1959, many Hawaiians, already a disadvantaged and marginalized minority, felt they were further disenfranchised from land and political power.²² Second generation Japanese-American former soldiers from Hawai‘i returned to the remote Hawaiian Islands after the Second World War with college degrees from mainland America, and with an awareness of minority empowerment efforts elsewhere. They combined forces with union leadership and other political

²² Statehood was proposed as a referendum of whether Hawai‘i should remain a Territory or become a state. Independence was not offered. In light of this limited choice, Hawaiians were divided over the vote. Some felt disenfranchised from the general population as a result of the attempt by the US Government to classify them as a racial class, rather than a national citizenry. Others felt the program of assimilation and acculturation ignored their identity as Native Hawaiians, while a third group felt loyalty toward the military as a major employer and therefore didn’t want to lose their jobs and were contented with the status quo (Linnekin 1997: 403). For Hawaiians, in particular those who had been denied the use of the language of their grandparents or felt they were denied opportunities because of discrimination, statehood offered an opportunity for to be considered as equal citizens with equal opportunities (Ibid.: 404).

leaders²³ to overthrow the ruling establishment. The collective group was viewed by Native Hawaiians as having seized control of the government and having created a new non-Hawaiian political powerhouse for the burgeoning state²⁴, albeit with a new form of state identity. In the new state, Hawaiian culture that had survived Americanization was appropriated and highly commercialized. Hawaiian cuisine was diminished in favor of Americanized ethnic food, and *hula*, traditional chant, and *luau* (traditional celebratory meals) were reduced to tourist entertainment (Trask 1999). Bacchilega (2007) refers to this as an imaginary '*legendary Hawai'i*', a space of tourism and marketing 'constructed for non-Hawaiians ... to experience, via Hawaiian legends, a Hawai'i that is exotic and primitive while beautiful and welcoming' (Bacchilega 2007: 5-6; emphasis added). The promotions for a tropical paradise brought throngs of tourists, and along with them, rampant real estate development leading to more Hawaiian displacement from land through evictions. The result for Native Hawaiians was rising homelessness, poverty, juvenile

²³ There were Native Hawaiians involved in this movement for political change, yet their absence from elected offices in the early years of the state (Coffman 2003) may have contributed to their diminished role in narratives of early statehood.

²⁴ Several factors contributed to the perception by Native Hawaiians that Japanese-Americans dominated the local landscape.

Firstly, in 1952 the US Congress passed a new naturalization law to facilitate the naturalization of resident aliens, which, according to historian Roger Daniels, was a product of the Cold War (Daniels 1990: 329 cited in Coffman 2003: 150). Because of the history of Japanese immigration to Hawai'i for the plantation industry, a higher proportion of residents in Hawai'i were affected by this law than anywhere else in America (Coffman 2003: 150). Thousands of residents of Japanese descent became citizens in Hawai'i, and they became an active pro-statehood voting bloc. In recognition of this important new voting group, the Democratic Party sent lobbyists to Japanese prefectural organizations to court new citizens for their party's vote (Tokunaga Interview 12 Sept. 1989, cited in Coffman 2003: 150). Evidence of this can be found in a survey conducted before the referendum: only twenty-five percent of Hawaiians on Oahu polled before the referendum vote favored statehood, but sixty-two percent of Japanese Americans were in favor of it (Coffman 2003: 290).

Secondly, a territorial commission, (the Hawai'i Statehood Commission) was created to advocate for statehood, and it adopted a narrative to ideologically obfuscate a history of colonization, subjugation, occupation, and the recent imposition of martial law. In this narrative, questions of post-WWII Japanese American loyalty were countered by promoting the heroism of the Japanese-American soldiers of the 442nd Battalion, one of the most decorated military units in WWII. Narratives of the loyalty of these soldiers to the US, and their sacrifice for their homeland were used to win statehood (Saranillio 2010: 292-293).

Thirdly, Japanese-Americans began to run for office, in part due to their frustration over visible and invisible ceilings, and the resultant lack of opportunity for economic and political advancement. In 1952, sixteen out of the 45 legislative seats in Hawai'i were filled by Japanese-Americans, a number that was proportionate to the Japanese-American population. By 1954, they filled 21 of those seats, or nearly half the territorial legislature (Coffman 2003: 152). They became 'a new political force that gave birth to a new arrangement of power in Hawai'i' (Saranillio: 2010: 294).

delinquency, and increased imprisonment (Goodyear-Ka‘apua 2014: 59; Trask 2000: 375).

2.2.6 The Hawaiian Renaissance: Cultural Recovery and Empowerment

The 1960s and 1970s were a period of re-awakening for Indigenous awareness and cultural heritage revival. Inspired by national and international movements for Native, minority, and civil rights, Native Hawaiian economic, social, and political resistance to colonial policies began (Smith 2006: 227-228; Young K., 2004: 90). Known as the “Hawaiian Renaissance”, the movement started with efforts for cultural rights in the 1960s, developed into a flourishing of the arts and rediscovery of traditions and practices in the 1970s, and transitioned into increased activism with a move away from ‘cultural nationalism as an articulation of collective identity’ (Young M., 2004: 84-90), to a campaign for land control in the 1980s and political sovereignty in the 1990s (Young 2006). It was the beginning of the restoration of a traditional spiritual land relationship for Native Hawaiians. Hawaiian professor Noelani Goodyear-Ka‘opua (2014) claims that ‘building consciousness about the history, status and health of [the land] provided a critical piece in the development of Hawaiian sovereignty discourse’ (Goodyear-Ka‘opua 2014: 60).

During this Renaissance, the Hawaiian language, traditions, and practices were renewed as a ‘conscious resistance to cultural imperialism’ and a means of cultural survival for a distinctive people (Oliveira 2014: 81). By reclaiming ancient practices, Hawaiians sought to make themselves visible as a living culture within a modern society in order to ensure the rights to ‘live and practice culture, to reclaim an everyday life that had been taken away from them by the dispossession of their land’ (Young M., 2004: 88). In this way, the Hawaiian Renaissance established the foundations for future nationalism among Hawaiians. ‘Establishing the Indigenous Hawaiian identity in the 1970s eventually led to political and legal assertions here and abroad and became the first significant battlefield to challenge US hegemony in these islands’ (Young K., 2004: 36). As Osorio states, ‘in the end, [Hawaiian] nationhood is identity’ (Osorio 2002: 260). As in other places impacted by settler colonization, contested views of what constitutes Indigenous identity has led to forms of Indigenous resistance (Smith 2004: 18).

2.2.7 Activism for Land and Sovereignty

The Hawaiian Renaissance began with monumental land struggles as Native Hawaiians were displaced to make way for residential and tourist-driven construction. The threat of loss of land had the unintentional result of increasing Native Hawaiian attention to traditional Indigenous values, places, and lifestyles that were being threatened, and sparked interest in the preservation of endangered historic cultural practices and sites (McGregor 2007, 2010; Trask 1999, 2000). Significantly, the land struggles triggered militant concerns about inequality in land ownership, race, ethnicity, and sovereignty. From the 1970s onward, ‘land and dispossession became the cornerstone of politics’ (Milner 2006: 151) and framed issues of identity and cultural survival.

Hawaiian Professor Jonathan Osorio has concluded that several events converged in the 1970s to promote Native nationalist activism, including the Hawaiian-led opposition in 1976 to the Navy’s use of Kaho‘olawe Island for thirty-six years of bombing practice (Osorio 2003: 215). According to Native Hawaiian Professor Davianna McGregor (2007), Native Hawaiian resistance to Western cultural domination was restored and energized by the efforts to protect the island of Kaho‘olawe, its landscape, and traditional cultural sites from federal military use, and by the return of the island nearly twenty years later, transferred to the State in trust for a future sovereign Native Hawaiian entity (McGregor 2007: 276).

‘We were becoming not Hawaiians, but brown Westerners ... with no sense of cultural identity or place’, claimed political activist Frenchy DeSoto (DeSoto cited in Essoyan 1994). ‘Kahoolawe made people feel really good about being Hawaiian again’, stated Emmett Aluli, one of the movement’s leaders (Aluli cited in Essoyan 1994). There are several reasons for this. Firstly, it provided the first land base returned to Hawaiian sovereign control, albeit in conjunction with some State participation. As a restricted historic heritage site²⁵, it is legally dedicated to the

²⁵ Kaho‘olawe, designated in 1994 on the National Register of Historic Places as a Hawaiian historical and cultural reserve, contains over 3,000 archaeological and historic sites and features. It is restricted due to the vast amount of unexploded ordinance on and around the island, as well as the number and fragility of the archaeological resources.

restoration of Hawaiian traditional practice, which inspires greater Native Hawaiian cultural awareness and community identification, participation, and pride by providing a place for religious, cultural, and educational activities (McGregor 2007). ‘We have to look back to go forward’, the slogans during the fight claimed, ‘Go back to get back’ (Coffman 2010). Secondly, it began to unite Native Hawaiians, non-Hawaiians and environmentalists in common efforts for natural resource protection (Kanahele 1979). Thirdly, through provision of the first land area to Native Hawaiian control, the formal language of the trust relationship afforded acknowledgement of potential US acceptance of possibilities for other future Native Hawaiian land control efforts. And lastly, it publicly demonstrated Hawaiian competency in organizing and completing an effective campaign for justice thus building social and political capital.

The building of social capital was important both within and outside of the community. Kaho‘olawe demonstrated the potential for effective Native Hawaiian leadership by both Indigenous and Western standards, transforming perceptions of Indigenous abilities through effective organization and education. Native Hawaiian efforts to protect the island were led by assertive and determined activists. Some activists had college degrees and would spearhead rights lawsuits against the State and US Government and create new departments at the University of Hawai‘i respectful of Native Hawaiian culture and tradition. Through their efforts, they changed perceptions of Hawaiian capabilities and demonstrated to Native Hawaiians and non-Natives a new emboldened and informed Native Hawaiian identity. According to the website of Protect Kaho‘olawe ‘Ohana (PKO), the group that spearheaded the eventual lawsuit over the island, ‘in working for the return of Kaho‘olawe, many of the current generation rediscovered what it meant to be Hawaiian’.²⁶ That generation of activists, among them Aluli, Osorio, and McGregor,

Hawai‘i Revised Statutes Chapter 6K §K-3 states (a) The Kaho‘olawe Reserve shall be used solely and exclusively for the following purposes: (1) Preservation and practice of all rights customarily and traditionally exercised by Native Hawaiians for cultural, spiritual, and subsistence purposes; (2) Preservation and protection of archaeological, historical, and environmental resources; (3) rehabilitation, revegetation, habitat restoration and preservation, and (4) education’.

²⁶ PKO Website, [Online] Available at: <http://www.protectkahoolaweohana.org/molsquoolelo-lsquo256ina.html> [Accessed 5 January 2017].

became not only social and political leaders in the Native Hawaiian community but also professors at the University of Hawai‘i mentoring future generations toward higher education.

Where Kaho‘olawe was the first significant conflict between the Native Hawaiians and the government, Kalama Valley was the first major real estate dispute between developers, land control authorities, and local community members, including Native Hawaiians. The conflict began in 1960 over the ousting of local Native Hawaiian tenant farmers to enable one of the earliest large-scale residential developments. It brought Hawaiians and environmental advocates together to preserve the environment and to protect traditional ways of life, both groups realizing that unity had a distinct power. For Hawaiians, according to political science professor Neil Milner (2006), Kalama Valley activism ‘became the spark for a movement toward a new vision of Hawaiian citizenship and nationhood’ and ‘triggered broader and more militant concerns about land, race, ownership and ultimately autonomy and sovereignty for *Kanaka Maoli* [Native Hawaiians]’ (Milner 2006: 149). In doing so, he asserts, the protests linked concepts of “home” to notions of political resistance (Ibid.: 171).

According to Milner’s analysis, the impact of the Kalama Valley protests on Native Hawaiian empowerment efforts were that land issues, including dispossession, were brought into all political discussions. For Native Hawaiians, Kalama Valley linked the concepts of ‘home, homeland, citizenship and sovereignty’ together (Ibid.: 151). ‘The protests at Kalama Valley’, Milner adds, ‘fostered an identity that was broad enough to include more than Native people but at the same time recognized the special status of *Kanaka Maoli* (Native Hawaiians)’ (Ibid.: 171-172). Future land disputes, he concludes, would involve more militant and overt Native Hawaiian participation, but based on the social capital gained through the Kalama Valley protests, these actions would be more acceptable to the mainstream population (Ibid.). Hawaiians would seek to use culture to create a public presence, not just with superficial representation, but also as a means to reclaim lives disrupted by dislocation from land (Young K. 2004: 88).

2.2.8 The Legal Land Claim Process Begins

With the growth of social and political capital built by the growing land-based activism and environmental organizational affiliations, Native Hawaiians were empowered to form a delegation to the Hawai‘i Constitutional Convention of 1978 and draft new legislation to protect Hawaiian rights, promote Native culture, sponsor state programs to teach Hawaiian language and history in public schools, adopt Hawaiian as an official language of the state, and to create the Office of Hawaiian Affairs (OHA) to manage revenues due from the Ceded Lands Trusts for the benefit of qualified Hawaiians. As Goodyear-Ka‘opua (2014) has noted, this was the outcome of a ‘desire to uplift Native Hawaiian people by accessing collective resources’ held by the state (Goodyear-Ka‘opua 2014: 59). By participating in the Constitutional Convention, Native Hawaiians began to assert political influence throughout Hawai‘i, resulting in ratification of a new Constitution by a state population that had increased seventy-nine percent with recent migration from the mainland (Kosaki 1978: 31), and that supported Hawaiian rights (Meller and Kosaki 1980). The outcome reflected a new era with increased Hawaiian awareness of history and the value of political and social capital. Militant activist Haunani-Kay Trask (2000) credits this new awareness with strengthening traditional Hawaiian values of *‘ohana* (family), *lokahi* (community), *kokua* (self-help and self-reliance), *malama ‘āina* (reciprocity and care for the land), and *kue* (resistance) (Trask 2000: 378). It was with this awareness that a poor *taro* farmer, William Kalipi, filed a lawsuit and began to assert his rights. Examined in Chapter Five, this was the first of a series of significant land claim lawsuits demanding State recognition of the existence of historic legal statutes protecting Native Hawaiian traditional customary rights.

As William Kalipi filed his court claim, he was not aware that a great cultural shift in political and social capital was about to become apparent within the judiciary.

William S. Richardson, a Native Hawaiian, was the Chief Supreme Court Justice of the State of Hawai‘i, and he was convinced that legal protection of Hawaiian rights needed to be confirmed through judicial interpretation. According to several of his former clerks who became leading judges and attorneys in Hawai‘i, Justice Richardson felt that rights to land use would be instrumental in establishing legal

foundations for supporting Native Hawaiian rights. Through his rulings (starting with the Kalipi ruling) he confirmed that Native Hawaiian traditional and customary rights were an essential part of state law. This will be discussed further in Chapter Five.

Justice Richardson also inspired the next generation of Native Hawaiian lawyers and activists. He founded the law school at the University of Hawai‘i and mentored numerous young lawyers, including Melody MacKenzie, his former law clerk, and Hawai‘i Supreme Court Justice Robert Klein (Matsuda 2010-2011). MacKenzie would become a lawyer for the Native Hawaiian Legal Corporation (NHLC) with involvement in both the Pele and PASH cases. She would also participate in the 1978 Constitutional Convention and become the founder of the Center for Excellence in Native Hawaiian Law at the University of Hawai‘i. Additionally, MacKenzie would become the editor of two influential books on Indigenous law in Hawai‘i: *Native Hawaiian Rights Handbook* and *Native Hawaiian Law: A Treatise*. Justice Klein would continue Justice Richardson’s legacy of rulings expanding Native Hawaiian rights and was responsible for the landmark rulings in the Pele and PASH cases. Both credit Richardson for motivating their efforts on behalf of the Native Hawaiian people. They, in turn, would follow their mentor’s directive to actively teach and guide future generations of Native Hawaiian attorneys, working toward a restoration of the traditional ancestral relationship between the Hawaiian people and the land. In their actions, they are encouraged and supported by the unique laws that have integrated Hawaiian culture and heritage into the Constitution and legislation of the state.

2.3 The Law in Hawai‘i and Native Hawaiian Historic Legal Rights

The law in Hawai‘i is unlike that of any other state in the United States. The law is a blending of surviving historical statutes of the former Nation of Hawai‘i and modern Anglo American, or English common law. Historically, both traditional customary law and Nation of Hawai‘i law recognized and protected the fundamental grounding of Hawaiian culture and life in the relationship between the Indigenous people and their ancestral land. The two contemporary legal systems, legislative English common law and Indigenous customary law, are typically separate and distinctive,

yet in Hawai‘i they have been merged together, one structure grafted onto the other, to create a unique legal system. Legal scholar David Bederman (2010) maintains that Hawai‘i is the best example of the process of incorporation of Indigenous customary property rights into state law, albeit with a tension between the two (Bederman 2010: 70). Inherent in the imposition of one legal system over the other, are conflicts. The resolution of these tensions and conflicts has been through continuous processes of judicial investigation, proof, discussion, and court rulings, or decisions.

The basis for the conflict can be seen in the differences between the two systems. English common law is based on societal customs and set by judicial rulings in courts based on legal precedent (Gifts 2010: 96). It is the foundation for American, Welsh, and English national legal systems and the basis for all state laws in the US as well. Importantly, the Nation of Hawai‘i adopted English common law in 1892 (Sullivan 1998), codifying Hawaiian customary law at that time and integrating it into national law (Sproat 2008). The codified Hawaiian customary law statutes have persisted through time to become the basis for modern Hawaiian law at statehood in 1959. Section 1-1 of the Hawai‘i Revised Statutes states:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai‘i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or *established by Hawaiian national usage* (emphasis added).

The key term here to note is “Hawaiian national usage”. Hawaiian national usage is interpreted in Hawaiian courts to mean the continuation of customary practices that have been in place since 1892, the year HRS §1-1 was adopted (Bederman 2010: 71). This is the second legal system, the everyday commonplace order of practices and traditions that are outside of judicial or legislated regulation but provide other forms of societal order. Known as contemporary customary law, it contains “norms” or standards of informal law that provide rules of conduct adopted and enforced by constituent communities. In other words, judicial precedent alone in Hawai‘i does not

have the force of law. Customary law is considered equally important, and it is valued both by the government and judiciary. To prove the existence and extent of traditional practices, expert oral testimony by Native witnesses is presented in court. On the basis of sufficient oral proof, customary and traditional practices are determined continuous and contemporary, and protected by law. This is highly unusual in Western courtrooms where juries decide the truth or falsity of presented evidence. Instead, Hawaiian law privileges the role of cultural experts and their court testimony, and the jury has no role in deciding if, when, and how custom and traditional practice exists.

The inclusion of Hawaiian rights into state legislation sets Hawaiian land use law apart from property-based legislation in all other US states. These rights have been continuously affirmed through legislation and were confirmed in 1978 as Article XII §7 within the Hawai‘i State Constitution.

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

In any other US state, the individual rights guaranteed an owner of land are for exclusive ownership and use. They include the right to exclude others from the boundaries of the property and the right to control all resources the land produces. The foundation for the right to exclude is in the Fifth Amendment to the US Constitution and is grounded within an economic view of property that portrays state and federal government as contractual agents of the citizenry, but not sovereign over them. It is not only a fundamental right within the United States, it is a founding principal of the nation.

In Hawai‘i, landowners do not have total rights to exclusive use of land. Use is limited by the inclusion of protected heritage rights for access to private property guaranteed to people of Native Hawaiian ancestry. It is what is known in American

law as “codified tradition” and is based on the ‘enduring interplay of traditional and Western law. It codifies custom in Hawai‘i, adopting English common law *except as modified by Hawaiian custom and tradition*, or the judicial precedents of the Kingdom of Hawai‘i’ (Sproat 2008: 30; emphasis added). These are known in the state law as “Customary and Traditional Rights” and have been adopted by each political ruling authority in Hawai‘i since ratification by the Nation of Hawai‘i in 1850. They have been passed down directly, with limited interpretation as Hawai‘i became an American state, elevating in importance within each polity the value of Native Hawaiian heritage.

It is the definition and assertion of historic “legal rights”, and desire for clarification of existing statutes guaranteeing those traditional rights, that has formed the basis for many lawsuits (MacKenzie, Serrano and Sproat 2015: 24). The term that describes the length of time that is required, usually by statute, to determine when custom can be claimed as a right under the law is “legal memory”. Legal memory, according Merriam Webster, is ‘the minimum period of time usually prescribed by statute for a custom existing to have the force of law, or for conduct continued to be the foundation of a legal right or title not otherwise provable’.²⁷ Hawaiian legal memory, or the date when the practice must be verified to, is 1892, the date of transition from Nation of Hawai‘i to the US legal system.

What this means, according to legal scholar David Bederman (2010), is that ‘Hawaiian custom actually pre-empts the common law, and [the State] has adopted the equivalent of statute[s] establishing legal memory’ (Ibid.:71). In other words, the State of Hawai‘i has retained statutes from the Nation of Hawai‘i whereby expert Native witnesses may provide proof of existing traditional practices, including the timing, extent, and description of practices, for proof of a legally-practiced custom.

The use of expert Native witnesses first became an issue in 1970 with the case of *State v Zimring*, where the court claimed the Native Hawaiian testimony was

²⁷ Online Merriam Webster Dictionary. [Online] Available at: <https://www.merriamwebster.com/legal.lega.%20memory> [Accessed 5 May 2017].

“hearsay”, rather than “material fact” of Hawaiian usage since it could not be proven to have taken place before 1892 (Ibid.). The court based their ruling on the ‘inadvisability of relying solely on the kind of affidavit submitted, in a case of first impression on a question of vast public importance’ (*State v Zimring*: 203-204 cited in Bederman 2010: 216). As will be discussed further in Chapters Five and Six, who in Hawai‘i has the authority to determine protected traditional cultural practice, and what constitutes proof, would be reviewed several years later in Kalipi and would be dramatically challenged again by the court in both the Pele and PASH cases. In all of these lawsuits, the historic statutory recognition of Hawaiian customary law would be stressed, and the continuation of protected cultural practices would be challenged and ultimately demonstrated.

The study of Hawaiian history shows how the adoption of new economic and legal systems after Western contact impacted the social stability of Hawaiian society. In particular, the rapid transition to a capitalist system of production led to the abandonment of traditional modes of life and ultimately served to displace commoners from land. Native government efforts to protect Indigenous rule against foreign domination resulted in further commoner land alienation and were ultimately unsuccessful. The resultant loss of Nation of Hawai‘i lands during the overthrow increased the amount of land alienated from Native Hawaiian control. It was not until statehood that possibilities for Indigenous empowerment became evident and a movement emerged for the renewal of the traditional land stewardship relationship.

This dissertation concerns the intersection of several different elements, all of which intersect, support, and influence each other. Each element; law, narrative, heritage, and political power are involved in a struggle for dominance in an effort to find a level of balance necessary for effective social control based on democratic principles of fairness and equality. Much has been written about this intersection, with theorists approaching it through multiple disciplines and perspectives, trying to understand the interplay and forces at work. However, just as there is no one conceptualization of heritage, there is no one theory applicable to examine how meaning is made when heritage narratives are used in land claims for minority ethnic sovereignty. Instead, multiple perspectives and theories need be considered, and elements combined to

create a new theoretical framework. Chapter Three will provide a review of the theoretical concepts of heritage, the role of narrative in the formulation of identity and community, and the interaction between cultural narrative and storytelling in the law. In doing so, it will begin to provide a conceptual basis for understanding narrative as a social system that conveys meaning and how the use of narrative in law may have the potential to change perceptions of the past, identity, and relationships to place.

CHAPTER THREE THEORIZING HERITAGE AND LEGAL NARRATIVE - BUILDING THE FOUNDATION

Any history that we tell, whether it comes from the oral traditions that are centuries old, from the published accounts of nineteenth and twentieth century writers, or even from the correspondence and editorials of contemporary scholar-activists, is not merely informational, but carries an activist content.

Professor, musician, and activist Jonathan Kamakawiwo'ole Osorio, *The Contemporary Pacific* 2001

Since the 1980s scholars have been reconsidering the role of law in society, reflecting on its function as more than just an authoritative mechanism that maintains and controls social order. Many have now come to view law as a governmental institution that operates to construct identity while mirroring, reproducing, supporting, or challenging cultural norms (Bederman 2010; Bruner 2002; Butler 1990, 1993, 2012; Cover 1983; Fraser 2000; Gearey 2010). These norms have their basis in communal narratives and practices that help to define and determine acceptable behavior in society.

Like heritage, cultural norms are not static but shift in response to changes in external power structures (Foucault 1977, 1980). Recent theoretical research (Butler 2012; Butler and Athanasiou 2013; Fraser 2000) suggests that repetitive challenges to authorized power within official public spheres, such as courtrooms, can slowly impact the balance of power in society by correcting imbalances, unsettling norms, and forcing social changes not otherwise achievable. For Indigenous peoples in post-settler colonial societies in particular, such challenges to social norms are attempts to rectify historic injustices by confronting authorized interpretations of the past. In this process narrative plays a significant, central, and vital role.

Due to the complex nature of the use of heritage narratives in the law, this chapter is presented in three sections. The first section defines and discusses what constitutes

narratives, how they are constructed and how they provide meaning in our lives. The second section examines how heritage narratives contribute to individual and communal identity formation and explores scholarly research on Indigenous and Western epistemologies, comparing variations in comprehension of the “self”. Such differences often become the foundation for legal arguments, and inevitably result in courtroom conflict. The third section reviews theoretical literature on forms of narrative used in legal proceedings, discusses how legal storytelling differs from other forms of narrative, and analyzes the ways in which narratives compete in courtrooms by challenging, maintaining, and influencing communal senses of belonging and perceptions of the past. It is followed by a discussion of current theories of performativity, exploring the role of communication to construct identity and bring about social change. By presenting the information in this manner, the chapter provides the basic building blocks on which to build a new theorization of the impact of Indigenous narrative construction and presentation in land claims on Indigenous heritage and identity.

3.1 Narrative and its Uses

Narrative, narrating, and storytelling, according to Shenhav (2015), are dynamic elements of communication and are essential to human experience. Narratives are dynamic as they convey ideas from one person to another, and are critical in framing human culture and traditions. In this way, narratives provide a relationship to the world that places us within a community and helps to tell us who we are (Ibid.). They are, Connelly and Clandinin note, illustrative of ‘the ways humans experience the world’ and make meaning out of their involvement (Connelly and Clandinin 1990: 2). Furthermore, narratives structure our actions (Geary 2010) to organize human experience (Bruner 1991: 21)

Each person creates their own stories by incorporating personal life histories, practices, traditions, experiences, and impressions, and then turn tales of these events, people, and sites that have meaning, into narratives. The creation of personal narratives is a selective, cognitive achievement of memory interpretation, organization, and recall, as fragments are remembered, filtered selectively,

regrouped, and transmitted. The structured story is created using cultural conventions and language familiar to the author (Potter 1996). All recollections, including those with unresolved issues, are incorporated into memory as some form of story.

Typically, narrative stories have a structural framework. They have a beginning, a middle, and an end, all of which work toward resolving, revealing, or addressing an issue introduced at the start. A narrative typically follows a familiar pattern, as Aristotle defines in his *Poetics*: an ordinary situation occurs where we know what ought to happen, but it is disrupted by a *peripeteia*, a turn of events or reversal of circumstances. From this reversal emerges something we did not anticipate but from which we make meaning (Bruner 2002). The action within a narrative includes a ‘sequence that moves from the setting of goals, the performance of those goals, and the reflection on success or failure’ of those actions (Propp cited in Gearey 2010). Some actions buttress or support the sequence while others hamper or otherwise negatively contribute to it (Geary 2010). Narrative analysis can be used to illuminate social shifts in communication, how meanings change through construction, and the evolving ways we make sense of ourselves and the world around us (Sherwin 2009: 91).

There are multiple forms of narratives, and they are used for different purposes. To examine the different forms of narrative and their relationship to each other and to law, the Oxford Dictionary is a useful place to begin. Narrative is defined as:

- 1) A spoken or written description of related events; the narrated part of a literary work, as distinct from dialogue
- 2) A form of art involved in telling stories
- 3) A representation of a set of values or aims of a particular group²⁸

The first definition of narrative as a spoken or written description of related events can be interpreted as either a narrative of scientifically proven data on historic events,

²⁸ Oxford Dictionaries, n.d., *narrative*. [Online] Available at: <https://en.oxforddictionaries.com/definition/narrative> [Accessed 8 May 2017].

or as is the case in Hawai‘i, as heritage, the personal and communal accounts of the past. The second definition, narrative as an art form, can be considered the creative written and rhetorical medium employed to present a particular perspective on the contested subject. For this examination I will call this form “legal”, as it sculpts portions of the other multiple contributing narratives into a specific shape, artistically translating them into a particular form, and strategically employing elements to build an aesthetic and convincing argument. In Hawai‘i, this form of narrative in land claims uses Indigenous heritage to develop the direction of an overarching legal narrative, and to support legal claims of validity. The third form of narrative may be interpreted as the dramatization of the combined final argument. It represents, rather than describes, employing rhetorical speech and body language, inference, and insinuation, with the objective of representing the narrative with emotional force, dramatizing the issues, and convincing the audience of the legitimacy of the argument in order to actuate a process. Following linguist John A. Austin (1975), an act such as this is performative, going beyond mere communication to construct or impact identity (Austin 1975: 6-11).

Philosopher Judith Butler (1993) advances this concept one step further, suggesting that such participation in a “discursive practice” is also a “performative act”, and that such actions, particularly in legal forums, may bring about the changes it actively represents and describes (Butler 1993: 6). Thus Native Hawaiian participation and control of the legal narrative process contributes toward ‘produc[ing] the effects that it names’ (Ibid.: 13), which is a new modern Hawaiian identity. All three narrative forms, heritage, law, and the performance of speech, have the potential to individually and collectively influence Native Hawaiian identity. These separate elements may explain how the process of building and defending versions of the past through legal narrative construction can impact heritage.

3.2 Heritage, Narrative, and Identity

Heritage, the ways in which the past is employed in the present, is a social and cultural process of meaning making (Harrison 2010; Lowenthal 1996; Sørensen and Carman 2009). As a social process, heritage is inherently and dynamically political

(Smith 2006), reacting to changes in social, economic, and political forces to remain relevant, while also determining who has the power to interpret the past. In doing so, heritage does not attempt to explore and explain the past, according to historian David Lowenthal (1996), but instead to clarify pasts so as to infuse them with present purposes. It is not enough to only inherit the past, explains Lowenthal, ‘but it must constantly be reanimated and assigned meanings to be made relevant to our lives’ (Lowenthal 1996: xi). The issue of the relevancy of the past to contemporary life is at the heart of the court conflicts in Hawai‘i. Native Hawaiians must demonstrate that the past has meaning in the present, and ancient practices must be proven continuous and actively performed in order to justify legal protection.

Lowenthal (1998) also views heritage as a cultural process. He maintains that heritage supports communal affiliation by providing links to a communal past and transmitting social, religious, and spiritual traditions, practices, and values over generations. In this, heritage takes two forms: it can be both tangible; represented in artifacts, sites, memorials, architecture, sculpture, and monuments, and intangible; demonstrated in beliefs, rituals, stories, traditions, arts, and practices. Heritage cultural practices, central to this study, are intangible and include acts of remembrance, commemoration, communication, and the creation of significance, all of which serve to keep alive and reinforce stories of the past and endow meaning to the present, and to form and maintain contemporary identities (Ibid.). In Hawai‘i, Indigenous heritage practices are typically associated with specific geographic locations, thus gluing the intangible to the tangible. Heritage is therefore about memory, not dispassionate facts, and it is the various forms of memorialization that provide meaning to people.

Heritage should not be mistaken for history. Heritage is based on collectively accepted “truths”, curated through complex social negotiations between individuals and groups (Palmenfelt 2010: 72). It constitutes a form of remembered reality filtered through experience and filled with symbols imbued with meanings (Geertz 1974). In contrast, history attempts to document the past with evidence in the form of scientifically proven “data”, including written or recorded accounts of the past. Western law, as will be discussed later in this chapter, typically requires historical

“data” in lieu of heritage “truths” to substantiate claims. In the legal cases to follow in Chapters Five and Six, Native Hawaiians were challenged to develop a process to transform intangible “truths” into evidential court “data” to support their legal claims.

Western and Indigenous conceptualizations of heritage are fundamentally different. Western heritage creation begins with the capturing of personal ephemeral memories. These memories are associated with artifacts, sites, and places, and commemorated and reinforced through practices and symbols, such as memorials, monuments and landmarks. The resultant stories, images, and concepts connote, but do not construct reality. Instead, they provide a sense of things, such as an emotional relationship to an ancestral past or a spiritual tie to specific places, beliefs, and traditions. Some memories are included, while others more painful are repressed or ignored. What emerges in this process as memory is not provable by historic record, but instead contains selective portions of events that have relevance and importance to the originator or narrator of the story. Events remembered in this way give meaning to the past and are adopted as reality.

Native American scholar Margaret Kovach (2009) distinguishes Indigenous heritage from non-Indigenous heritage. She claims that Indigenous heritage is more inclusive, formed from personal memories, as well as integrating ancestral memories passed down through oral legend and myth. It includes concepts unfamiliar to Western knowledge systems including metaphysical sources, empirical observations, and revelations from dreams and visions (Kovach 2009: 56). The inclusion of such concepts into legal processes in respectful and inclusive ways is thought by Indigenous scholars to be part of a continuing cultural renaissance to decolonize minds both within Indigenous communities as well as outside (Ibid.: 12).

Two critical difficulties arise in documenting Indigenous heritage narratives for the court. First, in traditional Indigenous contexts “truths” are embodied within intangible cultural knowledge. Such knowledge is often considered privileged information and may be known only to recognized and designated experts who selectively reveal them to insiders or relay them to outsiders (Boyer 1994: 48). In

such circumstances, data needed for court presentation may be either hidden, protected, culturally complex, or religious and spiritual. Hawai‘i exemplifies this situation. Due to the historic trauma of cultural appropriation and governmental authorized assimilation, Native Hawaiian cultural practitioners²⁹ are protective and secretive of their cultural protocol. Access to traditional knowledge is highly restricted, and when shared, carefully curated. The second difficulty is that Native Hawaiian heritage is based on orally transmitted ancestral memory imbued with spiritual significance. Once documented, the challenge in presentation of Native Hawaiian heritage within the court is fourfold: Indigenous intangible concepts are very difficult to translate into the language of the court, practices may not be understood by other court participants, contemporary traditions may not be recognized by an existing body of Western law, and witnesses may not be forthcoming within the framework of the court proceedings.

State of Hawai‘i courts permit both forms of “truth”. This is unique in Western legal systems. Historical data and heritage may both be used to substantiate legal claims. Hawai‘i recognizes alternative views of the past within the highly multicultural state and acknowledges the survival of historical legal statutes that reference ancient Native systems of social order. To Hawaiians, oral legends are considered records of historical events, thus blurring the Western distinctions between heritage and historical record. Significantly, asserts Niezen (2009), recovering suppressed historical cultural material in the pursuit of cultural justice may uncover and encourage ‘the rediscovered sense of collective selfhood’ necessary for minority empowerment (Niezen 2009: xiv).

This sense of collective selfhood begins with the creation and sharing of personal stories. The process is initiated when personal memory is incorporated into stories to make sense of life experiences. Scholars view these stories, the basis for heritage, as a form of expression people use to continue to relate to what is known as ‘lived time’ (Bruner 1987; Clark 2010), a crucial component of human experience (Wyllie 2005)

²⁹ Native Hawaiian cultural practitioners are those individuals who are recognized within the Indigenous community as knowledgeable and experienced in traditional practices.

employed to describe realized existence in a temporal world and personal interactions within a specific environment (Grayling 2017). According to Bruner (1987), stories are composed of fragments of lived time consciously or unconsciously selected to build stories. He considers that these fragments contain messages of meaning that only emerge through the development of larger and broader stories, or narratives. In particular, legal narratives, which will be discussed in more depth later in the chapter, can be seen as defining lived time by inclusion within greater interactive and social frameworks to ‘organize certain kinds of problems into a form that renders culturally meaningful both the problems and their possible resolution’ (Baron and Epstein 1997: 147-148). From this framework, Indigenous narratives can be considered not just as stories, but also as references to broader cultural issues in peoples’ lives, providing insight into underlying social concerns as well as supplying clues toward their resolution.

When narratives are shared with others, reinforced through repetition, they become what sociologist Maurice Halbwachs (1992) calls “collective memory”. Events and narratives are temporal and geographically specific, and are therefore transformed in the retelling to reflect contemporary perceptions of the world from a specific time and place. Each person’s individual memories and experiences (including religious, ancestral, and cultural) are “entangled” with those of other individuals, lashing community members together through mutual associations and values, thereby impacting future decisions and actions of the collective group (Assmann 2008; Ricouer cited in Clark 2010). Together, this sharing of collective memories becomes the ‘building stones of narrated cultural heritage’ (Palmenfelt 2010: 63), tying people together through shared memories of the past to form communities, and in doing so, satisfying the human need for belonging (Smith and Waterton 2009). This sense of belonging provides the basis for personal and collective identity. Thus restoring a collective sense of belonging lost through colonization and forced assimilation is essential for building a Native Hawaiian movement for social and political empowerment. However, in order to restore a sense of belonging, Hawaiian heritage must first be recovered, and shared, and communal values adopted.

Collective meaning making is intrinsically tied to identity. To create meaning from shared heritage, community members need to translate collective memories through the cultural lenses of their own experiences and incorporate them into personal memories to influence perceptions, values, beliefs, and actions. In this way, heritage narratives ‘have the power to explore people’s relationships, both public and private, with their environment and with one another’ (Benham 2007: 512). Narratives clarify knowledge in such a way as to illuminate the foundations of who we are collectively and individually (Ibid.). The connection to communal knowledge provides meaning to shared memories and defines both personal and collective identity.

The link between collective memory and identity has been the subject of substantial scholarship and is useful for distinguishing differences and similarities between Indigenous and Western identity. From a Western perspective, three viewpoints are highlighted: Firstly, Geertz (1974) sees identity formation as the “inside” versus “outside” or first person versus third person interpretation of reality; in other words, individual memory as experienced versus observed or relayed behavior (Geertz 1974: 28). In his formulation, the result of a closed network process of memory formation creates “others” who are not part of the group to which we belong; they are not “us”, and do not belong to “our” group (Amsterdam and Bruner 2000: 233). Concurrently, the process of sharing memories helps to define who we are and contributes to individual and collective identity formation (Amsterdam and Bruner 2000; Smith and Akagawa 2009).

Assmann theorizes identity formation differently, suggesting that instead of two formats of reality, first person experienced, and third person observed, there are four formats that contribute to conceptions of identity: cultural, individual, social, and political. She suggests that since people participate in a wide range of activities and social environments, they live simultaneously in the first person singular as well as in the first person plural. Their memories are both personal, as they relate to individual direct participatory experience, and plural as felt and observed in relation to the presence, influence, interaction, and knowledge of others. Whether first person singular memories become collective memories or not is dependent on conscious and unconscious processes of information selection, and subsequent decisions on what to

include into or exclude from the collective. The process of selection, she concludes, contributes toward building identity through decisions of what is experienced first-hand; what is remembered through the collective experiences of others, what remains private and what becomes public (Assmann 2008). Cotterell (2006) disagrees, positing that all forms of shared meaning-making have the power to shape social relationships and thereby shape personal identity (Cotterell 2006: 99).

Evidence of distinctive Indigenous senses of identity and belonging are evident in heritage narratives. Indigenous heritage narratives contain linguistic constructions imbued with distinctive cultural qualities (Potter 1996). As they are retold, Indigenous narratives are re-interpreted to reflect contemporary perceptions of the world and to maintain relevance to temporal and political social conditions. Within Indigenous communities, generational transmission ensures that the innuendos and inferences, historic references, and values of the associated society and culture are remembered and understood. Sharing collective heritage narratives within an Indigenous culture thereby provides the group members with a certain type of power in that it shapes social relationships, perpetuates cultural memory, distinguishes those within a community from those outside, strengthens networks of mutual understanding, and creates and sustains a collective sense of ethnic affiliation (Cotterell 2006: 99). Exposing collective narratives publicly makes them susceptible to charges of inauthenticity. Were inauthenticity asserted by Hawaiian courts, the repercussions would be disastrous for the Native Hawaiian community, including the loss of legal rights to economic and political entitlement programs, as well as to land.

3.2.1 Epistemological Differences in Narratives

Not all narratives shared in Hawaiian courts are equally understood. Epistemological differences in the interpretation of narratives may cause conflict in multicultural societies such as Hawai'i. Epistemological processes of thought, or ways in which the world is perceived, frame our understanding of the world and of ourselves. The basis for legal misunderstandings, therefore, may be differences in perception of the role of a person in society. From a Western, or Hegelian perspective, concepts of identity are individualistic, with each person, the "self", defined, distinct and in contrast to the "other" and to the environment. Time is linear, with a distinct past and

an imagined future. The Western self is free to act independently, and responsible only for personal actions (Geertz 1974: 31). By this reasoning, knowledge, land, and the environment exist as commodities completely separate from the individual or community, to be used, sold, and manipulated for financial or personal gain. They are objects like other material goods and have no spiritual relationship to the individual. This Western viewpoint is based on an order to the universe with the Biblical hierarchy of man dominating over other creatures and the environment.

This is vastly different from Native Hawaiian concepts of “self” and the perceived role of an individual in the community and in the world. Native Hawaiian worldviews place community members within a familial network comprised of kin, community, and environment (MacGregor 2007). In this network, personal identity is integral with community identity, located in the physical environment, tied to particular places, based on genealogical connections, and supported by ancestors as guides for appropriate behavior (Benham 2007). Within the Native Hawaiian community, members strive to assume social and cultural responsibility for the maintenance and well-being of both the network and the physical environment. This sense of responsibility is a primary principle of Indigenous culture underpinning individual identity and actions.

Along with the responsibility for maintaining the collective is an obligation to orally transmit traditional knowledge from generation to generation. In doing so, community members assure continuity of collective stories, myths, legends, and their inherent spiritual meanings and inherited values. Each narrated story contains, according to Native Hawaiian Maenette Benham (2007), an Indigenous perspective with both physical and abstract, or metaphysical qualities. She views these narratives as containing great and “rich” knowledge that was disrupted by colonialism. She posits that rediscovery of Indigenous narratives has the power to reveal information that can inspire and mobilize processes for political empowerment (Benham 2007: 513-514).

In court, an Indigenous individual speaks on behalf of community, and not as a single individual. In Hawai‘i, this cultural responsibility restricts the number of individuals

who are willing to testify as individual witnesses. Instead, as many Native Hawaiian cultural and political informants reported during interviews, a representative must be designated by the community to speak on behalf of their collective interests. Not only does this limit potential witnesses but it is also a time-consuming effort that may exceed the length of the trial.

3.2.2 National Use of Heritage Narratives

Forces outside the community can also manipulate collective narratives. Collective narratives have immense social and political value for national governments and provide a particular paradigm for the authorized use of heritage. Governing authorities create national narratives to strengthen network bonds between residents. The purpose is to encourage consensual, as well as ascriptive (birthright) citizenship³⁰ to form a cohesive national identity (Gill 2016: 19). This sense of nationalism or patriotism is vital for the support of national policy objectives and to maintain social and political order. Unifying national “grand narratives” are creatively and purposefully constructed for building social, political, and economic capital, which are necessary elements for maintaining power structures that administer, restrict, and enforce ideas and sentiments of authority and power (Anderson 2006).

To safeguard grand narratives, governments attempt to control and shape the understanding of the past, including jurisdiction over memorialization, interpretation, and management of heritage stories, myths, and legends. To accomplish this, government legislative processes support and promote certain narratives over others. The result is a discourse, or a way of constituting knowledge through social practices (Foucault cited in Wandel 2001), whereby government authority influences, establishes, and maintains power over representations of the past. Domination over representations of the past are achieved by identifying criteria for defining policies, practices, and places for heritage protection; employing semiotic forms for meaning making (Fairclough 2015: 7); and establishing what Laurajane Smith (2006) labels as

³⁰ Based on the writings of John Locke, consensual citizenship is based on mutual consent to membership in a community.

an authorized heritage discourse (AHD). Within the AHD, policies are formulated to determine authenticity, and designate and protect certain practices, traditions, sites, and memorials of value to the state. By subsequently endorsing one narrative or site over another, the state rationalizes social and legal policies of inclusion and exclusion, defines race and belonging (Gearey 2010), and reinforces political objectives to advance national agendas (Weisman 2015: 145).

Evidence of politically-based policies like the AHD are manifest in court rulings in Hawai‘i where the state governor selects the justices of the Appellate, Circuit, and Supreme Courts from a list supplied by a state nominating commission.³¹ The state Supreme Court Chief Justice subsequently chooses Family and District Court judges thus making the entire judiciary selection process inherently political and representative of the will and power of the state. Under this system, when authorized government policies aim to protect the status quo of Indigenous marginality, judicial political obligations can actively hamper social empowerment through the courts.

Weisman (2015) concurs and suggests that governments use national narratives to obscure larger issues, such as widespread discriminatory practices and programs. These programs inhibit social progress and restrict policy development that would otherwise have the potential to repair or mitigate systemic issues underlying social problems and ultimately improve the lives of marginalized groups (Weisman 2015: 145). However, narratives of historic injustice can be reversed to become tools employed by marginalized groups as well, including Indigenous peoples. The legal cases presented in Chapters Five, Six and Seven will illustrate how heritage can be used ‘to challenge and redefine received values and identities by a range of subaltern groups’ (Smith 2006: 4). Native Hawaiians, by taking prominent leadership roles in

³¹ No community has a single unified political position. Instead, each community has a myriad of subgroups with different interests, beliefs and objectives. The activist Native Hawaiian community members, who are the subjects of this examination, are a subgroup of the total Hawaiian population in Hawai‘i, and they believe that they do not have control over the Authorized Heritage Discourse (AHD). It is their view that regardless of whether the state has integrated Hawaiian values into state policy and procedures, the official discourse (AHD) is not under their control. Through their activism and lawsuits, the Native Hawaiian activist community is in pursuit of greater control over the state narrative of Hawaiian heritage.

the courts and using the lever of heritage protections and values to fight land claims, challenge authorized notions of incompetence and marginality within the mechanisms of the state.

Responses from the marginalized such as these are “discourses of resistance” and include ways of speaking, understanding, and relaying perspectives of the past, with an emphasis that ‘draws on and naturalizes certain narratives and cultural and social experiences — often linked to ideas of nation and nationhood’ (Smith 2006: 4). According to Jurgen Habermas (1989,1996), resolution of the conflicts in this type of discourse are dependent on civil society where organized groups and independent citizens have an opportunity to openly converse, debate, and formulate opinions. Discussions, of course, occur both in private and in public, but only in the public sphere can racial and political prejudice become apparent and be addressed. The law is one such public sphere, and control and participation from inside the legal process may be a route to Indigenous empowerment. To understand how this may be possible, it is essential to understand how the law works and the uses of heritage within legal narrative.

3.3 Law and Legal Narrative

Law is a set of legislated rules created by governments to control and maintain social order through a series of consequences actualized in court (Bradney et.al. 2000: 4). Legal proceedings test the applicability of the authorized rules for acceptable public behavior, which we call laws, within individual situations. This is done through a variety of linguistic events, such as court cases. The study of the language of the law reveals how legal communication is restricted by the social environment; how institutions define the roles we play in society (Gibbons 1994); and how society influences, and is influenced by, the law (Merry 2000). Analyses of the language of the law in Hawai‘i and of the conditions of production and interpretation of such linguistic events have the potential to illuminate issues of great social concern (Gibbons 1994: xii). One important issue is how some policies are used to rationalize unfair government objectives while systematically inhibiting Native Hawaiian social progress.

3.2.1 The Philosophy of Law and Culture

Western law is underpinned by the principles of justice, morality, and fairness, even when all of the principles are neither codified nor legislated (Dworkin 1998). These foundational principles of what is right or fair in society are used to justify and support forms of government control, including authorized perceptions of the past. The intended purpose of each court, an institution of government, is to find truth and promote justice through fair and equal treatment of all citizens. While the intent is noble, in reality hierarchical social and political power structures and economic realities influence government policies. These are amplified in post-colonial communities like Hawai‘i, where traces of historic injustice persist through policies that support government use of Indigenous ancestral lands. The stakes are immense and the courts realize this.

The foundational principle of Western common law is the “rule of law”, the ‘doctrinal recognition of a need for equal treatment of equal cases before uniform, consistently applied law’ (Cotterell 2006: 98). Law is premised on democratic principles and rights to equal treatment (Ferguson 2012). To build consensus for following the law, citizens must be committed to the legal system. They must believe that the operation of law will provide an acceptable form of order to communal existence, and that it will represent and support the communal values and culture of the place in which they reside. Conversely, the law must relate to society and provide justifications for change. In other words, the law must have and provide meaning to substantiate its decisions on what is “true” and what is “good”. Law, therefore, is not just about the mechanisms and regulations of law and social order, but instead about meaning making (MacAuley 1989).

Anthropologist Clifford Geertz (1983) concurs. Law, he states, ‘is not a bounded set of norms³², rules, principles, values or whatever from which jural responses to distilled events can be drawn ... but part of a distinctive manner of “imagining the

³² D. Bederman, *Custom as a Source of Law*, (Cambridge: Cambridge University Press, 2010), p.51. [Here Judge Richard Posner (2001) is referenced. According to Judge Posner, laws differ from norms in that laws are ‘promulgated by an official authority and enforced by legal sanctions’, whereas norms are not, but are instead customs enforced by a sense of obligation.]

real””(Geertz 1983: 173). In a sense, he theorizes, law can be seen to be providing not one meaning for an event, but a pluralism of legal meanings under which we all live (Ibid.: 232). In providing meanings, the law recognizes and confirms socially accepted values, and uses authorized governmental mechanisms to maintain and encourage acceptable cultural norms in society, as it discourages others less suitable. To do this, the law has very distinctive and regulated processes and procedures. The State of Hawai‘i used such legal procedures to acknowledge the shift in public awareness of the economic plight of Native Hawaiians when the legislature formally recognized and confirmed traditional Indigenous rights to customary practices in the 1978 revision to the State Constitution. By confirming traditional rights, the State signaled an authorized acceptance of ancestral values, recognized a change in cultural norms, and acknowledged the value of maintaining Indigenous culture to Hawaiian society.

3.2.2 Challenges for the Court

To maintain relevance, the law must reflect cultural values (Weisberg 1996) as it resolves conflict. Here the law encounters various challenges: the law must be reflexive and responsive to social and cultural change, it must operate within and through different discourses of power, and it must recognize the impact of personal experience and background on judicial undertakings and juridical rulings. By framing restrictions, the law can shape expectations and reward particular behaviors, thus determining what is socially and politically acceptable within a society, and what is not. In this way law has a particular power, a ‘capacity to create the meaning by which people understand the social environment in which they live, and their place within it’ (Cotterell 2006: 99). The gradual recognition and interpretation of laws protecting Native Hawaiian rights demonstrates a state response to growing social awareness of persistent inequalities and unfairness. As a consequence, it places restrictions on land development and frames acceptable behavior toward historic traditional customary practices.

Law and Culture

When the government is conflicted on how to classify a cultural community, the law generally dictates and defines the “culture” according to classifications by membership, ethnicity, race, or territory. This manner of classification has a great

impact on the lives of Indigenous peoples, for it selectively distinguishes them from the general public in democratic societies. For example, the US federal legal definitions for “Hawaiian” were created to classify a segment of the community that did not fit the legal definition of “tribe” or “ethnic minority”, but were eligible for specific entitlement programs. In effect, government attempts to define Hawaiian culture has created divisions within the community and within the larger society by making efforts for Indigenous empowerment more difficult and complex. Cotterell (2006) suggests that legal theory needs a better basis for understanding how to deal with this concept of culture, which he views as encompassing collective beliefs, values, traditions, attachments, social relations within communities and outlooks. The notion of culture, he believes, is too broad or of limited use for the law because the term embraces too wide a field of phenomena. Although the law acknowledges that cultures exist in various combinations, are in a constant state of change, and are distinctly place and population related, he theorizes that the law struggles to determine how it must change to reflect social transformation. Evidence of this struggle is very apparent in Hawai‘i where the legal system has had difficulty determining the relevancy of historic laws to contemporary society and has struggled to interpret them in accordance with modern cultural values.

Legal Operation within Systems of Power

Courts are where law is administrated and where “legal reflexivity” is actuated. Legal reflexivity refers to a model of law in the welfare state whereby the state sets general standards through which lawmakers operate for goal-oriented social intervention. According to Teubner (1983), ‘reflexive law restricts itself to the installation, correction, and redefinition of democratic self-regulatory mechanisms’ (Teubner 1983: 239). Courts constantly review and reinterpret law to adjust it to reflect an evolving society. Inherent processes in democratic societies serve to control this reflexivity. The processes include Foucauldian theoretical systems of power that discredit or invalidate some sources of “truth” and elevate others. Legal discourse is one of these systems of power.

Gibbons (1994) proposes that the complexity of court proceedings frames not one type of legal discourse, but a multiplicity of discourses operating simultaneously,

each encompassing a system of power. The types of legal discourse include judicial discourse (decisions), courtroom discourse (interactive language between judges, lawyers, witnesses, and others in court), and consultant discourses (between clients and lawyers) (Gibbons 1994: 13). According to Shiner interpreting Foucault, each of these legal discourses involves political mechanisms for distinguishing between which discourse is “true” and which one is “false”, which he calls “regimes of truth”. These regimes of truth are considered foundational to law. They are purported to be moral and ethical reasoning but are actually political will. Shiner suggests that for that law to be effective in determining truth it must respond to both political mechanisms (Foucault 1977: 207 cited in Shiner 1982: 384). When the case includes Indigenous defendants, I would argue that over the last forty years another discourse has emerged through postcolonial minority awareness, that of an Indigenous legal discourse (between Indigenous and non-Indigenous court participants). This discourse introduces alternative epistemological frameworks that challenge normative regimes of truth and adds the political mechanism of social responsibility.

Bourdieu (2005) suggests that shifts in discursive power relationships are constrained by more than expertise, truth, and fact-finding processes. He hypothesizes that Western legal systems are biased toward those with social capital (access to powerful people), economic capital (money), cultural (the ability to distinguish cultural uniqueness) and symbolic capital (standing based on personal value in society), and suggests that efforts for empowerment by subjugated peoples are not an equal opportunity proposition based on fairness. He also considers those involved in social or political competition bring with them the gains and failures of their predecessors and ancestors (Bourdieu 2000). Power in a courtroom involving Indigenous participants is therefore not equally distributed. Repression from the past continues to haunt the descendants of those who suffered historic injustices. For example, as Native Hawaiians present their rights cases, the record of past injustice is continuously present and is also being considered and tried. According to Ferguson (1996), it is evident that ‘the surface narrative of a courtroom transcript is not unlike the consciousness of an individual: both offer the official record of what passes for examination, and both know themselves to be under distinct pressure from other levels of examination that need to be contained’ (Ferguson 1996: 89).

When Indigenous rights are involved, responding to multiple levels of examination adds an additional level of complexity to the courts, as it does in Hawai‘i. Western societies base determinations of truth on techniques and information scientifically “proven” by subject matter experts. In the courtroom, well educated, high status experts are favored over less educated, low status specialists. These experts are trained through Western educational systems in theories that privilege some forms of knowledge over others. According to Foucault (1977) the choice of Western-trained high status experts:

invalidates [minority or Indigenous] discourse, occasionally by blatant denial, but continuously by a set of implicit rules concerning what sorts of concepts and vocabulary are acceptable and what credentials and status are requisite for one’s discourse to count as knowledge. (Foucault 1977 cited in Shiner 1982: 384)

Upholding one form of truth and denying another is central to economic and political power (Foucault 1977, 1980). However, Hawaiian law provides an exception to this model. Hawaiian law has developed unique legal rules, concepts, and vocabulary that recognizes, rather than invalidates, Indigenous traditional collective knowledge as evidentiary proof in the courtroom. Native Hawaiian traditional knowledge based on collective memory is considered a valid form of “proof”. This disrupts the notion of the superiority of Western knowledge systems in American courts and challenges the balance of power in the courtroom. In particular, the legal statutes accepting alternative knowledge systems and forms of expertise provide opportunities for Indigenous empowerment that may not be available elsewhere. By accepting Native Hawaiian heritage in oral testimony, the court accepts communal memory as evidence of a factual claim. Such acceptance elevates traditional knowledge systems as valid legal ways of knowing; provides opportunities for building cultural capital; and should contribute toward greater legal, political, and social empowerment.

Nevertheless, the concept of “equality before the law” from a Western perspective raises the question of whether for equality to be promoted the law must assume

cultural uniformity and be blind to differences, and if so, then how a doctrine or policy can recognize the claims and interests belonging to a specific group (Cotterell 2006: 98). The US Supreme Court, the federal courts, and the state courts in Hawai‘i have struggled with the constitutional issue of equality under the law versus social justice in support of Native Hawaiian rights.³³

The Influence of Culture on Legal Narrative

Culture, states Bruner (2002) is not only within the law but has a formative influence on the law. In particular, he maintains, cultural values and concepts are embedded into the intricacies of the law and legal processes (Bruner 2002: 2). The way in which they are embedded is through narratives. Legal scholar Robert Cover concurs. Narrative, Cover (1983) asserts, gives law meaning, and through narrative law ‘becomes not merely a system of rules to be observed, but a world in which we live’ (Cover 1983: 4-5). This legal construction of reality in narrative, he posits, reflects and simultaneously shapes the world to which it applies. The process, he concludes, provides knowledge of the ordering of the social world (Ibid.). Legal narrative, which describes the customs, peculiarities and idiosyncrasies of society, therefore provides deep insight into the social values inherent in the associated society, and also works to transform and shape the same culture it reflects. This theory has enormous significance when applied to Indigenous legal cases, for it asserts that in presenting Indigenous culture for Native rights and land claims, Indigenous culture may also be impacted.

3.3.3 The First Form of Court Narrative: Heritage

Often, Indigenous knowledge is relayed through storytelling. Traditional legends and myths contain metaphors about places, people, and events. The goddess Pele, for example, is the Hawaiian deity of the volcanoes and legends speak of her “wrath” when she is insulted. As will be discussed in the land claim case *Pele Defense Fund v Paty* in Chapter Six, the narrative of Pele warns of possible repercussions from

³³ *Rice v Cayetano* 528 US 495 (2000) concerned a challenge to Native Hawaiian only voting within a quasi-state agency (Office of Hawaiian Affairs) created for the betterment of Native Hawaiians. The case worked its way through the State courts and was eventually elevated and decided by the United States Supreme Court, striking down the Indigenous-only voting regulations as a discriminatory procedure contrary to the United States Constitution.

“injurious” actions to the goddess from geothermal drilling, and testimony by Native Hawaiians urge avoiding such an occurrence. Pele, the volcano, and the goddess, must therefore be “defended”. This becomes a dominant element in the testimony of Native Hawaiians during the hearings. Heritage in the form of traditional story is therefore a very significant form of court narrative in Native Hawaiian land claims cases.

Culture can also be used as an element in building a court case. Courtrooms can be considered forums for legal disputes about memory of the past as well as authorized locations for social change and minority empowerment. In particular, heritage narratives are used in legal challenges to oppose a state’s official stance on perceptions of the past. This has great relevance when a group has had a history of subordination. Heritage becomes an instrument in a tug of war between those who are trying to emerge from a legacy of discriminatory policies to achieve some level of sovereignty and those in power who are resisting those efforts and attempting to maintain the status quo. The competing narratives employed on these legal battlefields have, according to Lowenthal (1990), “rival attachments” to earlier times, and conflicts that emerge in the courtroom reflect distinctive politics of the past. Establishing the ownership of a recognized heritage narrative is essential for minorities, in particular Indigenous peoples, working to establish autonomy and identity (Lowenthal 1990: 310-311).

3.3.4 The Second Form of Court Narrative: Legal Narrative

The law uses a form of narrative, namely legal narrative, to explain and interpret government statutes and legislation. Each legal narrative is composed of not just one story, but multiple accounts of an event that can be divided into separate parts. Individual parts are analyzed for their usefulness in building and supporting cases, as well as for their ability to survive detailed examination and prolonged questioning. The reason for this is that a multitude of professionals examine each legal narrative and the component parts are manipulated, rearranged, reinterpreted, and restructured as they are retold and repurposed for various reasons. The goals are to create meaning for the narrative, to determine relevance to the law and to society of a judgment, and to effect change or support the status quo. Amsterdam and Bruner

(2000) in their foundational text for law school students, *Minding the Law*, noted the variety of ways that the law uses narrative. According to their teaching:

The law is awash in storytelling. Clients tell stories to lawyers, who must figure out what to make of what they hear. As clients and lawyers talk, the client's story gets recast into plights and prospects, plots and pilgrimages into possible worlds ... If circumstances warrant, the lawyers retell their clients' stories in the form of pleas and arguments to judges and testimony to juries ... Next, judges and jurors retell the stories to themselves or to each other in the form of instructions, deliberations, a verdict, a set of findings, or an opinion. And then it is the turn of journalists, commentators, and critics. This endless telling and retelling, casting and recasting is essential to the conduct of the law. It is how law's actors comprehend whatever series of events they make the subject of their legal actions. It is how they try to make their actions comprehensible again within some larger series of events they take to constitute the legal system and the culture that sustains it. (Amsterdam and Bruner 2000: 110-111)

Legal narratives don't just tell stories; they compete for dominance (Posner 1990: 6). To prepare for battle, they are framed within arguments that support or debate conditions, legal rights, or proposed events. The arguments have no other forum for successful resolution other than within lawsuits. Within lawsuits, narratives are told with the objective of winning a positive judicial ruling. Distinct from literary storytelling, a narrative legal argument may result in a ruling with significant and sometimes violent social, political, or economic repercussions (Cover 1995). Law, like heritage, is therefore a social process that impacts the rules of an orderly and ordered society. For Indigenous claimants, court involvement may result in positive change, but it may also result in negative repercussions. The outcome of a negative ruling to a powerful political opponent is likely to increase social and political alienation.

Judicial Rulings

The ongoing control of existing government policy is maintained through continuous legal interpretation of legislation. Interpretations are expressed within judicial rulings, otherwise known as opinions, judgments, or decisions. Consequently, judicial rulings are one of the most significant forms of legal narrative. Judges find commonalities between current issues and historic legal decisions, then use them to clarify and interpret issues of the past and make them relevant in the present. In doing so, judicial rulings find new meanings within past decisions, establish new binding and persuasive ways of interpreting law to maintain relevance to the current society, and tie past concerns to current issues. In doing so, they provide a permanent legal link between authorized versions of the past and the social and political present. While not supposed to be relevant, the background of the judge is very important, for he or she brings personal perspectives, interests, and experiences to the court along with cultural values. In Hawai‘i, this supports the theory that gubernatorial selection of Indigenous court judges over non-Indigenous judges may therefore result in more culturally sensitive rulings and provide greater support for Indigenous legal rights.

Legal Narrative Construction

Under the rule of law, objectivity is a fundamental principle. However, total objectivity is difficult to achieve when legal decision-making is based on, and influenced by, human perception and culture (Green 2012). Lawyers strategize to reach their objectives, governments have political goals, and judges’ rulings are influenced by personal and professional experiences (Martin 2003). One place where the lack of objectivity can be found is in case building where the “truth”, “fact”, and “reality” required to construct a case are identified and defined by attorneys. Their focus, administration, and conceptualization of the law is on “getting the facts”, implying these elements can be either “found” somewhere or “hypothetically imagined” (Amsterdam and Bruner 2000). This suggests that the strategy adopted by attorneys to build an effective court narrative does not necessarily emerge from a client or witness telling a “complete” and “truthful” story, but instead may be strategically constructed with carefully filtered and reviewed information interpreted as “facts”. Famed Harvard Law professor Alan Dershowitz concurs, and offers that legal narratives are actually built from the end, since the conclusion of the story is already known, and the objective is a positive ruling in the client’s favor (Dershowitz

1996: 101). The conclusion is that in the court forum, where information is selectively chosen, whichever lawyer succeeds in presenting a better prepared and defended “truth” most clearly has the best chance of winning the case.

Amsterdam and Bruner (2000) suggest that it is the conscious selection of information in the practice of law that actually defines the facts within legal narratives. The choice of facts can, in actuality, impact social reality. This supports the notion that the choice of witnesses, statements, and heritage presented in Hawaiian land claim cases can not only mirror but impact the greater social environment. They submit that:

These ‘facts’ are presumed to frame the issue in debate, delimit the choices of action that can be pursued, determine the visitation or the vindication to be authoritatively pronounced ... Increasingly, [legal professionals] are coming to recognize that both the questions and the answers in such matters of ‘fact’ depend largely upon one’s choice of some overall narrative as best describing what happened or how the world works. We now understand that stories are not just recipes for stringing together a set of ‘hard facts’; that, in some profound, often puzzling way, stories construct the facts that comprise them. For this reason, much of human reality and its ‘facts’ are not merely recounted by narrative but constituted by it. (Amsterdam and Bruner 2000: 110-111)

Legal Presentation

Presentation of legal narrative takes place through ritualized practice, speech, and behavior. As an instrument of authority and power, the law has procedures and processes to maintain a regimented method for the presentation of legal arguments. An argument is presented not as one continuous narrative, but as a narrative that emerges slowly, introduced piecemeal in writing and speech, with evidence offered in the form of witnesses and submitted documentation. The narrative, in effect, constructs the “facts” in the case, and the judge or jury decides the “truth”.

3.3.5 The Third Form of Court Narrative: Dramatization of the Narrative

One of the ways that law tries to distinguish “truth” is through the use of language. Each legal speaker communicates to an audience, be it judge, jury, or witnesses, with some form of activity, such as in writing or in speech, to build a narrative. The medium in which narrative tries to shape the legal world is language. Language is yet another social practice, part of a dynamic discourse that includes text and the social conditions surrounding its production. Understanding the social order is dependent on access to and mastery of discourse, including language, and how it is used in forums of power (Gibbons 1994).

In its delivery, the building of a legal narrative is a communicative activity (Baron and Epstein 1997: 142) with a storyteller attempting to convince the audience of the “truthfulness” of their side of the story based on evidence in the form of “facts”. It is frequently difficult to determine if the facts were taken to derive the narrative or if the narrative constitutes the facts (Potter 1996). According to Weisberg (1996), lawyers create a version of a narrative most conducive to supporting their legal argument. The narrative must be formulated within the limits of acceptable legal practice and must not violate credibility or ignore facts that are already established, but should push the limits of objectivity by extending possibilities of meanings and justify the storyline (Weisberg 1996: 66). This is done to invoke and employ emotion in the act of persuasion, and in doing so, win the case.

Other rhetorical strategies are also employed to construct narratives within arguments (Baron and Epstein 1997: 148); analyze proceedings to render scholarly insight on the law, society, and culture; or formulate and steer judicial opinions (Weisberg 1996). These strategies are based on legal reasoning within narratives. Legal reasoning is a particular line of thinking that builds a case with logic, designed to lead listeners to a desired conclusion as much by inference, metaphor, and imagination as by scientific reasoning and logic (Dworkin 1998). It includes a logical pathway from the start of the first statement, expanding the argument step-by-step using examples based on facts, witnesses, and legal precedent to come to a

“reasonable” conclusion.³⁴ James Boyd White, the Hart Professor of Law at the University of Michigan, instructs law students through his textbook, *The Legal Imagination* (1985) to be ‘manipulative and conceivably dishonest’ (White 1985: 93), employing rhetoric so that the audience ‘get[s] a sense of the meaning of things’ (Ibid.: 3), even though the jury and judge are conflicted between an obligation to legal fairness (duty) and a personal view of what is “right”. He advises students to use exclusions and silences to infer meanings that are ambiguous enough to allow for future interpretations, but clear enough so general social assumptions will be concluded. If told effectively, legal narratives ‘appear to be the truth, regardless of what actually occurred’ (Whalen-Bridge 2010: 229). In effect, legal narratives are a creative version of the “truth” as presented by an attorney and supported by elements of evidence. In this way, lawyers use narrative to develop strategy for effective presentations in court.

Lawyers are trained to deliver narrative in ritualized, rhetorical delivery. In court, the lawyer is an actor, using verbal and non-verbal forms of communication to create an enthymeme to reach the desired conclusion. An enthymeme is a statement in which all facts are not explicitly stated, but enough are supplied to allow conclusions to be drawn based on personal experience and belief (Sherwin 2009: 105). The goal of delivering a “performance” in court, as in theatre, is to elicit certain responses that will lead the “audience” to reach specific conclusions favorable to the client. This is accomplished by triggering expectations, drawing on personal schema, or mental blueprints of how we should or should not feel about situations and thereby exploiting listeners’ world knowledge (Sherwin 2009). Ritualized speech is employed to provide specific articulations imbued with particular legal meanings. There is an emphasis on accuracy in utterances to ensure that meanings cannot be misconstrued. In fact, many of these “expert utterances” are so carefully and thoughtfully worded that they cannot be paraphrased without misconstruing meaning (Boyer 1994: 91).

³⁴ “Reasonable” is a term used in the court. What is considered reasonable is frequently determined through a test developed by the court.

3.3.6 Legal Narrative Performativity

The performativity of narrative in the law has, in recent years, been the subject to much scholarly interest (Amsterdam and Bruner 2000; Brysk 2013; Butler 2012; Fraser 1995). Theories of performativity are based on the transformative power of communication and how it demonstrates rights to power (Derrida 1971; Lyotard 1988; Saussure 1922 cited in Daylight 2017), or as Brysk (2013) calls it, the ‘politics of persuasion’ (Brysk 2013: 1). Legal performance studies stress the cultural organization of communicative processes, explore how language is structured, and review individual speech act performances as part of multiple concurrent discourses. These studies also investigate the impact of language on broad historical narratives of race, ethnicity, belonging, and rights (Bauman and Briggs 1990).

Cover’s work on the relationship between violence, society, narrative, and law has provided a basis for many performance-based theories. Cover stresses that since law is located in text, and the text is always prepared in narrative form, then the study of legal narrative can provide insight into how the world is organized and how law attempts to shape the world (Cover 1992 cited in Gearey 2010). In this theory, the world does not have a fixed order, but instead, we are constantly creating a world of right and wrong, and trying to enforce it through laws or prescriptions. ‘Every [legal] prescription’, writes Cover, ‘is insistent in its demand to be located in discourse – to be supplied with history and destiny ... explanation and purpose’ (Cover 1983 cited in Minow, Ryan and Sarat 1995: 96). Legal prescriptions, he continues, and the meaning of law, with its moral prescriptive points, can only be understood in relation to cultural norms. Those norms, in turn, can only be understood through models provided by narratives (Minow, Ryan and Sarat: 99-102). Such narratives in law are shared through performative speech acts.

Performative speech acts demonstrate a level of power held by a performer over an audience. The actor, by presenting in court, is a figure of authority substantiating, or acting upon fact, which is “the story”. The concept of performativity emerged from J.L. Austin’s speech act theory, whereby a performative is an utterance that creates the object of its speech, as well as providing meaning and value. According to this conception, speech has the power to call something into being, independent of any

other action (Austin 1975). This is particularly true in the courtroom as an orator is given the authority by court regulation and custom to “speak” orally and in writing; is granted a level of recognition; and through presentation, may influence a higher authority, say a judge or jury, to bring about social change. Performativity is therefore Foucauldian; every court participant is involved in the hierarchy of court regulation and each is recognized as having a distinctive authoritative power whose discourse and rhetoric can impact future social conditions.

In order to be effective in law courts, performative speech acts must reflect current social norms. The use of heritage narratives, for example, mirrors the cultural values of the associated public. Every time a statement is made in writing or in speech, it may have the same content as a previous statement, but it is in a new context, resulting in new meanings with the potential to cause different changes in society. Performativity studies stress the cultural organization of the communication process (Bauman and Briggs 1990) and ‘view the study of power as attempts to theorize features of cultural domination as well as the possibilities of resistance to and subversion of such domination’ (Allen 1998: 456). When applied to law, performativity studies focus on the ways in which people and their linguistic tools are constrained or empowered by the structure of the law, its authoritative proceedings, and institutional regulation. The theoretical framework of performativity has much in common with other cultural empowerment processes, such as human rights discourses, minority sovereignty discourses, and feminist discourses, as they are all, per Brysk, ‘speaking rights to power’, or have the potential to break bonds of subservience from forms of authoritative state power (Brysk 2013: 1).

The foundation for performativity theory returns to Habermas’s concept of the “public sphere” in critical social theory (1996). The public sphere mediates between society and the state and provides a place where democratic political participation occurs through open communication. In the public sphere, norms are legitimized based on discussions. Those discussions become administrative power, which then gets translated into legislated policy. Courtrooms are one form of authorized public sphere for negotiation between discourses. In Habermas’s framework, political democracy does not require social equality, but all participate as if they were social

equals. This open and accessible discourse can lead to consensus about the nature of the common good, the basis for law. However, social inequality cannot be denied or ignored, but must be acknowledged. Feminist theory, in this case, can be applied to hegemonic discussions of forms of dominance of one social group over another.

Feminist theorist Nancy Fraser (1990) challenges Habermas's theory of the public sphere. Fraser notes that by definition, as a place of power, the public sphere is exclusionary. Through exclusion, there is a lack of participatory parity in the framework and this can generate social inequalities. Excluded groups, having less power, are subordinate in society and internalize their social positions, suffering distortions, or "misrecognitions" of who they are. This prevents them from developing a positive cultural identity. She asserts that groups form "counterpublics", or oppositional entities that function outside the official public sphere. Subaltern counterpublics want participatory parity, and create alternative discourses with new interpretations of their identities, and clarifications of their needs and desires in response to exclusionary policies. Fraser's "identity model" theory proposes that factions contest imposed depictions, reject negative images, and build new collective self-representations. In doing so, they challenge the authorized public sphere by bringing to the forefront issues that would otherwise be ignored. Within this alternative model, Fraser disputes the Habermas conceptualization and theorizes that the public sphere is not a unified democratic entity, but instead is one part of a larger system composed of many publics in conflict over power (Fraser 1990).

This provides a new framework for understanding Native Hawaiian discourse and social negotiation in the public sphere of the courts. Fraser's model can be applied to the legal process where adjudication (dispute resolution and legal ruling)³⁵ is not only about interpretation, it is a demonstration of power between discourses in the public sphere (Cover 1986). In the conflict between oppositional public spheres, different narrative genres compete for the judge's attention (Sherwin 2009). Legal interpretations consequently can be seen to reflect the opinions and perspectives of a

³⁵ Cambridge University Press, n.d., *adjudicate*. [Online] Available at: <http://dictionary.cambridge.org/dictionary/english/adjudicate> [Accessed 11 January 2018].

principal group, and those who do not share the dominant perspective are frequently silenced or excluded from the discourse (West 1993). Subaltern challenges within the authorized public sphere have the potential to force consideration of excluded voices. In the end, Fraser dismisses Habermas's model as an ideal of democratic society that can never be realized since social equality cannot be achieved as long as inequality is advantageous to dominant groups (Fraser 1990). Instead, subaltern counterpublics, such as Native Hawaiian activist groups, serve to confront society through movements for change. Fraser sees these counterpublics 'joining collectively to produce a new self-affirming culture of their own – which publicly asserted, will gain the respect and esteem of society at large. The result when successful, is "recognition": an undistorted relation to oneself' (Fraser 2000: 110).

Gender theorist Judith Butler (1993) asserts that individuals within the counterpublic may themselves be changed by involvement in the process of activism. Although Butler's work is concerned primarily with gender, it additionally focuses on performativity, the way actions, including communication, serve to form identity. In her conceptualization of the construction of personal identity, there is much relevance to heritage studies, since gender, like ethnicity and nationalism, is culturally formed. Cultural definitions, she maintains, cannot sustain themselves but must be continuously performed, or "cited", to be reproduced and maintained (Butler 1993). This concept of "citationality" is Derridian and refers to repetitive acts of mental "coding" that frame our contextual understanding of the social conventions of language (Derrida 1971). Continuous and repetitive courtroom discussions of Indigenous ritual or description of cultural protocol to prove relevancy under the law can be considered citational and may serve to contribute toward a redefinition of "Hawaiianness".

Butler considers that an individual's behavior creates their gender, or by extension, their ethnic identity. The way you act and speak, she claims, the performance of who you are is the role you live in society. Performativity, which serves to produce a series of effects, continually creates and shapes your identity (Butler 2012). This theory presumes that the speaker has the power to bring into being the identity they communicate by rejecting a projected, labeled categorization in lieu of an identity

that “is” a doing. ‘Identity [in this way] is performatively constituted by the very expressions that are said to be its results’ (Butler 1990: 25). Repeated performances of personal expressions of selfhood change identity and overthrow previous norms. In simpler terms, behavior that is expected supports the existing norm; performed differently, the norm can be subverted. Subversion, however, Butler states, requires ‘a regularized and constrained repetition of norms. Reiteration creates space for citations with potential to subvert the norms itself as a “privileged interpretation”’ (Butler 1993).

This is, according to Allen (1998), a paradox of Foucault’s subjectivication³⁶, where regulatory power produces, regulates, and controls the formation of identity (Allen 1998: 459). The subject’s ability to speak is shaped by the surrounding discourses and their position in social structures (Heller 1996: 330). Through Butler’s theory of performativity, the subject who resists the norms ‘is enabled, if not produced, by such norms’ (Allen 1998: 15). Native Hawaiian participation in the courtroom can be seen as an example in this process. Native Hawaiians, through land claim cases, are both resisting current definitions of Hawaiian identity and capability, and challenging authorized notions of the past. In the process, they are enabling the creation of the very identity they are performing.

3.3.7 Performativity and Indigeneity

Performativity theory is very relevant to the study of movements for Indigenous recognition and empowerment through the law. All knowledge, explains Saussure, is produced by human statements (Saussure 1922); and within it, ‘consciousness is the first step towards emancipation’ (Fairclough 2015: 229). Bruner proposes that the use of certain words and rhetorical forms employed in narratives is culturally significant since they trigger memories and emotions that change the way we perceive ourselves. Through purposefully re-envisioning events and retelling stories, marginalized Indigenous peoples can reflect on their memories of events and redefine themselves

³⁶ British Journal of Sociology of Education 27 (2006), 511-528. [Here Foucault (1982) is referenced. According to Foucault, the word “subject” when applied to individual identity has two meanings: the individual is “subject” to external power by ‘control and dependence’, and also “subject” to one’s own self-identification and knowledge. Also per Youdell’s analysis of Foucault, a person is ‘subjectivated, or simultaneously ... rendered a subject and subjected to relations of power through discourse’.]

by how they recall the past. This redefinition of who they are and how they can use this knowledge is empowering. This can occur through efforts to represent themselves in public spheres by refocusing existing stories, researching and building new narratives, subverting existing power relationships, and reframing identity. In this, Bruner confirms the applicability of the identity construction theory of Butler:

[The] culturally shaped and linguistic processes, that guide the self-telling of narratives achieve the power to structure perceptual experience, or organize memory, to segment or purpose-build the very “events of a life. In the end, we become the autobiographical narratives by which we “tell about” our lives. (Bruner 1987: 15)

In their courtroom battles, Indigenous peoples, such as Hawaiians, are deconstructing Western paradigms, including academic concepts of the validity of only scientifically proven knowledge, and concepts of literacy tied only to written language (Romero-Little 2006). Robbins (2015) suggests that Indigenous peoples need greater political understandings and awareness of the state in which they live in order to know what is possible and thereby create feasible programs for self-determination. However, Liechty posits that this is not enough and that only in the context of post-colonial, self-conscious rediscoveries of heritage values can Indigenous court initiatives for claiming identity occur. He contextualizes such actions as being part of movements of post-colonial therapeutic transformation and recovery. He also suggests that they may have foundations in the Foucauldian theory of the “technology of the self”, the means by which humans develop knowledge of ourselves and create an identity on that basis (Liechty 2011: 529). Butler concurs and states that highly regulatory practices create and reinforce norms of identity that are constantly reiterated. This reiteration, she asserts, is indicative of an inherent instability in the norm that can be challenged through turning regulatory law against itself to create re-articulations of identity (Butler 2000).

It is within courtrooms that contemporary disputes of post-colonial discourse are occurring. It is here, in the structured and confined limits of the modern legal system, where Indigenous people are mining their ancestral knowledge to construct legal

briefs and claim title to their historic rights. In their witness testimony, they must present and defend their cultural knowledge. Through the language employed and the performance delivered, the transformative process of Indigenous empowerment is taking place. For it is through effective performance that the legal system provides Indigenous participants the opportunity and the means to engage directly in the system of power. Through effective performance as engaged and informed plaintiffs, lawyers, judges, and witnesses, Indigenous participants in the court process are performing and becoming the empowered identity they wish to be.

The legal cases in this study: *Kalipi v Hawaiian Trust Company* (Kalipi), *Pele Defense Fund v Paty* (Pele), and *Public Access Shoreline Hawai‘i v Hawai‘i County Planning Commission* (PASH) represent different challenges to the law protecting customary and traditional Native Hawaiian rights. They are sequential, with each case establishing precedent upon which the next case builds. Although they present different challenges to land use, there are distinct commonalities between the cases. Each case:

- Develops one line of legal reasoning, which is the Native Hawaiian traditional and customary access rights to land
- Explores the continued relevance of historic statutes
- Questions the importance of legal protections of Native Hawaiian culture and heritage
- Challenges definitions of Hawaiianness
- Requires definitive “proof” by the Hawaiian community of the existence and continuity of traditional cultural practices

Scholars take two positions on the conflicts within these particular cases. Native Hawaiian activists view such attempts to use Indigenous lands as continued affronts to their right to exist as a people with a unique national identity (Kauanui 2008; MacKenzie 1991, 2012, 2015; Osorio 2001). Others, including legal scholars who focus on real estate development in Hawai‘i, take the opposing position that protected cultural rights of an individual ethnic group are unconstitutional under American law (Callies 2010; Watamull 1994). Sullivan (1998) posits that in legal

cases such as these, ‘tension and uncertainty result when ill-defined, [or] unwritten “custom” is accepted or proposed as a valid source of rights in the real property of others whose traditional expectations include exclusive possessory rights and security of title’ (Sullivan 1998: 1). The land claims in the chapters to follow are representative of tension in Hawai‘i over interpretations of the past, and Native Hawaiian attempts to preserve and protect customs to guarantee survival as a unique culture. In each case, the process of legal argument and defense becomes a method of exploration of actual heritage practices and a reconsideration of what defines Hawaiian identity, custom, and belief.

Native Hawaiian historic rights to land impose restrictions on land development that creates an environment fraught with political tension. In recognition of this tension, a plan for investigation and data collection was developed at the start of the process of dissertation development. The goal was to develop methods of enquiry that would demonstrate respect for all viewpoints and perspectives, be culturally sensitive, and maintain an objective position. The development of the research methods adopted will be the subject of the following chapter.

CHAPTER FOUR METHODS FOR INVESTIGATION - FRAMING THE PROJECT

| | |
|---------------------------|---|
| <i>E iho ana o luna.</i> | (That which is above, will be brought below.) |
| <i>E pi'i ana o lalo.</i> | (That which is below, shall rise u.) |
| <i>E hui ana nā moku.</i> | (The islands will be united.) |
| <i>E kū ana ka paia</i> | (The walls shall stand upright.) |

Traditional Hawaiian Chant

I approached this investigation carefully and cautiously. I had embarked on research in Hawai'i for my master's degree in 2008, and was very aware as a non-Hawaiian, non-Indigenous researcher that the contemporary political environment in Hawai'i was fraught with increased tension over controversial initiatives for Native Hawaiian sovereignty and augmented pressure for land development. Through fieldwork at that time I came to understand that it was essential to approach any scholarly exploration in Hawai'i, including potential fieldwork within the Native Hawaiian community, with an awareness of the complex social, political, and economic issues at hand.

In particular, the historic injustices of imperialism and colonialism have impacted the cultural heritage of Indigenous peoples. Memories of the appropriation of Indigenous knowledge, called "historical trauma", "intergenerational trauma", or "soul wounding" remain painful and contribute to poverty, drug abuse, incarceration, and other maladaptive behaviors (Lambert 2012: 45), and figure prominently in the literature of contemporary struggles for Native Hawaiian self-determination (Goodyear-Ka'opua, Hussey and Wright 2014; Trask 1999; Sai 2008). As a consequence, research in the Pacific is imbued with political anxiety of past injustices done to Indigenous peoples and is viewed as perpetuating imperialism in the quest for scientific knowledge (Smith 2012).

Increased Indigenous activism and the growth of the field of Indigenous scholarship have contributed toward this tension by promoting heightened suspicion of the motives and objectives of foreign researchers (Smith 2006). Activists instead advocate for a shift in the politics of representation (Smith and Waterton 2009), a taking back of academic scholarship for the promotion of research from an Indigenous perspective. Native Hawaiian activists suggest communities protect traditional knowledge by privileging Indigenous scholarship over non-Indigenous scholarship (Smith 2012). As a result, Indigenous communities are reluctant to participate in ethnographic studies conducted by foreign or non-Indigenous researchers (Castellano 2004; Martin and Mirraoopa 2003). The result is reduced access to interview subjects for non-Indigenous scholars and a concomitant decrease in community cooperation. In particular, ethnographic research based on cultural knowledge by Western academics is viewed by Native scholars as “liberal individualism” or “knowledge for knowledge sake”. It is subject to intense criticism for its focus on scholarship to advance Western understandings but not to benefit Indigenous causes (Beamer 2014; Goodyear-Ka‘opua, Hussey and Wright 2014; Perkins 2013; Smith 2006.) Overcoming such tension and suspicions requires methodologically creative approaches for investigation, which are supported and encouraged by the nascent field of heritage studies (Sørensen and Carmen 2009).

The cooperation of Native Hawaiians was essential for the successful completion of this dissertation. In-depth interviews were needed to gain insight into the meaning of culture, heritage, practices, land, traditional values, and identity, all of which are vital components of heritage-based land claims. Research methods required the inclusion of sensitive and considerate advances to community members for interviews; a thorough identification and recognition of appropriate Indigenous cultural protocols; acceptance by acknowledged leadership within Native Hawaiian networks; and clarified and accepted parameters for discussion, observation, and participatory documentation.

Indigenous protocols were particularly important. According to Maori scholar Karen Martin, they provide information that helps to identify someone’s cultural affiliation so that relationships can be established ‘on political, cultural and social grounds’

(Martin and Mirraoopa: 2003). The methods had to be extremely flexible and highly responsive to information obtained during fieldwork and guidance received gradually from experts on Hawaiian culture, politics, and society.

A research plan emerged during initial consultations within the Hawaiian academic community, and accommodated multiple perspectives on knowledge acquisition and alternative worldviews (Kovach 2009) while establishing boundaries (Gill and Temple 2014) and setting up collaborative relationships. The flexibility of the design emerged during consultation with community members, and it was subsequently revised through guidance from activist leaders and Indigenous scholars. The success of my fieldwork was based on my ability to gain acceptance into the Native Hawaiian community, and this was dependent on my capacity to learn from expert guidance. In the end, Indigenous cultural protocol dictated the actions needed to create and foster the relationships crucial to the success of this dissertation.

4.1 Research Process: Methods for Investigation

This dissertation utilizes elements from several types of theory to produce an innovative methodological approach. The primary theoretical perspectives employed are theories of narrativity, identity formation, and nationalism. I applied a mixed qualitative method approach of ethno-historical (Andrews 2009), socio-legal, and legal narrative analyses (Andrews 2007; Bruner 1987; Clandinin 2007) with content analysis (Pickering 2004). I incorporated elements of grounded theory for constant comparisons, coding, and thematic sorting (Bryman 2016; Silverman 2005), and informed and supported my research with ethnographic semi-structured interviews and participant observation (Jones 1991) in recognition of Indigenous protocol (Denzin, Lincoln and Smith 2008; Kovach 2009; Smith 2006).

The methods selected are each distinctive, but complementary, and address different areas of the dissertation. Coding, grouping, and thematic categorization were used for assessing and comparing the primary issue within each court case. Constant comparison was used to compare the case data so that themes could begin to emerge. Semi-structured interviews and participant observation were utilized to determine the

personal experiences of interview subjects and provide insight into Hawaiian culture and meaning making within constructed narratives (Gill and Temple 2014; Silverman 2005). Content (Pickering 2014) and legal narrative analyses (Amsterdam and Bruner 2000; Bruner 2002; Clandinin 2007) provided a means to examine the social and political effects of narrative performance in the courtroom; the impact of specific forms of rhetoric in law; the maintenance and legitimization of hierarchies of power; and the use of legal process for social change (Clandinin 2007; Fairclough 2010 cited in Smith 2006: 16).

4.2 Locate, Document and Classify Land Claim Legal Texts

Textual data collection was completed in three stages: fieldwork foundations; completing a literature search on Hawaiian history, culture, and heritage; and the development of a database of lawsuits in Hawai‘i.

The foundations for fieldwork began early in dissertation development. In preparation for the visit to Hawai‘i, I re-established contacts in the islands and initiated new affiliations for support and guidance. I used Native Hawaiian contacts made during prior research in Hawai‘i to request assistance in data collection, and subsequently received guidance by experts in Hawaiian culture, law, and politics. I was advised to develop a local research affiliation, build networks of contacts within the community, to learn Indigenous protocols, and to be very patient when waiting for responses. I was informed that in remote island communities local academic affiliations are paramount and the ability to function successfully within political social and economic spheres is dependent on building and maintaining positive social relationships.

My initial connections led to the building of wider networks within the Native Hawaiian diasporic community as well. Multiple networks would ensure that any inadvertently inappropriate cultural behavior did not preclude further opportunities to interview Native Hawaiians in Hawai‘i. To build these networks, I contacted friends and family members along with professional and academic colleagues throughout the continental United States for introductions to relatives, business associates, and

acquaintances who either were Native Hawaiian or who had contact with Native Hawaiians. Many people responded to my requests for introductions and through these new connections I was able to slowly expand my network within Hawaiian society. This expanded network set the foundation for ethnographic interviews during fieldwork conducted in 2014 and 2015.

In Hawai‘i, a local institutional research affiliation was required to support my research objectives, validate my scholarly undertakings to the Native Hawaiians, and build effective and supportive networks for investigation. The institution with the greatest potential for interaction within the University of Hawai‘i and the Native Hawaiian community was the US Government funded East West Center, an Oceanic/Pacific and Asian research study center located in Honolulu. The East West Center is located adjacent to the University of Hawai‘i at Manoa on Oahu. It has a close affiliation with the University and offers an affiliate scholar program for foreign graduate students enrolled abroad to participate in international forums and discussions on national and international development and research. It also provides limited access to UH library resources.

The East West Center encourages and supports cross-cultural and interdisciplinary discussions, facilitates international Pacific/Oceanic cultural understanding, and promotes research on subjects of common concern throughout the region. I became an Affiliate Scholar at the Center and engaged in discussions that resulted in friendships with Indigenous students and professional researchers from throughout the Pacific. The friendships provided an opportunity to learn about common cultural practices and afforded occasions to discuss perceptions of the issues of decolonization and self-determination. I learned very general Pacific Island cultural protocols for gathering data including how to approach potential interview subjects, request interviews, and present my objectives. Several of the students and administrators at the East West Center are Native Hawaiian and they actively supported and encouraged the different phases of my investigation. Most importantly, my affiliation with the East West Center lent local credibility to my research efforts within the Native Hawaiian community. The geographic isolation of the remote state of Hawai‘i in the middle of the Pacific has produced an inward-

focused perspective on the world elevating state economic, social, and political concerns and reducing geopolitical issues to secondary discussions. Local academic and professional affiliations are therefore more important to Native Hawaiians than foreign credentials.

My text collection was completed by first conducting a literature review, and then undertaking two periods of fieldwork in Hawai‘i to conduct interviews and gather legal documentation. I returned to Cambridge University to organize the data and analyze cases.

I began my research by conducting a thorough literature survey on Native Hawaiian history and culture. My goal was to explore multiple perspectives on theory, heritage, culture, and tradition, and to understand the nuances and complexities inherent in alternative historical viewpoints including post-settler, post-colonial, Indigenous, and Native Hawaiian. Since historical reporting has a temporal and social context, a wide range of documents were read pertaining to Hawaiian history, heritage, and culture. These ranged from *The Works of the People of Old* (Kamakau 1976) and *The Legends and Myths of Hawai‘i* (Kalakaua 1888), to *Autobiography of Protest in Hawai‘i* (Mast and Mast 1996), *Sovereignty Matters* (Barker 2005), and *A Nation Rising* (Goodyear-Ka‘opua, Hussey and Wright 2014). Due to the specificity of the topic and the contemporary nature of the investigation, numerous texts were shipped from Hawai‘i or were accessed only during fieldwork. This research provided a basis for understanding the social, economic, and political issues contained within the case study lawsuits, knowledge that was critical for determining applicability to this study.

I subsequently conducted a thorough review of available resources for data on State of Hawai‘i land claim lawsuits in an effort to locate, document, and classify land claims. There were three proprietary resources and one that was public (online). Library and online databases were searched for legal information about American law in general and for specific case law in Hawai‘i. The three applicable legal search engine databases for US lawsuits are private and provide information from scholarly law journal articles, the primary source for analysis of US court cases, court case

summaries, and judgments. The databases include HeinOnline, NexisLexis, and Westlaw.

HeinOnline and NexisLexis were accessed using keyword sorting to find law journal articles related to Native Hawaiian land use cases. Each article, or case, was reviewed for relevancy and the applicable articles were downloaded with the keyword from the search noted on the cover page. The downloaded articles were used to begin development of a more specific coding classification and data organization system for the lawsuits. The most successful keyword phrases were used to search Westlaw US International, a database of US lawsuits. Lawsuits were briefly read to develop an identification system by type of claim. Those lawsuits found to contain topics related to Native Hawaiian heritage for control or access to land were downloaded and placed in existing or new files. All retrieved information was noted on a spreadsheet and coded with thematic divisions by court case, year, type of claim (i.e. access rights, religious practice), objective, claimant, defendant, witnesses, location, and cultural heritage impacted. Accompanying case files were created and cross-referenced with supporting documents for each lawsuit, including available online court transcriptions, associated scholarly articles, available testimonials, and supporting evidence including Environmental Impact Statements (EIS) and Cultural Impact Assessment (CIA) reports.

There is only one public online database in Hawai'i that contains state lawsuit information. All other court lawsuit archival documentation is available only in hard copy within the State of Hawai'i Historical Archives, the State of Hawai'i Judicial Archives, and selected public libraries in Hawai'i. Only two sources were accessible from the United Kingdom: the State and Federal websites.

The State of Hawai'i database was accessed using my embedded keyword search categories. I copied summary court judgments for lawsuits involving Native Hawaiians or issues concerning Native Hawaiians then cross-referenced them with

previous findings to confirm which lawsuits involved land and Native Hawaiian heritage.³⁷

Transcripts of court proceedings and other supporting documentation used to verify heritage claims in court are not included in the summary court proceedings but are crucial data for an investigation of how heritage is presented in land claims. Under both state and federal law, they are part of the public record if documented, and must be made available to researchers. However, due to budgetary difficulties, the State of Hawai‘i does not record all court presentations and did not begin video recordings until 1997.³⁸ As a result, transcriptions of court proceedings are limited. If they exist, they are held in specific court archives either as recordings or as typed manifests. They have not been digitized and they are only available for researchers in person and by written request. I accessed the State Judicial archives during my second fieldtrip to Hawai‘i. I worked with court librarians to find and access relevant files on microfilm and I printed out each page separately, as the court regulations permitted. For this dissertation, all oral recordings found were transcribed, and hard copy documentation found was scanned, coded, and added to the existing relevant case files.

4.3 Investigate Cultural Impact Assessment Reports

Cultural Impact Assessment Reports are professionally-prepared documents that have been used in Hawai‘i since 1997 to determine the cultural and social impact of proposed land use on community values, heritage, and historic sites in land claim court cases. Environmental Assessments (EA) and Environmental Impact Statements (EIS), which are required by federal and state law before federally-funded projects commence or state land use permits are issued, must include CIA summaries.

³⁷ Summary court judgments are actual summaries of cases, and include the ruling judge’s comments concluding the case, or elevating it to another, higher court. If it is elevated, then another file is created within a higher court. Thus each case needs to be followed through the different courts, and through their respective sections of the databases. Ultimately each case is either resolved to the extent possible through the law, or a new case is developed under a different section of the law, and for a slightly different purpose.

³⁸ Hawai‘i State Judiciary, n.d., *Hawai‘i State Judiciary’s Public Access to Court Information*. [Online] Available at: <http://hoohiki.courts.hawaii.gov/#/search> [Accessed 15 October 2014].

Although the state provides guidelines for CIA preparation, there are no legislated procedures for their production.³⁹ Nonetheless, CIA summaries are used in court cases as supporting evidence of the impact on heritage in land claims. CIA reports are prepared either by, or in cooperation with, Native Hawaiian cultural experts and include heritage claims related to specific places and practices. The CIAs contain ethnographic interviews that aim to clarify relationships between local Native Hawaiian community members, document memories and narratives of the impacted site, and to determine, quantify, and qualify past and present traditional cultural practices. This type of information has significant value for this dissertation as it provides insight into Native Hawaiian culture and values.

Native Hawaiian academics who participated in the production of CIA reports gave me copies of report sections they had produced, and supplied names of the non-academic consultants who prepare Cultural Impact Assessments. I called seven recommended consultants and requested copies of CIA reports. All stated that the reports were proprietary information and could not be released without the permission of the client. One allowed me to review documents in his office. This confirmed the sensitive nature of this research in a charged political environment and the secrecy involved in substantiating claims of impacted heritage. In all, fourteen CIA reports were examined to determine the format, questions, methodologies, practices, details, and numbers of participants involved.

4.4 Case Categorization and Selection

A total of 176 cases were read and appraised and 111 were included in case files. The claims were classified by case category (theme). Seven categories were determined and include: Access, Kuleana, Archaeological and Burials, Water, Customary and

³⁹ State of Hawai'i, Chapter 343 HRS, stipulates guidelines for the completion of an Environmental Assessment for cultural resources. The Environmental Impact Assessment process was designed by the US Federal Government to inform national decision-makers of the likely consequences of their decisions. The process has been adopted by many state governments, and includes the preparation of an Environmental Assessment in accordance with state environmental regulations. The Hawai'i Environmental Policy Act is found in the *Guide to the Implementation and Practice of the Hawai'i Environmental Policy Act* (2012).

Traditional/Hawaiian rights, Nationalism, and Homelands (Hawaiian Homelands Commission Act or HHCA).

This categorization was used to organize the cases, sort all relevant data, and identify and classify cases for future analysis. Case files with documentation were cross-referenced within this system. Table 1 summarizes the reviewed cases and categorizes them by case ruling date. Figure 2 graphically depicts the trend in the volume of cases, by category, over time.

| | Access | Kuleana | Archaeology and Burials | Water | Customary and Traditional Rights | Nationalism | Home Lands /HHCA |
|-------------|--------|---------|-------------------------|-------|----------------------------------|-------------|------------------|
| 1978 - 1983 | 5 | 2 | 1 | 2 | 1 | 0 | 1 |
| 1984 - 1987 | 2 | 1 | 1 | 0 | 2 | 0 | 1 |
| 1988 - 1992 | 0 | 0 | 0 | 0 | 2 | 1 | 0 |
| 1993 - 1996 | 0 | 0 | 0 | 0 | 3 | 0 | 2 |
| 1997 - 2000 | 1 | 0 | 0 | 0 | 2 | 1 | 0 |
| 2001 - 2004 | 3 | 0 | 1 | 3 | 6 | 1 | 0 |
| 2005 - 2008 | 4 | 0 | 0 | 0 | 13 | 0 | 1 |
| 2009 - 2012 | 11 | 2 | 11 | 5 | 14 | 2 | 3 |
| | | | | | | | |
| Total Cases | 26 | 5 | 14 | 10 | 43 | 5 | 8 |

Table 1 State of Hawai‘i Native Hawaiian Case Analysis 1978-2012

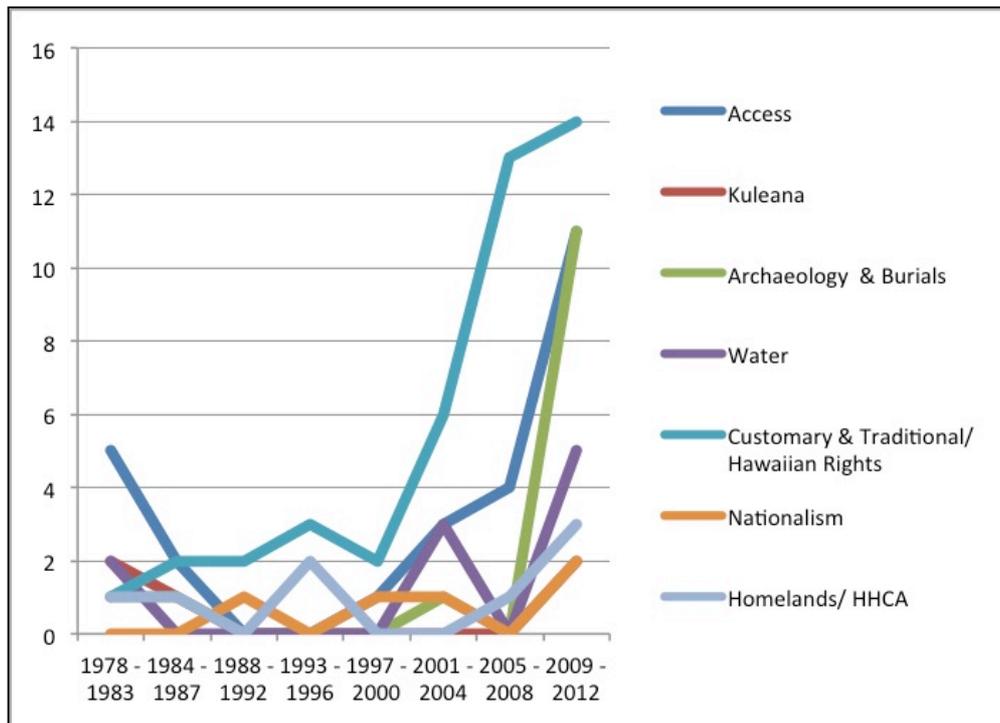


Figure 2 Comparison of Case Categories

As can be seen from Table 1, the category with the greatest number of cases is Customary and Traditional Rights, and these dramatically increased over time, as is apparent in Figure 2. Since many of the Customary and Traditional Rights cases involve access rights, which also increased over time, this subcategory was of particular interest.

Within the Customary and Traditional Rights category, the land claim lawsuits follow a particular line of legal reasoning with the most meaningful cases relying on precedent established during previous rulings. Three cases emerged as significant in the development of this particular line of reasoning: *Kalipi v Hawaiian Trust Company* (or “Kalipi”), *Pele Defense Fund v Paty* (or “Pele”), and *Public Access Shoreline Hawai‘i v Hawai‘i County Planning Commission* (or “PASH”). The decision to use these cases for study was based on the cumulative results of the case review, availability of documentation, and the significant body of scholarly work in legal journals examining this particular line of reasoning on these specific cases. These same cases have also been the topic of discussion in contemporary scholarly work by Native Hawaiian academics. The importance of these cases was confirmed by Native Hawaiian scholars and lawyers through interviews, and the issues argued

can be viewed as representative of larger social and cultural concerns within the community (Wallman 2006).

4.5 Fieldwork: Ethnographic Research on Heritage and Nationalism

I conducted fieldwork sessions in Hawai‘i in 2014 and 2015. Each fieldwork session was based in Honolulu and lasted for four months. During this time I visited the islands of Oahu, Maui, Hawai‘i, and Kaho‘olawe to collect documentation, conduct interviews, and observe and participate in cultural, political, and social events within (or related to) the Native Hawaiian community. I accessed archival court documentation by visiting six courthouses, two land use commission offices, one county office, the State Archives, the University of Hawai‘i historical archives, the Supreme Court Library, and the Department of Land and Natural Resources. All documentation was accessed through prior, formal request and was retrieved from hard copy files, microfilm, or microfiche. In Hawai‘i, court testimony is the property of the court reporters. I mailed requests to eight court reporters from the selected court cases in order to purchase court transcriptions. Two court reporters had died, four sold limited copies to me, and two did not respond.

Recognizing that the concept of community cannot be defined as one group in one location (Smith 2012), I conducted interviews with Native Hawaiian activists, academics, community leaders, professionals, students, cultural practitioners, lawyers, judges, and community members throughout the islands. A total of fifty-six interviews took place with eighteen recorded on audio and thirty-eight documented in written notes. Twelve interviews were with non-Hawaiian political leaders, lawyers, and other participants in the land claim processes. An additional nine interviews were transcribed from publicly available videos. Most interviews were conducted in-person with nine conducted via telephone. Two interviews were withdrawn after completion. Native Hawaiians advised me to build relationships based on personal interaction and to avoid formalizing affiliations. Confidentiality forms were therefore not proffered due to the sensitive nature of the topic, the insular social networks, and the tense political environment. Instead, audio recording requests were made with the assurance of anonymity for this dissertation. I was advised by a former Supreme

Court Clerk to not record former Justices in order to ensure a more relaxed and open discussion. As a result, several interviews were documented only through written notes.

To complete this stage of my fieldwork, I combined the qualitative methods of semi-structured, open-ended ethnographic interviews with participatory observation. The interviews were semi-structured to allow for open-ended questioning and were flexible to enable the subjects to freely describe their culture and the world around them (Bryman 2016). Passive participatory observation, with occasional invitational involvement in selected closed political and social forums contributed toward building credibility in the community and also provided an opportunity to gather information on worldviews and perspectives through surveillance, note-taking, and digital recording (Ibid.).

My initial interview was very informative. I developed an interview format and a list of potential questions. I tested them out by asking a Native Hawaiian student at the East-West Center for an opportunity to speak with him privately to learn more about Hawaiian culture. We sat casually in the lobby of the East-West Center dormitories for our interview. However, rather than discussing his perceptions on Hawaiian culture, his concerns were how our discussion might affect him economically and politically. This was a theme that would surface many times in speaking with Native Hawaiians. Hawai'i is a very expensive place to live and out of necessity students primarily live with their families while going to university and hold jobs to contribute to the family income. This student was living at the university dormitory and being supported by a scholarship. He was hesitant about being interviewed and told me that he was reluctant to speak with me for a number of reasons: fear of jeopardizing his scholarship; his ability to graduate; and alienating the community of scholars, activists and students in which he worked and lived, or the community in which he had been raised. He apologized for agreeing so readily to the interview and stated he required some sort of confirmation from Native Hawaiian leaders to validate my acceptance as a researcher. Briefly, he told me that his culture was the essence of his being and he could not separate his identity as a Hawaiian from the physical environment of the islands. Even relaying this small piece of information made him

uncomfortable and he retracted his statements immediately after making them. He apologized for agreeing to speak with me and left the room.

This first interview revealed the student's fear and distrust of my motives. His awareness of the potential repercussions for his involvement were palpable and as a result, the appointments of all subsequent interviews were scheduled through networks established with the assistance and cooperation of Hawaiian leaders, activists, and academics. Introductions would provide community members confirmation of the accepted nature of my research and establish credibility for my research endeavors. By following accepted protocols, I demonstrated my understanding and acceptance of Indigenous methods of research. An initial list of protocols was provided by Hawaiian academics and the list was expanded based on my success during interviews. I was told to approach the community with gratitude and a great deal of humility and to show respect for the Indigenous knowledge that was being transmitted along with deference to the person who had agreed to transmit.

Gathering data in this Indigenous community thus became a learning process in Indigenous epistemologies and protocol as well as a fact-finding mission for data collection. Gaining consent for an interview did not guarantee active participation. To begin to understand Indigenous culture and knowledge transmission and avoid misunderstandings, my Indigenous academic and cultural advisors told me that I needed to try to learn in new and different ways and to find value in silences as well as in verbal descriptions and explanations. This would help me to understand the social contexts and symbols (Mead 1934) inherent in the webs of significance in island life (Geertz 1973) and in Native Hawaiian identity. Cultural leaders and Native Hawaiian academics advised me to follow Indigenous protocols when interacting with the community and to not discuss myself or present my opinions. It was difficult, but transformative. I learned through interviews with numerous Hawaiians to 'ride the wave', and 'go on my personal journey where it would take me'. I was told to not ask questions, to not use my hands, to be aware of non-verbal cues, and to recognize different forms of tension in the air. My ability to absorb and respond grew appropriately over the course of my fieldwork. I sat still for longer periods of time, spoke less, and listened more intently.

As time went on a greater number of requested interviews were granted. I also realized that I had been the object of observation. I had been patiently watched and carefully monitored by members of the Hawaiian community who were vetting me for my ability to hear their voices and learn from their ways. I eventually passed muster and gained their trust for my efforts and persistence. Word spread that I had gained the smallest amount of credibility and doors opened for interviews that had previously been closed. In particular, my familiarity and experience with Indigenous protocols became an important analytical tool as it allowed me to ‘pick up on coded or abbreviated language’ (Gill and Temple 2014: 9) and gestures.

As per guidance, my gratitude was evident and effusive. An interview, a cultural *kupuna* and a Native Hawaiian academic informed me, is seen as a gift of Indigenous knowledge to the interviewer, a sharing of information that could not be transmitted any other way. In return, I showed my appreciation by presenting a reciprocal customized gift to demonstrate my gratitude.⁴⁰ Each interviewee evaluated the gift and my ability to listen and observe. Their assessment determined the length and depth of the interview and what type of information would be transmitted. My first interview lasted ten minutes; during my second period of fieldwork, my interviews lasted between one and three hours.

Each prospective interview subject was contacted with a highly personalized email acknowledging their skills, achievements, and community position; stating the name of the referring individual; noting the purpose of the contact; my background and affiliation; and identifying my research goals. The emails also included an appeal for guidance and assistance, a request to learn from the potential interview subject, and a request for an interview at a convenient time, and in a place of their choosing. When I arrived at each interview, I asked for permission to record the session. On the actual recording, I introduced myself, introduced the interviewee, stated the date, provided a short biographic history of my professional background, and again requested

⁴⁰ Typically interview subjects are not financially recompensed for their participation. In this case, cultural protocol dictated the exchange of gifts for information.

permission to record. I explained that I wanted to learn about Hawaiian culture, heritage, and leadership directly from Hawaiians. I also expressed my interest in learning about intrinsic values in Hawaiian culture from community members. I asked a minimal number of questions and allowed the speaker the freedom to develop the direction and topics of the interview.

If permission was granted, the interview was recorded on my iPhone and transferred to my computer that evening. Each recording was assigned a reference number for security and the names of the interviewees were saved separately. All taped sessions were later transcribed, and observations recorded in a separate notebook.

Observations included appearance, atmosphere, non-verbal communication, and location chosen (Schensul 2008). Interviews were analyzed using content analysis to determine themes (Ibid.). The following dimensions (themes) of identity emerged as profoundly significant:

- Cultural memory
- Indigenous nationalism
- Ethnic affiliation
- Civic participation

These dimensions would be employed in the examination of land claims data to help determine the impacts of narrative construction on Native Hawaiian identity

I observed Native Hawaiian activist rallies, commemorations, religious services, organizational meetings, communal activities, and cultural practices. I also participated, by invitation, in four traditional ceremonies, six social gatherings, four political/activist meetings, and one spiritual retreat. Interview notes, observations, and participatory events were documented through journal entries and photographs.

4.6 Challenges in Data Collection

There were numerous challenges investigating land claims in Hawai'i. Each challenge was resolved by befriending various staff and community members during

the fieldwork. With their assistance, I developed workable solutions for the timely collection of data. The challenges were:

Archival data collection in Hawai‘i is problematic. The State has been slow to digitize, centralize, and cross-reference judicial archival records. The hours of entry and access to repositories are limited, the records are incomplete, and reproduction of documents is tightly controlled. When reference materials are found, they are either on microfilm or delivered to researchers from archives in large, unsorted boxes. There is only one aged microfilm machine per courthouse. The microfilm printing process takes approximately thirty seconds per copy and the machines overheat after several hours of use. Archival storage boxes must be searched manually to find requested documents and the documents can only be photographed or manually copied. No photocopies are permitted.

Data collection was very time-consuming. The islands operate with a slow, leisurely pace. As a result, it was difficult achieving fieldwork goals in a timely manner.

Access to academic resources in Hawai‘i is restricted to enrolled students. The UH Library and The UH Richardson School of Law Library have restricted usage to only currently matriculated students. The University of Hawai‘i is challenged financially and chronically understaffed. As a result, the UH library and the law library severely limit access to resources, including the library, databases, electronic resources, classes, and lectures. Additionally, legal research must be done with the cooperation of law school students or with the law librarian.

Written transcripts of oral court testimony were limited. The State courts do not record all court testimony. If the case does not have recorded oral testimony, or transcriptions of oral testimony, then the record of evidence presented to support claims of heritage significance is incomplete. This makes it very difficult to analyze the heritage claims in many court cases.

Cultural Impact Assessments are not required by law. CIA reports, which are used as evidence in courtrooms, may be presented in court, but are not required by law, and

therefore are not typically submitted for the public record. Instead, most CIA reports are owned by consulting firms that are commissioned to prepare them for their court cases.

Interviews required an extensive amount time to set up. Native Hawaiians need to verify the intent and background of a researcher before agreeing to an interview. It may take weeks, months, or years to obtain an interview.

Culturally appropriate behavior is difficult to determine. There are no written guidelines on Hawaiian protocol or culturally appropriate behavior in the Native Hawaiian community. Inadvertent insults or offenses will jeopardize the possibility for future interviews. For example, repeating a request for an interview is considered offensive and will result in a prolonged delay or rejection of the request. It is not considered acceptable to ask what was offensive. Alternative entry points into the community were therefore required to ensure continued interaction within the Native Hawaiian population.

Local credibility is critical for community acceptance and was difficult to achieve. As stated previously, the geographic isolation of the remote state of Hawai‘i in the middle of the Pacific has produced an inward-focused perspective on the world, elevating state economic, social and political concerns, and reducing geopolitical issues to secondary discussions. Local academic and professional affiliations are therefore more important and have greater credibility than foreign, or mainland ones. As a result, it was essential to establish firm academic and professional associations before attempting fieldwork in Hawai‘i.

4.7 Methods for Case Examination and Analysis

The selected court cases were examined as interpretive acts, a type of discourse based on narrative and performativity (Simons 2014) Within the three selected cases, the content, strategy, evidence, and language were analyzed. In particular, how lawyers and Native Hawaiians constructed various forms of court narratives was investigated.

4.7.1 Case Examination: The Argument and its Language

No lawsuit arises out of a vacuum. It occurs in a specific time and place and involves certain issues, people, and concerns. Case examination was completed using a three-step process. The first step was to determine what the case was about, who was involved, and why it was occurring. The second step was to uncover the source of the disagreement, determine the time frame of the issues involved, the associated places impacted, and the socio-historic context of the conflict. The third step was to analyze the language of the lawsuits; to determine the strategy, rhetoric, language, and presentation; and assess their impact on the dimensions of Indigenous identity construction.

The land claims selected for investigation all developed into significant lawsuits involving the use of heritage to justify Indigenous control of land. These kinds of lawsuits are grounded in arguments where one party, the plaintiff, disagrees with existing or proposed laws, policies, or actions, which are defended by the other party, the defendant. To begin a lawsuit, the plaintiff files a claim with the court to argue their position in front of a judge. The resultant discussions take the form of a formalized argument constrained by specific rules, regulations, and language. Lawsuit arguments therefore have three qualities: they are spacio-temporal, they are contextual, and they have positionality. They are spacio-temporal in that they emerge from and through certain broad social, political, and economic circumstances at a specific time and place and therefore need to be viewed relative to the political and economic environment from which they materialize. The lawsuits are contextual in that they develop from unresolved disagreements or proposed changes in the status quo over new public motions, legislation, or policies that are viewed as unacceptable by members of the public. As everything people do reflects their world, including the roles they play, the relationships they have, the places they live, the society within which they function, their goals, ambitions, desires and dreams, these elements of are all reflected in their actions, including the generation of lawsuits. How they frame their arguments, and on what they are based provides a level of positionality. Culture therefore plays a great role in the courtroom; it both influences actions and rhetoric in the courtroom and it is influenced by the subsequent legal interpretations. It follows

then that the study of legal arguments can provide insights into contemporary culture and society.

The lawsuits formed over time were in reaction to certain social and political conditions which impacted Native Hawaiian traditional and cultural practices. As in all lawsuits, legal narratives were developed to present the case arguments in court.

4.7.2 Legal Narrative: A Brief Summary

Legal narrative is a language practice intricately involved in the generation and maintenance of social power. Although discussed previously in this dissertation, the following summary explains the selection of methods used for case review.

The law cannot exist without narrative (Bruner 2002). Narrative is a means to communicate experiences and is an important social practice. Narrativity in the law legitimizes stories, generates legal power, and contains, anthropologist Justin Richland offers, ‘the legitimizing authority that undergirds that power’ (Richland 2013: 218). Robert Cover (1983) was more succinct in his description of the law and narrative in his seminal article *Nomos and Narrative* where he writes:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which to live ... Law and narrative are inseparably related. (1983: 4-5)

The language within a narrative is a tool through which law operates, and in doing so, it provides yet another source of power (Mertz 1992). Words and expressions infer and confer meanings with the goal of achieving a positive ruling from a judge, and in doing so, shifting or maintaining existing structures of power.

Legal narratives take on special significance when cultural differences between plaintiff and defendant are evident. Cultures have distinct concepts of truth and

employ singular words to convey distinctive meanings. For example, even the oppositional concepts of true and false do not imply the same meanings in all languages (Boyer 1994). Conceptual divides, like those that exist between Indigenous epistemologies and Western conceptions and understandings, must be identified in the courtroom, and strategies must be employed to build bridges of mutual understanding. The methods used for this dissertation focus on how those cultural divides were crossed, and the language, evidence, and strategies employed to effectively present Indigenous cultural values and identity in the courts. Of particular interest in this dissertation are the processes of investigation, codification, documentation, and presentation of information to support intangible claims in courtrooms with legislated procedures that require tangible, scientifically-proven evidence.

4.7.3 Land Claim Content Analysis: The Broad Picture

To complete this investigation, the land claims were analyzed to determine the impact of land claims and increased land control on Native Hawaiian heritage, and to examine whether there had been a subsequent influence on notions of identity. Content and socio-legal analyses methods were used to explore the spacio-temporal aspects of each case and to provide historical and social context. For each argument, the following elements were identified: the general topic and its historical basis; the social, political, and economic conditions at the time of the lawsuit; and the associated places, heritage impacted, plaintiffs, defendants and their attorneys. Content analysis (Pickering 2004) was also used to examine the themes involved in each lawsuit; to determine whether the argument involved wider elements of cultural, political, nationalistic, social, or economic tension; and to define the power relationships inherent within the discourses. The transition of empowerment through legal action over time was analyzed to determine changes in Native Hawaiian leadership, education, cultural awareness, traditional practice, and political involvement. Such transitions can be of great value in assessing the impact on identity and heritage, and answering the research questions.

4.7.4 Legal Narrative Analysis: Meaning Making from Narrative

Legal narrative analysis was used to review the positionality of each case. Language and performance in court was reviewed to determine strategy and rhetoric in court testimony transcriptions, submitted briefs, evidence, and other accessible written documentation. The words and phrases employed were examined to identify descriptions and references to elements of the four dimensions of Indigenous identity.

Positionality can also highlight conceptual divides in understanding within the courtroom. Through analysis of the narratives, such divides were identified and processes for bridging them revealed. The discourse involved in this type of discussion is particular to legal narrative analysis. Legal narrative analysis differs in this way from what I will call normative, or non-legal narrative analysis. Normative narrative analysis is the method of exploration of stories created to communicate experiences and perceptions of one person to another or to a group. It illustrates a particular perspective colored by the personal life events through which the teller drafts the story. By contrast, legal narrative analysis examines a specific form of constructed language, that of the court. Legal narrative inquiry investigates strategy and story building as a performance activity, examining oral and written arguments, testimony, and evidence in court, all with language constrained by regulation, in order to understand particular cultural and social realities (Amsterdam and Bruner 2000; Brooks and Gewirtz 1996; Bruner 2002). The investigation of legal narrative explores spoken and unspoken presentation methods in the “performance of law” (Wolfe 1994), such as inferences and suggestions, movement and drama, all within the constraints of authorized courtroom procedures. Bruner (2002) contends that there are two motives for looking at legal narrative. One is to control it and the other is ‘to understand it, so as to cultivate its illusions of reality’ (Bruner 2002: 11).

Legal narrative analysis was used to analyze the strategy and language used to create the “reality” of each case. The intent was to uncover the intrinsic cultural meanings within briefs, evidence, submissions and presentations; to determine how assertions of heritage value were substantiated; to uncover the shared cultural meanings in specific behaviors (Wallman 2006); and to analyze the use of heritage for cultural

and political empowerment (Van Dijk 1998-1999, 2010). According to Pickering (2004), this type of analysis:

reveals the significance of textual features that are latent or hidden in the manifest content or that have consequences beyond their immediate, obtrusive meaning. Even a single lexical choice ... such as a loaded term in a government report, may reverberate throughout the whole text in a series of interactions with other components of the text, and a particular test may set off a chain of development and response. (Pickering 2004: 889-890)

In particular, narrative analysis was used to explore the tools used to build and support arguments employed for convincing a court audience of the truth of a position in an argument. Some of the tools considered were the strategic use of questioning to test evidence (Gibbons 1994); the use of bilingualism to serve or subvert justice (Youngblood Henderson 2002); and the use of manipulative strategies to control marginalized voices and promote dominant ones.

Narrative imagination lies at the heart of cross-cultural research in normative narrative inquiry. This implies that there are recognized obstacles in interpretative perspective since the researcher and the subject have not had the same experiences and may not come from the same background (Andrews 2007), but both acknowledge that there are commonalities in conceptual understanding that can be clarified through questioning.

Throughout case examination, information on culture and meaning-making collected through ethnographic interviews, observation, and participation informed and supported my findings and conclusions. Books on Native Hawaiian culture and history, such as *Nā Kua'āina: Living Hawaiian Culture* (McGregor 2007); *A Nation Rising: Hawaiian Movements for Life, Land and Sovereignty* (Goodyear-Ka'opua, Hussey and Wright 2014); and *Ku Kanaka: Stand Tall: The Search for Hawaiian Values* (Kanahele 1986) were used to analyze the meaning and intent of the wording employed while looking at perspective, purpose, and choice of words. The use of

Hawaiian words was documented to explore the integration of Hawaiian culture into non-Native society. Clarifications were requested from previously contacted experts in culture and law to better understand cooperative arrangements between groups united for common objectives. Scholarly journals were also accessed to explain issues of regulation and precedent. The journals were crucial for an understanding of process and interpretation.

In the following chapter, the case of *Kalipi v Hawaiian Trust Company* will be examined. Kalipi, an impoverished farmer, entered the courtroom at a time of great change in Hawai'i. Armed only with a belief in his right to continue the traditional practices of generations of his family, he initiated a significant process of Native Hawaiian identity transformation by using heritage as a narrative tool in the courtroom for his case

CHAPTER FIVE KALIPI V HAWAIIAN TRUST COMPANY - CONSTRUCTING THE FLOOR

Koe nae na kuleana o no kanaka maloko (Reserve the native rights within [the deed])

Kalipi family kuleana deed from the Land Commission, Commissioners to Quiet Title, on or about July 26, 1852⁴¹

In 1975 William Kalipi, an impoverished subsistence farmer, discovered his wealthy neighbors had erected fences around their substantial properties impeding his access throughout the *ahupua'a*. The fences limited his ability to lead a traditional lifestyle by restricting his gathering of plants and other natural products. He believed he had a customary as well as a legal right to continue to access and gather natural products throughout the *ahupua'a*, and with the help of a local legal aid organization, sued his neighbors. In *Kalipi v Hawaiian Trust Company et al.* (or “Kalipi”), William Kalipi can be seen as a modern day David taking on the giant Goliath, as a simple, impoverished farmer engaged in a legal battle against opponents with wealth, land, and political power.

William Kalipi had to prepare for this challenge. He had to explore intangible values that were difficult to define and articulate. He needed to communicate who he was, what he considered his birthright, and what his culture and heritage meant to him. With his legal team, he had to decide how to present this information in court and how to defend his actions and statements. In this chapter I argue that the process of building and arguing his case fundamentally changed William Kalipi. He became more informed, assertive, and determined to preserve a way of life that ensured the survival of a culture and an identity. His transformation demonstrated to Native

⁴¹ *Kalipi v Hawaiian Trust Company, Ltd.*, [1982].

Hawaiians (and an observing public) a new image of a modern Native Hawaiian, with the strength, fortitude, and capability needed for heritage protection and self-determination.

From a legal perspective, the grand narrative of modern Native Hawaiian land claims began with the case of *Kalipi v Hawaiian Trust Company Ltd.*⁴². It was the first significant Native Hawaiian case post-statehood in the Hawai‘i Supreme Court to challenge the continued existence of eighteenth century laws protecting Native Hawaiian traditional rights (Native Hawaiian Rights Commission 1979; *Pele Defense Fund v Paty* III.B). In this case, the court considered the influence of Hawai‘i’s aboriginal heritage on the modern state and attempted to reconcile the incorporation of Hawaiian traditional and customary land use principles with American common law rights to exclusivity (McHugh 2004). The argument at the heart of the debate over incorporation was whether laws passed in the eighteenth century protecting and preserving traditional access rights and their associated practices remained viable, and if so, how they should be interpreted in the legal context of the twentieth century. In the end, the final case ruling over viability was momentous for both Hawaiian law and Native Hawaiians: for the first time in contemporary history, the Hawai‘i Supreme Court ‘recognized [confirmed] the *modern* legal bases of traditional and customary rights’ in Hawai‘i state law (Forman and Serrano 2012: 12, emphasis added), and noted they came from Nation of Hawai‘i law. These legal bases supported Native Hawaiian claims to traditional and customary rights and provided a lawful justification for greater levels of Indigenous heritage protection. For Native Hawaiians, the case demonstrated the value of heritage as a legal tool in judicial processes in their quest for greater sovereignty. Importantly, for the plaintiff in the case, William Kalipi, his involvement in the legal proceedings would reveal the potential for identity renewal and empowerment through Indigenous action in the courts.

⁴² For clarity, “William Kalipi” will be used to refer to the individual plaintiff and “Kalipi” will refer to William Kalipi and his legal team, or to the case itself.

William Kalipi had to overcome significant personal, cultural, and political challenges in the development of this case. For one, he was a modest farmer working with pro bono Legal Aid Society attorneys challenging major landowners, a powerful financial entity, and the state government. When the case began there were no legal handbooks on Native Hawaiian law, little scholarly research on Hawaiian history from a Native perspective, few interpreters of the Hawaiian language, and a lack of contemporary legal decisions related to Native Hawaiian land and access rights. The law pertaining to *kuleana*, Native rights, and traditional customs was not well known. Although the Nation of Hawai‘i statutes were the basis for modern state law, the historic precedents and issues on which modern legislation was grounded had never been investigated. Additionally, the Native Hawaiian community was just rediscovering its culture and traditions after an extensive period of authorized discrimination and forced assimilation. What William Kalipi did have was orally-transmitted knowledge of the land and its uses, a sense of obligation to community and family to continue traditional practices, and a dedication to do what was righteous and honorable. He would have to set aside the traditional cultural value of *aloha* (getting along) to do what he felt was *pono* (correct and righteous) to protect his rights and family. The process of court involvement would have a profound impact on how he thought of himself, his place in the community, and his heritage.

Three factors can be seen as contributing toward transforming William Kalipi’s sense of identity and empowerment. These factors are:

- 1) William Kalipi’s response to defense attacks on his rights and identity
- 2) Protection and expansion of Hawaiian rights within the 1978 Hawai‘i Constitutional Convention
- 3) The ancestry, background, and interest of Supreme Court Justice William S. Richardson

The first factor became apparent through the discourse of court rhetoric and provoked increasingly more informed and directed responses from William Kalipi and his legal team. The second factor, the 1978 Hawai‘i Constitutional Convention, dramatically influenced the course of the case and provided the basis for the final

ruling and decision. Lastly, the insightful and considerate judgment of a politically astute and culturally aware Native Hawaiian justice, who Native Hawaiian lawyers, professors, and judges interviewed noted was dedicated to the perpetuation of Hawaiian culture as a foundation for state law, would set an example for Hawaiians of the possibilities for successful civic engagement and steer a positive course for future legal judgments on behalf of Native Hawaiians.

5.1 An Era of Action: The Socio-political Environment and the Kalipi Case

The Kalipi case materialized during a period of great change in Hawai‘i. The state was experiencing dramatic increases in population with new residents bringing political perspectives from the mainland. These perspectives included (as discussed previously) an increased awareness of American social and economic disparities along with a sense of shared responsibility to rectify them. Population growth was particularly evident in voter registration, which had been liberalized during the 1968 Hawaiian Constitutional Convention. Qualifications had been relaxed for voters with representation reapportioned by order of the US Supreme Court to reflect the new and increasingly more diverse population throughout the islands.⁴³ The result was a shift in power in the state as incumbent legislators lost their stronghold in government (Kosaki 1978), creating greater opportunities for minority and marginalized voices to be heard. The increase in political involvement was swift and dramatic as shown in Table 2.

⁴³ The redistricting for voting provided a one person, one vote policy. In 1978, the population of the state was unevenly distributed throughout the islands. Four-fifths of the population lived on the island of Oahu, the smallest geographic Hawaiian county, while ten percent of the state population lived on the island of Hawai‘i, which contains 63 percent of the total state land. The Native Hawaiian population was disbursed throughout all of the islands (Legislative Reference Bureau, Hawai‘i Constitutional Convention Studies 1978, State of Hawai‘i). [Online] Available at: <http://lrbhawaii.org/reports/1978concon.html> [Accessed 26 July 2017].

| Election Date | Registered Voters | Percent Increase |
|---------------|-------------------|------------------|
| 21 March 1950 | 122,849 | — |
| 1 June 1968 | 242,827 | 97.7 |
| 20 May 1978 | 344,952 | 180.0 |

Table 2 Registered Voter Increases 1968-1978 (Kosaki, 1978: 128)

Political science professor Richard Kosaki analyzed the shifts in population at the time and determined there was an increasing desire for ‘grassroots’ or ‘participatory democracy’ (Kosaki 1978: 128). For the first time in Hawaiian history a legislated process emerged mandating local democratic representation throughout the islands. Newspapers and public interest groups bolstered the movement, promoting the virtues of public representatives over incumbent legislators (Kosaki 1978; Meller and Kosaki 1980). One of the first elections immediately impacted by the redistricting was the Hawai‘i Constitutional Convention of 1978 (or “Con Con”).

Polls and detailed analyses before the Convention concluded there were no priority issues or overriding concerns to be faced (Adrian 1996; First Hawaiian Bank Poll 1978: iii cited in Kosaki 1978: 136).⁴⁴ The Legislative Reference Bureau (LRB), the office responsible for advising legislators on current affairs, took little notice of the pending convention but warned legislators that in promoting real estate development they should be aware that ‘the history of Hawai‘i is the history of land use ... Ownership and use of land have been the barometers of social change and justice [in Hawai‘i], ... and the primary arenas for cultural interaction’ (Kahle and Chang 1978: 186). The report noted a gradual loss of Native Hawaiian sovereignty and land. It mentioned that a ‘controversy’ existed over the state’s founding. The LRB suggested that ‘land ownership questions’ still remained, and ‘responsibility’ for loss of sovereignty and reparations were unresolved issues (Ibid.). If a political clash at the

⁴⁴ Public Affairs Advisory Services Inc., *Final Report of a Poll of Hawai‘i Public Opinion* concerning the 1978 Hawai‘i Constitutional Convention, prepared for The First Hawaiian Bank and conducted on January 28-February 1, 1978, (Honolulu: February 24, 1978: iii).

convention were to occur, it would be evident in the tension between concepts of ‘private property and traditional values applied to Hawai‘i’s resources’ (Kahle and Chang 1978: 186).

The legislature refused to acknowledge the broad and comprehensive upheaval occurring in the state, including the emergence of an activist movement for Indigenous rights and increased Native involvement in legislative processes. By avoiding direct discussion of Native Hawaiian issues in the legislature, Native Hawaiian scholar Halualani insists, the state was ‘confusing and diffusing’ efforts for Indigenous sovereignty, and in doing so, perpetuating the power and legacy of colonialism (Halualani 2002: xv). Hawaiian culture may have been elevated in the official narrative of the state, but the government was still intent on promoting policies for development over resolving Indigenous land claim disputes. This became exceedingly evident in the Kalipi case as the state repeatedly attempted to deny the contemporary significance of Hawaiian heritage to the islands.

5.2 A One Man Offensive: Kalipi v Hawaiian Trust Co., Ltd.

It was within the tense political environment leading up to the Constitutional Convention that Native Hawaiian William Kalipi, an impoverished⁴⁵ thirty-three year old subsistence farmer on the island of Molokai discovered impediments to the continuation of his traditional sustainable farming practices (Kalipi CC vol. 1: 2).⁴⁶ Lacking the resources to employ a law firm for his case, he brought his claim to court in 1975 with the assistance of a local non-profit Legal Aid Society attorney. He would lose that original case, and file an appeal with the higher court in 1977. The case would ultimately be decided in 1982.

⁴⁵ The court granted Kalipi relief from paying any court fees at the end of the case due to his low income and lack of resources. (Kalipi A.1 Order Granting Ex Parte Motion to Proceed in Forma Pauperis 14 Feb 1978).

⁴⁶ The archival records available for this case were not numbered sequentially in the court docket (index). A system was imposed for reference in this dissertation. Each reference refers to a court presentation by the plaintiff or defense. Testimony, when available, is noted by the letter “T”.

5.2.1 The Case and the Original Argument

The case began in the Circuit Courts when William Kalipi filed his land claim lawsuit. At the opening of the case in court, William Kalipi claimed he owned a *kuleana*⁴⁷ (Kalipi CC vol. 1: 2)⁴⁸, a plot of land that had been awarded to his family during the Māhele. His *kuleana* consisted of two land parcels: a farming plot in the *ahupua'a* of Manawai and a 0.88 acre house lot next door in the adjacent *ahupua'a* of 'Ōhi'a (Forman and Serrano 2012; Kalipi SC A.6: 95-96). In reality, his *kuleana* was a miniscule tenth of an acre patch of land completely surrounded by several substantially larger properties totaling 1,280 undeveloped acres (Kalipi A-1: 95-96). William Kalipi's only access to his land was through his neighbors' acreage. His claim was that 'due to economic necessity and cultural tradition, [he] partially support[ed] his wife and four children by gathering food and other products from the land and sea' (Kalipi CC vol.1: 5). By restricting access to his *kuleana*, the adjacent land owners, The Hawaiian Trust Company, Ltd. (Hawaiian Trust), a financial company affiliated with the Bank of Hawai'i; the State, as trustee of a Ceded Lands Trust parcel; and a disparate group consisting of individual private land owners⁴⁹, were preventing him from exercising his rights 'to gather ... from the upper reaches of the *ahupua'a*' (Kalipi CC vol.1: 2). William Kalipi felt the restrictions violated his customary and 'legal rights', and filed his lawsuit in August 1975 (Kalipi CC vol. 1: 6). In the Circuit Court he stated the defendants were 'in violation of state law and ... ancient Hawaiian customs and practices' and he could not 'provide basic needs for his family living on the kuleana' (Kalipi CC vol.1: 2).

William Kalipi's original lower court claim was therefore for the continuity of historic practices throughout the *ahupua'a* for one man and his family. He did not mention he was Native Hawaiian nor that he was fighting for communal Indigenous

⁴⁷ A *kuleana* is a historic inherited land allotment from the Kingdom of Hawai'i to *maka'āinana* (commoner) farmers.

⁴⁸ The Circuit Court case volume and page numbers are directly reported from the records. Each volume is numbered separately. The Supreme Court case was indexed and assigned section letters and page numbers for this dissertation. "CC" designates the Circuit Court and "SC" the Supreme Court.

⁴⁹ Defendants for the Circuit Court trial included Pearl Petro, Ruth Searle, Ethel Shaner, Loren Meyer, William Meyer, Edmund Wond, Samuel Petro, and State of Hawai'i, Department of Land and Natural Resources (DLNR) and Hawaiian Trust Company. The Hawaiian Trust Company was not party to the Supreme Court suit.

rights. Significantly, at the time of the Circuit Court filing, William Kalipi and his family lived a mile away from his *kuleana* on the nearby Bishop Estate (Kalipi CC vol. 3: 804) where he worked as the resident caretaker (Kalipi SC A-1: 97; T: 214-217, 252). He had lived on the *kuleana* in the past but left to find work (Kalipi A-1: 97; T: 211). When he returned to Molokai in 1968, tenants occupied his house and he needed to find another place to live (Kalipi A-1: 97; T: 213). His residency outside of his *kuleana* is noteworthy, however, for after he lost his case in the lower court, and appealed the judge's decision, his residency would be the deciding factor in the final ruling of the highest court, the State Supreme Court. Kalipi would lose his case based on lack of residency, but the Supreme Court Chief Justice would interpret the law in favor of all Native Hawaiians, as well as other *kuleana* owners and tenants.

5.2.2 The Statutory Issues in Kalipi's Assertions

Kalipi's initial lower court brief raised three legal issues, each of which concerned traditional rights for *kuleana* owners. The issues were:

- 1) The intent of HRS §7-1 (the protection of historic traditional practices)
- 2) The application of HRS §1-1 (elevating Hawaiian values as important to the State of Hawai'i)
- 3) The current meaning of a clause inserted into nineteenth century *kuleana* grant awards, originally drafted in the Hawaiian language

Each point of argument in the case revolved around the wording in one of these statutes.

The first issue was Hawai'i Revised Statute (HRS) §7-1, initially passed in 1851 as part of the Kuleana Act of 1850 to ensure Native Hawaiians access to traditional land and practices. It contained language that reflected and implied social and political meanings understood at its drafting, but long forgotten through multiple regimes. By the time the Kalipi trial began, many of the cultural clues and assumptions implicit in the choice of specific words had been lost. With limited exception, the statute lacked contemporary interpretations. The statute states:

Where the landlords have obtained, or may there-after obtain allodial⁵⁰ title 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 ti 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*.
HRS §7-1: 1851 (emphasis added).

The court argument concerned who the “people” were and whether they ‘should be defined as “tenants” or another subset of the general population. The “rights” debate centered on whether rights entailing special privileges had survived from the Nation of Hawai‘i; and if so, under what conditions they could be actuated. The underlying issue was that William Kalipi felt he had inherent rights to continue traditional practices according to Indigenous customary law and historic precedent, as well as protected rights under HRS §7-1. From the alternative perspective, the defendants felt Indigenous customary law was subordinate to Western common law understandings and was no longer valid.

The second issue addressed HRS §1-1 (previously discussed in Chapter Two). HRS §1-1 is an adaptation of a historic statute adopted by the Nation of Hawai‘i when common law was comingled with customary law in the nineteenth century. It was included in the Hawai‘i State Constitution upon statehood in 1959 as an affirmation of the importance of Hawaiian culture to the State of Hawai‘i. By inclusion of this statute, the state adopted English common law except as determined by the US Constitution, state law, or ‘fixed Hawaiian judicial precedent’ and ‘Hawaiian national usage’ (HRS §1-1). In effect, the state had placed the Nation of Hawai‘i precedent and customary law (“national usage”) on par with common law and state law principles.

⁵⁰ Allodial is defined in Barron’s Legal Dictionary as ‘owned freely without obligation to one with superior right; not subject to the restriction on alienation which existed with feudal tenures’ (Gifis 2010: 25). In other words, if a parcel is owned outright by one landlord, they could not restrict others from entering and gathering the listed products from their private land.

The third issue involved *Kuleana* grants. *Kuleana* are fee simple grants of land awarded to commoners during the Māhele for the continuity of traditional subsistence practices. They are inherited through families and are not always inhabited. From the perspective of Western law, they are valid legal title land ownership documents in Hawai‘i. When *kuleana* are completely surrounded by another land parcel, they ‘cloud’ (Kalipi SC A.3: 63), or place a restriction on another landowner’s title, similar to an easement (Garavoy 2005: 524).⁵¹ The restrictions were placed on *kuleana* land titles in the nineteenth century through inclusion of the phrase ‘*Uo Koe Ke Kuleana o Na Kanaka*’ or ‘subject to the *rights* of the *people*’ (Ibid.: 525, emphasis added). Once again, uncertain terminology was the subject of great debate in the lawsuit.

There were commonalities between these three legal issues. They all:

- Lacked contemporary interpretations
- Related to a specific, undefined class of “people”
- Concerned traditional “rights to land”
- Involved a historical obligation the government had established, based on heritage values, with a segment of the citizenry

Essentially, the questions were whether historic customary and traditional rights still existed, and if so, what were they, to whom they applied, and if were they inherent in the land itself⁵² or were rights tied to those with ancestral connections to the land (Garavoy 2005: 525).

⁵¹ An easement is defined as a ‘right, created by an express or implied agreement, of one owner of land to make lawful and beneficial use of the land of another’ (Gifis 2010: 175). There are many types of easements, including easements of necessity (for the use of public utilities) and easements in gross (‘a personal privilege to make use of another’s land’ (Ibid.)

⁵² Transferrable to a new owner with the title.

5.2.3 Kalipi's Strategy and Case Development

Kalipi's arguments in the lower court focused on the language and intent of the two statutes and the *kuleana* land title. He based his claim on cultural tradition since these privileges were, from his perspective, protected under HRS §1-1 and HRS §7-1. Cecilia Kapuni, an elderly Native Hawaiian *kupuna* (traditional expert) verified William Kalipi's statements of ancestral tradition and continuity of practice.⁵³ Although under Hawai'i state law, oral tradition is valid proof to substantiate customary practice, Marion Kelly, a professor from the University of Hawai'i and a recognized authority of Native Hawaiian history, corroborated the continuity. By having her testify, Kalipi tried to pre-empt attacks on customary tradition by proving continuity based on established Western academic standards.

The strategy was violently attacked by the two defense teams, one representing the state and the other representing Hawaiian Trust and the private owners. Realizing the defense teams were ignorant about traditional cultural practices in Hawai'i, strongly opposed to Indigenous land control, and uninformed of the historic basis for current law, Kalipi altered his argument to support his assertions primarily according to Western forms of evidential proof. First, he provided historic legal cases to substantiate precedent, proving through case law that although rights in the past were not 'originally defined' they were 'universally accepted' (Kalipi CC vol. 3: 677). Second, he authenticated past access through presentation of his extensive knowledge of trails and natural resources throughout the *ahupua'a* (Kalipi CC vol. 1: 236, 257; Kalipi CC vol. 3: 744, 815). This familiarity confirmed his traditional knowledge and provided information on access routes and plants confirmable by scientific observation, all information of which none of the defendant owners, non-residents of the *ahupua'a* themselves, were aware (Ibid.). Kalipi's legal team went one step further, requesting permission to access the land in question and photograph the locations he described. This request was denied, since access would have verified his assertions.

⁵³ Cecilia Kapuni was a *kama'āina* (person of the land) witness and proved gathering was a contemporary traditional Hawaiian custom that had been continually practiced since 1892 (Kalipi SC A.2: 5). She was satisfying a legal requirement in Hawai'i for proof of historicity of heritage practice.

As the case progressed from the lower court to the higher court, the attacks by the defense became even more aggressive. The defendants' attorneys continuously tried to turn the case completely away from historic protected Hawaiian customary rights and into a strictly legal land use argument by equating traditional access rights with modern land use regulation. In defense briefs, traditional access rights became 'implied reservation[s] of an easement' and 'easement[s] by implication' (Kalipi CC vol.1: 10). William Kalipi, frustrated and angry over the continued lack of acknowledgement of his customary rights guaranteed by law, reversed the argument and asserted in the higher court that if *kuleana* were easements, then he should be afforded all the statutory protections that go with easements, including access rights (Kalipi SC A.3: 65). Furthermore, he claimed the defendants were limiting his rights as an owner by restricting the use of his property, a violation of the due process clause of the Fourteenth Amendment of the US Constitution⁵⁴, and of Article I, Section Four of the Hawai'i State Constitution (Kalipi CC vol.1: 50).⁵⁵ With their actions, Kalipi claimed the defendants were lessening the value of his land (Kalipi CC vol.3: 677), an issue the king had tried to avoid in the nineteenth century by drafting *kuleana* language to protect tenants' economic interests and preserve cultural heritage (Kalipi SC A.3: 52). Importantly, they were denying the historic foundations of the current law and ignoring the continuation of Indigenous custom and tradition in Hawai'i.

Within the court arguments, there were three component issues that William Kalipi needed to address. They were: blatant state opposition to Hawaiian empowerment through land control, profound ignorance of current statutory regulations and historic legal precedent, and a total denial of Indigenous rights

⁵⁴ Article 14 of the US Constitution provides that all citizens are entitled to the same rights, and have equal protection under the law. No state shall 'deprive any person of life, liberty or property'. [Online] Available at: <https://www.law.cornell.edu/constitution/amendmentxiv> [Accessed 31 August 2017].

⁵⁵ Article 1 Section 4 of the Hawaiian Constitution provides for equal representation of all citizens. [Online] Available at: <http://lrbhawaii.org/con/conart1.html> [Accessed 31 August 2017].

Kalipi's response to these issues will help to explain his transformation from a respectful and humble "tenant" to an informed, determined, and assertive "aboriginal" and "Hawaiian" over the course of the case.

First Issue: State Opposition to Hawaiian Empowerment

The state's intent was to limit Native Hawaiian control of land, and they exercised their power in the lower court. The case was put to a jury trial, an unusual move in a state where less than two percent of cases are disposed of by a trial verdict (Barkai, Kent and Martin 2005: 44), and dispute resolution is preferred.⁵⁶ A trial is typically used to decide who is at fault in a civil case argument or who is guilty in a criminal case, but not for an interpretation of law such as this. By presiding over Kalipi as a jury trial, the circuit court judge, a political appointee in Hawai'i, was able to promote partisan positions by controlling the number of questions the jury could put forward, deliberately refusing to clarify complex legal issues about law, culture and heritage to the jury, and thereby limiting the scope of information jurors could consider in making a determination (Kalipi SC A.2: 14-22).⁵⁷ Instead of discouraging the plaintiff, the state's imposition of obstacles boosted Kalipi's resolve and increased his focus on ancestral rights and heritage values. Kalipi would continuously object to the refusal of the court to clarify questions of history or law to the jury, and each time he would be overruled (Kalipi CC vol. 4: 1050-1059; Kalipi SC A.2: 8, 14). To make up for the deficit, Kalipi repeatedly defined cultural and legal terms and laws for the jury, until silenced by the Circuit Court judge. The lower court's denial to educate the jury about Hawaiian heritage would be one of the main charges in Kalipi's appeal to the higher court, and another justification for Justice Richardson's ruling in the Hawai'i Supreme Court.

As the case proceeded, the state unapologetically opposed recognition of *kuleana* tenants' rights, calling HRS §7-1 'an affliction' (Kalipi CC vol. 2: 491) in which

⁵⁶ Each party to a civil suit in Hawai'i must discuss alternative dispute resolution options, and submit proof to the court that they have met with the opposition and attempted to settle their differences. See *Rules of the Circuit Court of the State of Hawai'i*. [Online] Available at: http://www.courts.state.hi.us/docs/court_rules/rules/rcch.htm [Accessed 28 August 2017].

⁵⁷ The Governor appoints Circuit Court Judges in Hawai'i (State of Hawai'i Judiciary Annual Report, July 1, 1986 - June 30, 1987).

tradition conflicted with modern understandings of land ownership (Kalipi SC A.8: 131). Recognition was seen as placing unnecessary limits on development, which was a major economic goal for the legislature. So important was this case to the state that the most powerful government attorneys in the state participated. At stake was heritage recognition and its concomitant rights to land. The Attorney General and Deputy Attorney General denied the monarchy-reserved rights for commoners (Kalipi SC A.1: 231), claimed ignorance of trails on state lands (Kalipi CC vol. 1: 225, 229, 231, 236), and maintained that no traditional gathering had taken place on state land for the past twenty years (Kalipi CC vol. 1: 225).⁵⁸ Their assertions were corroborated by the Chairman of the Department of Land and Natural Resources (DLNR), the agency responsible for all land management (Kalipi CC vol. 2: 475). DLNR insisted permits were required for all access to state property, thereby placing customary access on par with other general public access regulations (Kalipi CC vol.4: 923-924).

Kalipi vehemently objected. *Kuleana* rights, he avowed, did not belong to the ‘public’ but were ‘private rights’ belonging to a subset of the citizenry (Kalipi CC vol.1: 49), and tied to *kuleana* ownership (Kalipi CC vol. 1: 50). These rights could not be classified with other general land use regulations because their bases were fundamental aboriginal rights, and declared Kalipi, ‘a regulation cannot extinguish a right’ (Kalipi SC A.3: 52). It was a moment of awakening. With this phrase, for the first time, Kalipi held that *kuleana* rights were not tied to ownership or tenancy, but were intrinsic rights held by Indigenous peoples. No longer was he only a subsistence farmer fighting for land access. He was now publicly declaring himself a member of a collective ethnic group fighting for their ancestral ties to land.

Second Issue: Widespread Ignorance of Hawaiian History, Legal Rights, and Law

From the initial preliminary lower court presentations, it became apparent that Hawaiian history, language, and heritage were not well known among the defendant group, state officials, or private citizens on the jury. Hawaiian Trust and the landowners asserted the Monarch had never reserved an easement (Kalipi CC vol.1:

⁵⁸ The highest ranking state legal enforcement officers and the chief legal counsel for the state.

213, 231), the jurors repeatedly asked for explanations, and the DLNR chairman categorically demonstrated state unfamiliarity with Hawaiian culture, heritage, and practices. In one instance, for example, the DLNR expressed fear that if the court allowed gathering, it would cause damage including ‘erosion, pollution, destruction of plants and wildlife’ due to the use of ‘transportation and equipment’ (Kalipi CC vol.2: 491). Kalipi would highlight this ignorance, educating court participants by noting Native Hawaiians access on foot, gather with respect for owners and their privacy, and maintain sustainable practices (Kalipi CC vol. 2: 359; Kalipi SC A.6: 161). Beyond defense, Kalipi was asserting power over the state by educating and informing the court of historic heritage values that Justice Richardson would later underscore in his legal decision.

Third Issue: Defendants’ Blatant Denial of the Existence of Aboriginal Rights

If the defendants and jury were ignorant of Hawaiian heritage and law, they blatantly denied that statutes HRS §7-1 and HRS §1-1 were still valid. Hawaiian Trust and the defendant group continually refused to admit Kalipi had rights separate from those of the general public, and argued that pre-Māhele customs and traditions no longer took place, and even if they did, they had no place in the modern state of Hawai‘i (Kalipi SC A.6: 131). The defendant group argued that the Kuleana Act of 1850 ‘superseded and abrogated’ any legal statute allowing traditional access or gathering (Kalipi SC A.6: 93), and claimed ‘pre-Māhele customs, traditions, practices and usages ... have no place in modern Hawai‘i’ (Kalipi SC A.9: 131). HRS §7-1 was deemed ‘repulsive to the modern definition of fee simple title’, and along with HRS §1-1, constituted ‘afflictions upon private owners’ and if recognized as valid law, would wreak havoc as a ‘manifest injustice’ (Kalipi SC A.8: 131), resulting in ‘mass confusion and turmoil ... [leading to] the wholesale upheaval of the land tenure system’ (Kalipi SC A.9: 133-134). The state blatantly denied that traditional land rights had a role in the future of Hawai‘i, but they were about to face more than one farmer (and his attorneys) in the fight to protect and preserve Hawaiian heritage.

5.3 Turning the Political Tide: The 1978 Constitutional Convention and the Jurisprudence of Chief Justice William S. Richardson

5.3.1 The Constitutional Convention: A Native Political Awakening

While William Kalipi was defending himself against repeated assaults on his identity and rights, a momentous change was occurring outside the courtroom. During the course of the trial, there was excitement and activity surrounding the 1978 Hawai'i Constitutional Convention (Con Con). Noting increased opportunities for empowerment through participatory government, Native Hawaiians, led by soon-to-be Governor John Waihee, quietly became involved in the Con Con and helped delegates get elected from Native Hawaiian communities throughout the islands. Their involvement in the convention process was sparked, according to historian Tom Coffman, by Native Hawaiian protest movements against increased real estate development and the concomitant changes in lifestyle, decreased living space, economic stability, and environmental sustainability (Coffman 2003). Hawaiians were concerned about the continuing availability of land and water (Trask 1999: 66), and were growing dissatisfied with the failure of the Department of Hawaiian Homelands to provide community members with allotments (Osorio 2003: 215). Native Hawaiians were not alone in pursuing legal changes in this manner. Kosaki contends special interest groups in many parts of the world tend to prefer to protect their interests in constitutions, since amendments are more difficult to alter than statutes or legislated laws (Adrian 1976 cited in Kosaki 1978: 131).

Once elected, Native Hawaiian delegation members formed a committee that proposed what Meller and Kosaki call a 'Hawaiian-affairs package', or fundamental changes in state law to acknowledge and protect Native Hawaiian culture and heritage (Meller and Kosaki 1980: 255-256). The delegates felt the state had an obligation to provide justice for the Native Hawaiian people (Yamamoto and Ayabe 2011). According to MacKenzie, the package was a Native Hawaiian initiative moved through the convention by Native Hawaiians with the help of their non-Native supporters (MacKenzie 2012: 633). The proposals submitted by the committee were confirmed at the Convention and ratified by the legislature. The proposals included:

- Recognition of historic injustices to the Hawaiian people, including the loss of land, and attempts to rectify them (Article XI)⁵⁹
- Creation of the Office of Hawaiian Affairs (OHA), a semi-governmental state office responsible for administering the Hawaiian Homelands Commission Act
- Instituting Hawaiian as the second official language of the state
- Teaching Hawaiian history and culture in public schools
- Procedures for the return of federal land such as Kaho'olawe

The new statutes elevated and confirmed the importance of Native Hawaiian history and culture in the state, and established offices and policies to ensure and protect the continuation of Native Hawaiian traditional and customary rights. The establishment of OHA was seen by Native Hawaiians as a first step toward self-governance (MacKenzie 1991: 77, 89) and a reflection of changing public interests in the state. To the legislature, these interests showed the Indigenous community was demanding a 'solemn trust obligation and responsibility to Native Hawaiians' be honored (Act No. 196, §2, 1979 Haw. Sess. Laws 398, 399). Hawai'i Constitutional Amendment XII, §7 would be ratified into legislation, stating:

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

To Native Hawaiians, the Con Con and resultant ratified amendments were groundbreaking legal developments in law, responding to longstanding unresolved claims for sovereignty and self-determination (MacKenzie 2012: 632). To Kalipi, the

⁵⁹ As reported to the state legislature, 'Article XI involves two distinct sets of concerns. First is the historic background of the use and ownership of land in Hawai'i, and its relationship to the Hawaiian People. Related, is the decline in numbers of Hawaiians, and their unfavorable position on the socio-economic ladder. Historic injustice and the obligation to correct it is a continuous theme'. (Legislative Reference Bureau, Hawai'i Constitutional Convention Studies 1978, State of Hawai'i: 150. [Online] Available at: <http://lrbhawaii.org/reports/1978concon.html> [Accessed 26 July 2017].

passage of the “Hawaiian-affairs package” would change the scope and direction of his case immeasurably. It would add force to his argument, legal justification for his claims, and confirm the importance of his Native Hawaiian heritage to the State of Hawai‘i. The voters of Hawai‘i clearly negated the defendant’s argument that customs and tradition had no place in modern Hawai‘i. According to the final brief by Kalipi:

The recent amendment indicates that the people of Hawai‘i consider Hawaiian customs and traditions to be such an important part of the culture and lifestyle of this state that they are worthy of protection by establishing these rights as a matter of constitutional law.

(Kalipi SC A.10: 160)

The voters of the state had spoken, demonstrating public social and political will in support of Native Hawaiians and heritage preservation. It was up to the Hawai‘i Supreme Court to recognize and respond to this revolutionary constitutional change. If the impetus for legal change was the Con Con, judicial enforcement came about as a result of the political interests, personal focus, and background of Hawai‘i Supreme Court Chief Justice William Richardson.

5.3.2 Authorized Power in the Hands of a Hawaiian: Chief Justice William S. Richardson

Chief Justice Richardson’s court decisions were a reflection of his family, heritage, and political affiliations. Richardson’s father and grandfather both served Queen Liliuokalani, who was the last monarch of Hawai‘i. His father was a member of the oppositional Democratic Party when the Republican oligarchy was in power after the overthrow, and he was imprisoned for partaking in a failed revolution to overthrow the ensuing Republic. He was, according to Dettweiler, a ‘living bridge between ... two eras of consciousness’: the historic monarchy and the modern state (Dettweiler 2005: 190). Richardson noted the discrimination he experienced in his youth in Territorial Hawai‘i and felt it influenced his court decisions (Interview with Justice Richardson 26 April 2004 cited in Dettweiler 2005: 217). In writing his opinions, he ‘took a little bit from each facet of my life, some fact, some stories from the older

folks and the way I understood the [Hawaiian] songs and legends' to evaluate each case and its significance to the community (Ibid.).

Chief Justice Richardson's heritage was also evident in his appointment to the bench. He was a protégée of John Burns, the first elected governor of the state, and the bench appointment may have represented a political commitment to elevate the rights of underrepresented and marginalized minorities; an effort to court, or maintain a local vote by proving the continuity of Native Hawaiian service to the ruling authority (Dettweiler 2005: 190); or a returned favor for delivering the Native Hawaiian vote (Fuchs 1961: 317). Nonetheless, conscious of both his heritage as a Native Hawaiian and his powerful position within the political elite of Hawai'i, Richardson took advantage of the new constitutional amendment elevating in importance and protecting Native Hawaiian culture and heritage, and sought and achieved a compromise between the economic interests of the state, the needs of the general citizenry, and the rights of the Native population. He based the need for compromise between traditional practices and current understandings of property rights on traditional Native Hawaiian cultural values of cooperation and non-interference (Kalipi Ruling 1982: 121).

His opinion began by noting 'the court's [new constitutional] obligation to preserve and enforce traditional rights of descendants of native Hawaiians' (Kalipi Ruling 1982: 164). He directly confronted state opposition by remarking that '[a]ny argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail' (Ibid.: 126). This particular statement would be often repeated in future land claims as the primary and fundamental basis for definitive rulings in favor of Native Hawaiian rights. He concluded Native Hawaiian rights were dependent on custom, and custom had to be considered based on usage, which required determination on a case-by-case basis (Parker 1989: 169). His ruling thus left open possibilities for the protection of yet undermined rights, customs, and practices. Although William Kalipi would eventually lose his case, *kuleana* tenants would gain access rights and Native Hawaiians would pursue both opportunities for further heritage protections, as well as political, social, and economic capital. Most importantly, they would be instilled

with pride at being legally recognized as a unique class of people with an important heritage and protected and highly regarded traditional customs and practices.

5.4 The Process of Identity Transformation

Anyone entering the adversarial environment of an American courtroom has to be prepared to defend his or her legal position. When the plaintiff is an Indigenous person, they also enter the courtroom burdened by historic traumas, lingering prejudice, and resentment over past injustice. Pursuing such an undertaking takes fortitude and courage, and the knowledge that attacks will be personal as well as legal. When the plaintiff is fighting for a principle as well as a legal right, they must be prepared to defend what they believe, whether it is religious, cultural, or political. William Kalipi needed to examine who he was, where he had come from, and what he felt was important to his family. This process of investigation and defense was transformative for him.

What is apparent through the testimony and legal briefs in Kalipi was the gradual transformation of William Kalipi's identity, a change that occurred through a growing awareness that the lawsuit was not about his access to land, but a defense of collective Indigenous rights and a demand for political recognition. The transformation occurred slowly, and transpired in reaction to statements made by the opposition during the course of the trial. What began as a lone subsistence farmer fighting to access a piece of inherited land to continue an ancient way of life, eventually emerged as a battle to clarify the existence of an Indigenous identity with traditional customary practices, and an effort to determine the relevancy to the modern state of preserving and protecting Native culture.

5.4.1 Reclaiming Identity and Redefining “Hawaiianness”

The process of bringing the case to court, developing a narrative, and presenting, defending, and arguing in court had a profound impact on William Kalipi from the beginning. First, preparing a case for court required him to set aside his traditional values of humility and acceptance and to disregard the Native Hawaiian cultural tradition of *aloha*, or getting along, in order to battle the defendants over his rights. In the Hawai'i Circuit Court, where the case was put to trial, Kalipi had to endure

rhetorical attacks on his identity and assaults on the communal history of his people. In the Hawai‘i Supreme Court, he battled glaring insults and direct challenges to the worth of his culture to the state. At the conclusion of the case he bravely presented to other Native Hawaiians, and to the state, a new empowered Native Hawaiian identity. In the eyes of an observing public he would represent the transformation of the passive Native Hawaiian into an Indigenous community activist fighting for collective rights.

The creation of an empowered, determined advocate for Native Hawaiian rights began before the case was filed. By necessity, Kalipi was forced to overcome a Native Hawaiian cultural barrier to file his claim. Native Hawaiians do not come forward individually to speak publicly, instead, according to interviews with community members and government agency representatives, they prioritize *‘ohana* (family) and community, and think and act collectively. If they do come forward, it is typically as the representative of a group with the approval and blessings of respected elder *kupuna* (leaders). Humility is so highly praised, my interviewees informed me that it is considered inappropriate to bring public attention on oneself. This cultural trait may be a lingering value surviving from the strict ancient hierarchical social structure of forced tribute to governing authorities, the *ali ‘i*, and the monarchy.

Once the case was filed, William Kalipi’s transformation was evident in how he presented himself over the course of the case. Initially, in court briefs and testimony he introduced himself as a *kuleana* tenant who wanted to teach his children traditions practiced over many generations (Kalipi CC vol. 3: 744; Kalipi SC A.2: 2, 4). After repeated attacks on his right to enter the defendants’ properties and denials of special privileges based on denial of collective privileges, William Kalipi’s legal claim became communal, transitioning to ‘aboriginal’ rights tied to the ‘common people’ (Kalipi CC vol. 1: 44). The right of access, he claimed, did not belong to the general public, but was a ‘private right’ belonging to a specific subset, ‘common people’, of which he was a member (Ibid.). His membership at this point was not because of his ancestry but due to his ownership of a *kuleana* that entailed holders to specific rights. Aboriginal rights, therefore, were initially associated only with land, not with contemporary Native peoples.

The subsequent defense strategy, however, focused on the relationship of an even smaller subset of people: *kuleana* owners, to the islands, the government, and the law. The attacks were fundamentally and simultaneously denying the importance of Native Hawaiian history to the state, while attempting to minimize the significance of an Indigenous cultural past. Kalipi took this attack as personal, asserting *kuleana* owners and tenants retained not ‘aboriginal rights’ but ‘traditional aboriginal rights’ (Kalipi CC vol. 3: 671-672), and he was not a ‘tenant’ but a ‘native tenant’ (Kalipi CC vol.3: 748). Where ‘aboriginal’ tied legal title to a historical people, the addition of the word ‘traditional’ tied title to collective and continuous actions based on shared values, including custom and practice (Kalipi CC vol.3: 671). Delving into history to support his legal narrative, William Kalipi realized the traditions on which he was basing his claim were all Native Hawaiian. Three quarters of the way through the case presentations, he re-introduced himself and his claim. No longer just a ‘tenant’, William Kalipi for the first time presented himself as a ‘native⁶⁰ Hawaiian’ (Kalipi CC vol.3: 672), a ‘Hawaiian *kuleana* owner’ (Kalipi SC A.6: 151) representative of a communal group with ancestral spiritual, cultural and political ties to Hawai‘i. From this point forward to the end of the case, Kalipi demanded that ‘rights of natives be reserved’ (Kalipi CC vol. 3: 673), and he be allowed to ‘exercise cultural practices which are part of his Hawaiian heritage’ (Ibid.: 687).

The increased ethnic identity as Native Hawaiian carried over throughout the rest of the case. William Kalipi’s new interpretation of the statutes from an Indigenous point of view necessitated his re-consideration of historic intent and origins. His attorneys investigated the original language and use of specific words in HRS §1-1. They found the nineteenth century “Hawaiian” people referenced were a very different demographic than present-day “Hawaiians”. In the nineteenth century, Native Hawaiians outnumbered non-Hawaiians by forty-to-one in the islands (New York Observer and Chronicle 1852: 53). Historic statutory reference to ‘Hawaiians’ would have meant the majority population, who were of Native birth, the ‘common people’ or ‘natives’ whose rights were protected (Kalipi CC vol.1: 44). Indigenous customary

⁶⁰ Lower case “n” repeated from the court text.

practices would have been normative, ‘universally acknowledged’ (Kalipi CC vol.1: 45), and not exceptional actions. The statute thereby would have safeguarded the practices of not just the ‘common people’ but of Native Hawaiians specifically. By contrast, Native Hawaiians in the 1970s were a minority, federally defined by blood quantum with ill-defined rights. The question therefore facing the court was one posed by the great American orator and US Supreme Court Justice, Oliver Wendell Holmes: ‘Can law produced during one period of time under particular social circumstances, in one jurisdiction, maintain or contain relevance in the same jurisdiction in a completely different time?’ (Holmes 1881: 1 cited in Richland 2013: 210).

After investigating the historic foundations of the statute, William Kalipi answered this question with force and certainty. Hawaiians, he stated, are the Native people of the islands, and their heritage, as defined in the past or as interpreted in the present, is so fundamental to the state social and political structure that it cannot be denied or disregarded regardless of how it is interpreted. As descendant citizens of an independent sovereign nation, and as Indigenous people tied spiritually, historically, culturally and politically to the islands, he declared intrinsic ‘aboriginal’ rights had been retained. Government regulations could not ‘extinguish’ these rights. In essence, Kalipi set aside the cumulative wounding and unresolved grief of government subjugation, rejected an imposed ethnic and racial identification, and adopted what Native Hawaiian writer Emalani considers a healing re-identification and narrative that better serves the Hawaiian people (Emalani 28 Sept 2017).

5.4.2 Rebuilding a Native Narrative: Restoring Language and Cultural Meanings

One of the ways Kalipi built his new narrative was to investigate Hawaiian language use in the original statutes and to compare it to contemporary understandings in the courtroom. Many of the documents were in Hawaiian, and with few proficient Hawaiian language scholars available at the time, translation was difficult. Even if translation was possible, there was very little historical research on which to base interpretations. Nonetheless, Kalipi discovered that Hawaiians had maintained many of the original cultural meanings contained in the statute wording. However, non-Hawaiians had more limited interpretations of the Indigenous language employed.

Kalipi found that the basis for the differentiated understandings was in fundamental epistemological differences among court participants in interpreting language. Native Hawaiian participants viewed words as contextual and having multiple meanings while the court, and non-Native participants, required definitive definitions. The problem was most obvious with the use of Hawaiian words in the statutes. For example, arguments over the meaning of the word “*kuleana*” took on new significance as Kalipi highlighted the conceptual differences.

From the defendants’ Western point of view, *kuleana* were considered land grants offered by the government to commoners during the Māhele, a critical time of social, political, and economic transition (Garavoy 2005: 524). They were seen as remnants of a past government, and surviving legal title documents attached to inherited land holdings. However, from Kalipi’s Native Hawaiian perspective, *kuleana* represented efforts by an Indigenous king to preserve threatened remnants of his people’s ancient way of life by incorporating traditional customary practices into codified law (Andrade 2008: 30). Codification of Indigenous custom into Western forms of common law, as Paul Nadasdy noted in his study of Yukon land claims, was an effort to translate complex Native relationships with land into equally complex legal language of private property ownership (Nadasdy cited in Coulthard 2014: 78). The word “*kuleana*”, in particular, reflects a complicated traditional and familial relationship Hawaiians have to their ancestral land (MacKenzie 2012: 648). *Kuleana* suggests, rather than is defined as, ‘rights’, ‘interest’, ‘privilege’ (Kalipi SC A.3: 63), and responsibility. In his explanation of the use of the word for the statute, Kalipi felt the king’s attachment of this word to land title referenced a duty to family and community, including an obligation to perpetuate traditional practices (Kalipi CC vol.3: 687). The defendants disagreed, denying that a cultural assignment could occur with the application of a title name.

The difficulty of bridging this gap in understanding was corroborated by one of Kalipi’s witnesses, William Wilson, brought in to translate documents from the original Hawaiian statute during the trial. Wilson attempted to phrase his translations in terms commonly understood in Hawai‘i in the 1970s, yet stumbled on the word “*kuleana*”. When questioned during the trial on why he did not translate this

particular word in the submitted documentation, he explained that meanings in Hawaiian were contextual and not easily defined. Any single English translation, he noted, ‘could be interpreted as too specific’, losing all historical context, and ignoring or denying the implied cultural references and implications (Kalipi SC A.3: 63). William Kalipi attempted to bridge the conceptual divide between Hawaiian and Western understandings by continuously providing explanations to the court, trying to satisfy its need for conclusive definitions. Although William Kalipi did not convince the defendants, his exploration of the topic may have contributed toward his self-identification and personal empowerment.

This idea is supported by the work of Thiong’o. In his groundbreaking study of Indigenous recovery from colonization, African scholar Ngugi wa Thiong’o (1986) determined history was a matter of perspective. He recommends those trying to recover from previous regimes’ social forces of subjugation do so by seizing back historical language to bring about a new era of self-determination and positivism. Reclamation of Indigenous language restores the cultural meanings inherent in language. Indigenous re-interpretation of Native words re-energizes traditional culture through language control, and restores the local culture lost through colonialization’s attempts to control the social production of wealth (Ibid.). Restoring ancestral language use and the inherent meanings in Native words and phrases, Thiong’o suggests, contributes toward the increased self-worth required to develop greater programs for economic security (Thiong’o 1986). He calls the process ‘decolonizing the mind’ (Ibid.). From another theoretical perspective, William Kalipi’s re-interpretation of Hawaiian words was a Native Hawaiian attempt to resist the psychological mentality of a constrained recognition, and re-define his identity differently than it had been defined by a non-Native political elite (Coulthard 2014: 39; Fanon 1986).

5.4.3 Rebuilding a Native Narrative: Reconsidering the Historical Record

In addition to restoring and introducing in-court cultural meanings to the Hawaiian language, William Kalipi created an alternative narrative by introducing an Indigenous historical perspective on the Māhele. For the first time, the king was presented as an enlightened and informed Indigenous leader who justified land

ownership for commoners on the basis of economic value rather than for purely cultural or paternalistic reasons. Ignoring the uneven distribution of land to royalty and commoners, the king became a new symbol of a past Indigenous trailblazer in a position of political power, a historic model of an informed and educated Hawaiian leader working for the good of a powerless public.

This new representation was not just limited to the Monarchy. The Māhele was also given a new interpretation from an Indigenous point of view. The Māhele was re-envisioned as the result of a ‘peaceful revolution’ following the creation of a ‘Bill of Rights’, which Kalipi’s legal team called the ‘Hawaiian Magna Carta’ (Kalipi SC A.3: 56). The reference to the English Magna Carta of 1215 implied Hawaiian commoners were granted equal rights with *ali‘i*. This new description was an attempt to “decolonize” history and empower through control of the past. In reality, the *ali‘i*, chiefs, and government were given the vast majority of the land leaving little for the commoners to claim. Introducing a new narrative into the official historical record provided an Indigenous voice to the political arena and challenged the status quo, or state “official” past. When Indigenous voices are expressed in this manner, according to Native scholars Blue Swadener and Mutoa, colonialist sensibilities are rejected and a discourse is produced that silences some voices and validates others formerly powerless (Blue Swadener and Mutoa 2008: 3). Kalipi’s attempts to reclaim history, according to Thiong’o’s theory, helped to overcome the lingering effects of psychological trauma and allowed the Native Hawaiian people to create a sense of empowerment (Thiong’o 1986).

5.4.4 Collective Empowerment: Decolonizing History by Looking to the Past to Inform the Present

William Kalipi’s case was timely, emerging through the confluence of a number of significant events. The discourse of Native empowerment and sovereignty had become the basis for Native Hawaiian land claim activism in Hawai‘i. Empowerment entailed improving living condition, restoring economic self-sufficiency, and protecting land, cultural resources, traditions, and culture. What the empowerment required was a positive self-image and the realization that effective change is possible. According to Sarat, questions of identity such as these are negotiated through the law, particularly when legitimate social transitions occur (Sarat 2012: 2).

In each period of transition, the law acts as a metaphorical bridge between one social state and another (Ibid.: 5). It creates a means for possible change in the lives of citizens, particularly when there were no possibilities previously. Teitel, who studies “transitional constitutionalism”, or how new constitutions reflect and inspire social and political change, submits that the state’s political identity is redefined by transformations in its constitution. As the state’s identity changes, so does the identity of its people. She proffers that although the law’s role is typically to stimulate political change, in times of transition, such as that surrounding the creation or redrafting of a constitution like Hawai‘i’s; the law, political values, and by extension, social identity, may be dramatically impacted (Teitel 2012).

In other words, dramatic changes in the law may act as catalysts for re-examination of social identities. Kalipi brought his case to court during one of these periods of great transition. The Hawaiian Renaissance and the Constitutional Convention were underway and social change was imminent. Native Hawaiians were actively pursuing political engagement and the population was reconsidering the historical obligations of the state to its Native people. Kalipi’s empowerment actions would pre-empt Thiong’o’s writing by ten years, but the theoretical premises would be the same. In the language of the statutes and in the interpretation of history, William Kalipi would take an Indigenous point of view and search for larger questions of meaning across different discourses. He used the rebirth of the Hawaiian language to investigate meanings within historic statutes, and took control of the historical narrative to reclaim Indigenous perspective.

5.4.5 Hawaiian Identity: A New Definition Created through Performance

In Hawai‘i, the creation of a recognized “Hawaiian” ethnic entity had historically taken place through shifts in political power. With each shift, Hawaiian identity was formed in relation to other categories, defining what Hawaiians were not in order to create new categories and definitions of identification. The result was an identity based on how others saw Hawaiians rather than how they saw themselves. The Hawaiian Renaissance and the Constitutional Convention contributed toward refocusing this self-definition, and encouraged redefinition from an internal community perspective. The context for the redefinition was in the creation of

narratives, providing shifting contours and layers that framed various forms of claims, such as sovereignty claims and land claims. Through these claims a sense of “Hawaiianess” came into being in relation to other spheres. Those spheres included law, economic security, and environmentalism, to name a few. Each sphere exhibited a different form of power. Exerting power in any of these spheres had political implications (Halualani 2002). Kalipi’s sphere was the law and he exemplified the impact that exertion of Indigenous power in the courtroom could achieve. Not only did his sense of self and belonging increase during the course of his case, but the process of presentation had a profound impact on his sense of belonging and identity. William Kalipi’s move toward claiming his rights in court can be therefore seen as the beginning of a Native Hawaiian identity shift in relation to the law. His actions defined a new identity for Hawaiians; or following Butler, he performed into being a symbolic version of the empowered Native Hawaiian.

William Kalipi’s transformation was evident in his actions, argument, and language, particularly his self-representation over the course of the case. He delved into history and oral tradition to find the basis for his statements and discovered elements of an ancestral and legal past that had been lost or overlooked for generations. This spurred him on to argue for reconsideration of the law on the basis of alternative historical representations. As he built a new legal narrative from an Indigenous standpoint, he had to defend the importance of Native Hawaiians and their heritage to the modern state. No longer as an individual fighting for land rights, William Kalipi became the lone court representative of a collective community with deep ancestral, spiritual, and political foundations in the Hawaiian Islands. Through his presentations, he re-contextualized Hawaiian history from an Indigenous point of view and took back the historical narrative. In the end, William Kalipi would lose his case because he did not fulfil the residency status required by HRS §7-1 to validate his right to gather in the ahupua‘a, but he would gain enormous ground in the fight for Indigenous recognition and land control. His narrative would link the customary past to the present and in doing so illuminate a potentially enlightened future (Ochs and Capps 2001: 218).

The impact of his actions was incalculable. Spurred on by William Kalipi’s courage, fortitude, and demonstrated public support for Indigenous culture, Native Hawaiians

would next use Justice Richardson's ruling as the impetus for further land claims, collectively engaging as the Pele Defense Fund to fight for heritage preservation and environmental protection. Where one man and one case had made a difference, a series of cases brought as an organized community effort would carry the Native Hawaiian land claims process into the collective future, expanding cultural awareness and preserving Indigenous rights. In the following chapter, Native Hawaiians engage with community members and other special interest activists in a combined effort to both protect the environment; to preserve Hawaiian customary, traditional and religious practices; and to build on Richardson's legacy of legal protection of Hawaiian heritage.

CHAPTER SIX PELE DEFENSE FUND V PATY - RAISING THE ROOF

E komo maloko o Halema 'uma 'u (whatever is hot is sacred to Pele)

Aluli and McGregor, in *A Nation Rising 2014*: 197

As Hawaiians were celebrating the confirmation of Hawaiian rights in *Kalipi v Hawaiian Trust Company*, they were also becoming increasingly alarmed over a new state initiative to extract geothermal energy on the Big Island of Hawai'i. In the state plan, a massive 9,000 acre, \$4 billion geothermal facility was to be built in Puna (Carroll 1992: 49), considered by Native Hawaiians to be the home of Pele, goddess of the volcano. They felt the project would desecrate Pele, restrict religious worship, and inappropriately use protected conservation land placed in trust for the benefit of Native Hawaiians. In their view, the enormous facility with its massive extraction equipment and extensive support network would turn Pele's tropical rainforest home into an industrial production center, destroying precious natural resources and drastically impacting Native Hawaiian traditional and customary practices in the area. To Native Hawaiians, this battle would come to epitomize the struggle to preserve Native culture and tradition, going to the fundamental core of Native Hawaiian heritage and challenging the perpetuation of their unique identity by threatening the very existence of the spiritual and religious relationship between Indigenous residents and their ancestral land (*Dedman v BLNR* cited in MacKenzie 2012: 646).

The Native Hawaiian battle against geothermal would be fought on several fronts. From a cultural standpoint, Hawaiians believed that they had an obligation to do what was *pono* (correct) in *malama 'āina* (protecting the earth). Their efforts would include prayer and tribute to Pele, conducted in accordance with traditional values. Politically, they would develop a program of organized activism to prevent devastation of their *'āina* (land) as a cultural and spiritual relative, destruction of the

goddess and her home, and restriction of their cultural and religious rights. To legitimize their claims, they created the non-profit Pele Defense Fund (PDF). PDF's leaders sought guidance from more experienced minority and special interest organizations, and fashioned a multimedia campaign to build cultural and economic capital. In their campaign, Pele was described as the foundation of an ancient religion practiced by an Indigenous community, and her rainforest home, with its active lava flows, a natural resource requiring special protection.

To stop the construction of geothermal wells, PDF filed a barrage of state and federal lawsuits in the hopes one would warrant judicial review. In a strategic move that would prove valuable in the future, PDF forged alliances with other organizations and local citizens groups to build public support for Native Hawaiian rights and environmental protection within the legal system. Numerous cases were dismissed, but *Pele Defense Fund v Paty* (or "Pele") persisted and was successfully argued for thirteen years through the court system, eventually leading to the expansion of Native Hawaiian access rights in the state (MacGregor, Matsuoka and Minerbi and Kelley 2002: 40).

In this chapter I argue that PDF strategically used heritage as a means to cultivate the tactical alliances needed to shift political power in the courtroom. In doing so they demonstrated an emergent form of empowered Indigenous identity needed in the quest for political recognition. Four factors contributed toward transforming PDF members' sense of identity:

- 1) Development of a successful, comprehensive strategy of activism
- 2) National and international support from environmental organizations and Indigenous groups
- 3) Native Hawaiians in authorized court positions of power
- 4) Preparation of the first Cultural Impact Assessment documenting the impact of development on the Hawaiian population

The first factor evolved in response to the state's refusal to consider the impact of development on Native Hawaiians. The second factor was one of the component

elements of the Native Hawaiian program of strategic activism. The third factor supported and increased Native Hawaiian cultural awareness, political involvement, activism, and education. The fourth factor was possible due to the combined success of the program of tactical alliances, legal expertise and experience, allied support, and increased professionalism.

The Grand Narrative of Pele: Approach to the Examination

PDF v Paty was one case within the context of a multi-lawsuit, strategic program Native Hawaiians adopted to stop the development of geothermal in Puna. This lawsuit was selected from among the other cases for this dissertation because it set the next judicial precedent after Kalipi regarding Native Hawaiian access rights and customary and traditional practices. The other cases in PDF's program were used as evidence during the Pele court proceedings and therefore warrant identification. See Appendix 1 for a list of legal cases involved in PDF's legal strategy demonstrating the scope of their efforts and their legal arguments.

PDF v Paty was not a typical court case. It was decided by the Hawai'i Supreme Court then remanded (sent back) to the lower court for a complete retrial. To clarify references throughout this chapter, the two journeys of this case's review are distinguished as Pele and Pele 2. Pele established a landmark ruling in 1994 based on intangible assertions of heritage, and Pele 2, the second part of the case, supplied tangible evidence supporting PDF's intangible claims.

6.1 Activism and Transition: The Socio-political Context and the Growth of Indigenous Consciousness

The 1970s and 1980s were exceptional periods of awakening for Indigenous people worldwide, and fostered new political actions for greater inclusion in democratic processes. These movements were known as "Indigenous politics" (Postero 2013: 109) and the "politics of recognition" (Coulthard 2007, 2014; Fraser 2000). Native peoples were rethinking the basis for power-based relationships and were discovering new ways to access power to improve their lives. "Indigeneity" as an identity became the means for achieving greater rights and equal justice.

6.1.1 Collective Indigenous Belonging: Native Hawaiians and International Human Rights

Indigenous peoples, disbursed all over the planet, began to collectively engage with each other to discuss their shared histories of historic displacement from traditional land and forge international alliances for political action. One of their earliest gatherings was at the 1975 World Council of Indigenous Peoples (WCIP) in Port Alberni, British Columbia, where discussions were initiated on the negative impact wrought by colonialism (Sanders 1977: 5-13). Participants sought redress through collective activism for political recognition and sovereignty over ancestral property (Ibid.: 21). Among the two hundred and sixty attendees from nineteen countries were Native Hawaiians, connecting the remote islanders to the rest of the Indigenous world (Ibid.: 15)

One of the purposes of the WCIP was to prepare statistics on discriminatory policies and codify demands for the 1982 United Nations Working Group on Indigenous Populations. That research led to the *Martinez-Cabo Report* (or “Cobo Report”), a document critically linking Indigenous rights to minority and ethnic rights (United Nations 2009: 2).⁶¹ Linking these rights was valuable for Native peoples, as wealthy nations had begun to tie foreign aid to human rights (Sanders 1977: 26). Governments who signed international treaties supporting human rights could now be pressured by other signatories to improve the lives of local Indigenous communities.⁶² It was a valuable lesson for Native Hawaiian activists and one PDF would use for Pele; a national or international Indigenous message well publicized and based on human rights could put political pressure on local governments for Indigenous political recognition and bring about positive change.

⁶¹ Jose R. Martinez Cobo was the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. [Online] Available at: <https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html> [Accessed 23 April 2018].

⁶² The treaties include the UN Fund for Indigenous Populations (1985) and the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989), [Online] Available at: http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf [Accessed 27 October 2017].

6.1.2 The Narrative at Home: Native Hawaiian Rights Reconsidered

Native Hawaiians soon realized the impact of their international activism. The US Federal Government began to reconsider its relationship with Indigenous islanders and initiated:

- A re-evaluation of the historical record through the 1980 *Native Hawaiian Study Commission Report* ⁶³
- Government hearings on the existence and extent of the trust relationship between Native Hawaiians and the US Federal Government, and addressing US complicity in the overthrow of the Nation of Hawai‘i
- Protections for Hawaiian religious practices under the American Indian Religious Freedom Act of 1994⁶⁴
- Inclusion of Native Hawaiian remains in the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)⁶⁵
- An acknowledgement by President Bush of the cultural significance of Kaho‘olawe to Native Hawaiians, and an end to the Navy’s use of the island for military target practice
- The handing of Kaho‘olawe over to the state to be jointly administered with Native cultural leaders, the first step in the restoration of traditional lands.

A critical turning point in Native Hawaiian relations with the US Federal Government took place in 1993. The US Congress enacted the *Apology Resolution*, admitting American complicity in the overthrow of the Nation of Hawai‘i and apologizing to descendants of its citizens.⁶⁶ Its issuance spurred Native Hawaiian researchers to investigate the legality of Hawai‘i’s admission into the federal union (Sai 2008), supporting the claims of independence advocates and providing a basis

⁶³ The report was commissioned by the US Congress and examined the socio-economic impacts of Hawaiian land displacement and proposed ways to correct injustice through the return of property to Indigenous control. The report concluded that Native Hawaiian settlement bills similar to the Alaskan and Indian Claims settlements should be seriously considered.

⁶⁴ US Public Law 95-341 (1978).

⁶⁵ This legislation fostered the return of Indigenous human remains from museums and protect burial sites from future desecration.

⁶⁶ US Public Law 103-150, 107 Stat. 1510. (1993).

for legal briefs in *Public Access Shoreline Hawai‘i v Hawai‘i County Planning Commission* (examined in Chapter Seven).

The growing tension over land control was evident later that year as more than ten thousand Native Hawaiians united in a solemn sovereignty protest march through Honolulu, as seen below in Figure 3:



Figure 3 Native Hawaiian Sovereignty March of 1993⁶⁷

The Hawaiians objected to the “theft” of their nation and forced the state to re-designate the centennial anniversary of the overthrow as an “observation” instead of a “celebration” (Los Angeles Times 18 January 1993; Engen 1993: 24). Governor Waihee, a Native Hawaiian, ordered the American flag taken down for one week, and only the Hawai‘i state flag was flown. According to one sovereignty advocate, the march was ‘a focal point to educate people both locally and nationally about how the [US] ... seized our sacred lands’ (Trask cited in Engen 1993).

⁶⁷ Honolulu Advertiser Library Photo, January 1993, Source: Honolulu Advertiser.com. [Online] Available at: [<http://the.honoluluadvertiser.com/article/2009/Aug/16/ln/hawaii908160330.html>] [Accessed 25 March 2018].

6.1.3 Defining and Overcoming Tensions in State Activist Movements

The increased Hawaiian activism exacerbated divisions between different groups in Hawai‘i which were stratified by ethnicity and very resistant to change (Akamura 1980:1 cited in Grant and Ogawa 1993: 154). Descendants of Japanese immigrants dominated politics while Hawaiians were largely marginalized and powerless (Okamura 2008: 154). The stratification was apparent in tensions between local chapters of mainland environmental organizations whose members were primarily urban, non-Native, and well-educated; and Native Hawaiians, who were concentrated in rural areas, less educated and primarily lower income (Frierson 2012: 213).⁶⁸ While often present at the same events, there was a lack of trust and an unwillingness to work together. If cooperation and mutual support were going to be built for effective undertakings between Indigenous and non-Indigenous activists, according to Snelgrove, Dhamoon and Corntassel who study decolonization processes, a place-based relationship needed to be established (Snelgrove, Dhamoon and Corntassel 2014: 3). The relationship needed to focus on one site, required anticipated destruction of land due to a proposed project, and had to impact large segments of the Native and non-Native population (Ibid.). Geothermal in Puna satisfied these requirements: the development would deprive state citizens of the use of pristine park land; contribute to worldwide destruction of a rapidly disappearing natural resource (rainforests); produce pollution harmful to the health of local citizens; and negatively impact Native Hawaiian beliefs and traditional, customary, and religious practices. An organized and educated leadership was needed to develop this coordinated effort and the Pele Defense Fund would emerge to fill this leadership role (Bowman 1991).

6.2 Outside the Courtroom: Building Alliances for Political Recognition

The Puna opposition arose in 1982 after the state Board of Natural Land and Resources (BNLR) decided to use Ceded conservation land adjacent to Hawai‘i Volcanoes National Park for large-scale development (Pele SC A.4: 102-103). The Estate of James Campbell wanted to develop the project, but an active lava flow

⁶⁸ The environmental organizations included the Sierra Club, the Audubon Society, and The Nature Conservancy.

rendered their property useless. As a result, the state traded public conservation land in the Wao Kele O Puna (WKOP) Natural Area Reserve and the Puna Forest Reserve (PFR) for Campbell's damaged property (Pele A.4: 100; Pele 2 2002).

6.2.1 The Impact of Geothermal on Pele, Goddess of the Volcano

Hawaiians were appalled at the potential loss. Wao Kele O Puna is considered by Hawaiians to be a *wahi pana*, a valued storied place, one of the most sacred areas in Hawai'i as one of few 'traditional centers of spiritual power' (Matsuoka, McGregor and Minerbi et al. 1996: 19, 33). It is the spiritual home of the last living Hawaiian *akua* (god), Pele, the principal Hawaiian deity continuously and publicly honored and worshiped despite the 1819 chiefly abolition of the *kapu* social order (McGregor and Aluli 2014: 182-183), and her *aumakua* (genealogical descendants) (Faulstich 1990). Pele's visible presence, manifested through lava and the steam, reinforces Hawaiians' religious belief in her (Ibid.). Connected to their ancestors through nature, Hawaiians believe Pele's 'lifeblood' is the life force of the Hawaiian people (MacKenzie and Kau 2003: 220), and they have a responsibility to keep her alive (Dedman cited in Frierson 2012: 219), including through lawsuits.

6.2.2 The Contested Case Hearings

To consider objections to the geothermal development project, the state had a legal adjudication process called a Contested Case Hearing (CCH). Speakers had to have a direct interest in the outcome apart from the general population, or "standing", in order to participate. Hawaiians had "standing" only if they could prove, per the Kalipi ruling, residency in Puna, fifty percent Native Hawaiian ancestry, and the continuation of traditional practices since the late nineteenth century.

Four CCHs were held starting in 1982, with Hawaiians, residents, and environmentalists objecting to the issuance of Campbell's development permits (CCH 6 June 1989, 19 June 1989). Native Hawaiians Lehua Lopez, Palikapu Dedman, and Emmett Aluli, the eventual founders of the Pele Defense Fund, were present and testified, as was Melody MacKenzie, who would become a lead Pele

attorney.⁶⁹ They were outraged that the state had not taken into consideration the impact on Native Hawaiian heritage before issuing permits, especially in lieu of the greatly diminished number of natural resources in the area due to recent eruptions (Frierson 2012: 219). In theory, the CCH process should have afforded Native Hawaiians, as residents with protected access rights, an opportunity to challenge the geothermal project. In reality, however, the CCH process would turn out to be only a formality designed to distract the public while the government proceeded in pursuing geothermal development (Sumida 1990).

6.2.3 Cooperative Activism Begins: Native Hawaiians and Environmentalists Together

Native Hawaiians, environmentalists, and local residents held rallies during the hearings to attract media attention to their cause. By March 1990 the rallies had grown into demonstrations of over fifteen hundred people (Faulstich 1990), the most significant protests in Hawai‘i since the Vietnam War (Borg 1990: A3).

Demonstrating a lack of familiarity with the Hawaiian value of *aloha* (peace and understanding), the state assigned a police presence to each gathering, and in a show of power, arrested over one hundred and forty protesters (Dawson 2005), attracting widespread media attention.

6.2.4 Creation of the Pele Defense Fund

When the protests did not stop the development, Lopez, Dedman, and Aluli (Carroll 1992: 50) founded the Pele Defense Fund (Pele A.4: 117), and began filing lawsuits. PDF felt state elevation of Hawaiian culture in legislation without enforcement was a form of elitist multiculturalism, and to reverse this trend Hawaiians needed judicial force to bring about improvements in Native Hawaiian lives. According to Lehua Lopez:

We knew that we were going into the courts of the Western legal system, where land is only one thing – property. And that we were

⁶⁹ Aluli, a medical doctor, and Dedman, a Pele practitioner, both had experience in legal proceedings. Aluli was a lead participant in the Kaho‘olawe case and a delegate at the Con Con. Both Dedman and Aluli were plaintiffs in ongoing geothermal federal court action.

introducing a “foreign” concept – that land can be sacred – it can belong to the gods. And that Hawaiians have a spiritual claim to the land that still exists, even if our lands have been taken away from us. But we felt that somehow we had to get into the dialogue. All this talk about the environment means nothing without [a say in land control].

(Lehua Lopez cited in Frierson 2012: 220)

The sheer number of cases filed within a short period of time drew more attention from the press. Appendix 2 notes the lawsuits, their legal bases, the corresponding laws violated, and the judicial decisions. Two years after forming PDF, its leaders decided to incorporate as a non-profit organization, affording them legal rights to sue collectively on behalf of a specific group of citizens and to solicit donations to cover their court costs. The incorporation validated their efforts, in particular to powerful mainland environmental organizations, and resulted in cooperative programming.

To the Hawaiian activists, the sacred *wahi pana* of Wao Kele was in need of safeguarding. If geothermal in Puna proceeded, it would ‘result in irreparable harm to resources essential to the subsistence, as well as the cultural and spiritual customs and beliefs of Hawaiians who live in the Project area and who believe in Pele’ (Pele SC A.12: 408). Steam extraction would drill into Pele’s ‘body’ and deplete her energy, limiting her ability to manifest herself to her practitioners, and threatening the continuation of her worship (Ibid.). PDF activists felt an injury to the goddess would provide a new form of cultural trauma and challenge continuation of the Hawaiian culture and identity (McGregor and Aluli 2014: 185).

6.2.5 Effective Advocacy through National Media

To develop publicity for political advocacy and accrue funding for their costly legal cases, PDF turned to professional advisors (McGregor and Aluli 2014: 188).⁷⁰ A media campaign ensued that targeted tourists and involved a \$35,000 full-page

⁷⁰ Advisors included the Advocacy Institute, a Washington, DC, nonprofit dedicated to counseling public-interest groups on effective activism, the San Francisco-based Public Media Center, and the Rainforest Alliance.

advertisement in leading mainland newspapers (Ibid.). The newspapers included The New York Times, the San Francisco Tribune, the Washington Post, and the Los Angeles Times. A copy of the national advertisement that appeared in the New York Times can be found in Appendix 3. The ad dramatically described geothermal as an environmental public concern to all, a human rights issue restricting Indigenous and religious rights, and an affront to an ancient and enduring Native religious belief system. It emphasized the importance of Native Hawaiian religious practices, and stressed the project was ‘sacrilegious’ (Carroll 1992: 50). To PDF, the campaign was a ‘breakthrough in gaining the attention and support of national environmental groups’ (McGregor and Aluli 2014: 188). It was so successful that attached mail-in coupons for donations funded its cost. PDF noted that they had not won any major court battles yet, but had established critical alliances⁷¹ and created a new political awareness (Bowman 1991).

A video titled *Pele’s Appeal* followed, providing visual imagery of an idyllic Hawai‘i not easily discernible in print. Shown nationwide on television via the Public Broadcasting System, it generated further capital in opposition to Puna’s geothermal project. In the end, the combination of press attention, targeted media, cooperative organizational support and public recognition all contributed toward building a social and political environment favorable toward Indigenous rights protection in the Hawaiian courts.

6.3 Inside the Courtroom: The Case of Pele Defense Fund v Paty

6.3.1 Narrative Analysis

Two legal narrative strategies were employed to examine this case. Since the case was part of a broad legal strategy, the case narrative was reviewed for its positionality in relation to the activism and political activities that were going on outside the courtroom, and in response to defensive arguments inside the courts. Documents were examined to determine PDF’s attitude and perspective presented through rhetoric, text and performance; their strategic use of offensive versus

⁷¹ After incorporation, PDF formed alliances with the Sierra Club and the Rainforest Alliance.

defensive positioning; and their investigation and interpretation of the past to build and support claims of historic and contemporary injury to culture and identity.

6.3.2 The Case and its Statutory Issues

In March 1989 PDF sued the state over the land exchange in *PDF v Paty*.⁷² PDF's briefs identified four claims of violations of the law. The issues included:

- 1) The state's obligations relative to the Ceded Lands Trust
- 2) The right of Hawaiians to object in court
- 3) Access rights for Native Hawaiians
- 4) Protection of natural resources in the Natural Area Reserve System

Although the issues were separate, they were not mutually exclusive since all involved some aspect of Hawaiian cultural practice and Native Hawaiian rights.

The first issue involved the state's obligations relative to the Ceded Lands Trust. The Ceded Lands Trust was established by the US Congress 'to save a dying race and rehabilitate its people' (NHLC 1992: 2). Its basis lies in the Hawai'i State Constitution, which holds the Ceded Lands in trust for 'the betterment of the conditions of Native Hawaiians' (*Ulaleo and PDF v Paty* 1990: 1396-1379 cited in Mackenzie 2012: 634). The Ceded Lands were Crown and Government lands of the Nation of Hawai'i seized during the Nation's overthrow and eventually annexed to the US Territory of Hawai'i to be used 'solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes' (Newlands Resolution 1898⁷³). At the time, the US Federal Government noted Hawai'i's unique history and cultural needs, and determined 'land laws of the continental US should not apply to Hawai'i' (30 Stat 750-52 cited in Pele A.5: 123), anticipating challenges to the unusual land use concepts and statutes found in Hawai'i. Upon statehood, the Ceded Lands were transferred to the state within section §5(f) of the Admission Act

⁷² Paty was the Chairman of the BLNR at the time.

⁷³ The Newlands Resolution was an Act of Congress to annex the Republic of Hawai'i and create the Territory of Hawai'i in its place. The Hawaiian Organic Act was approved in 1900 by Congress to adopt a form of government for the new territory, in supplement of the Newlands Resolution.

(*Arakaki v Lingle* SC No. 05-1128), and confirmed in Article XII §4 of the Hawai‘i State Constitution.

The second issue involved the guarantee provided in 42 USC § 1983 delivering every person in the US a civil remedy in court. This law was developed as a legal remedy to combat judicial abuse perpetrated against former slaves following the American Civil War, and was renewed in response to racial discrimination in the twentieth century American south.⁷⁴ Invoking it ties the case to other civil rights actions on behalf of oppressed minority and ethnic groups, and historic injustice in the US courts. Making this claim requires legal qualification, or “standing”, established by meeting identity qualifications as set by law. In the case of Hawaiians, there are conflicts between US Government, state, and Indigenous definitions of “Hawaianness”, creating different standards for clarifying belonging and identity.

The third issue addressed the state’s obligation under Article XII §7 of the State of Hawai‘i Constitution, and Hawai‘i Revised Statute §7-1 ensuring Native Hawaiian access rights for traditional practices on undeveloped property. According to the Kalipi ruling, four conditions had to be met in order for statutory protection of Native Hawaiian access and gathering rights protection to be ensured:

- 1) The Native Hawaiian plaintiff had to live in the *ahupua‘a* in which traditional practices were to take place
- 2) Gathering had to be limited to items listed in HRS §7-1, as well as other products proven traditionally collected in the area
- 3) Practices had to take place on undeveloped land
- 4) Gathering and other customary observances and activities had to be used for traditional practices (Carl 2009: 218)

Although the Kalipi ruling advanced Native Hawaiian access rights, the language of these conditions remained vague and open to interpretation and challenge.

⁷⁴ Source: [Online] Available at: http://www.constitution.org/brief/forsythe_42-1983.htm [Accessed 24 January 2018].

The fourth issue involved the Natural Area Reserve System (NARS), a state designation to protect land “in perpetuity” because of its unique biologic and geographic diversity. The state was determined to overcome all obstacles to achieve its energy goals by ignoring, overturning, or denying laws protecting natural resources and Hawaiian rights, and obliterating any potential for public opposition. This included declassification of NARS status for Wao Kele O Puna and the Puna Reserve, and allowing destruction of endangered fauna used in Native Hawaiian cultural, religious, and spiritual practices.

At the heart of these issues were questions of whether Native Hawaiians had religious and traditional rights in Puna that were legally protected, if these rights were superseded by other state objectives, and who had the right to fight in court on behalf of the Indigenous community.

6.3.3 Case Development and Strategy

The case began in the lower court with PDF maintaining they had been illegally denied an opportunity to object to geothermal development. The court ruled PDF did not have standing to file a lawsuit and PDF appealed the decision to the Supreme Court of Hawai‘i.

In the Supreme Court, PDF’s strategy was to address the issues as violations of laws created to protect Native Hawaiian rights and culture. From their first brief, PDF argued state officials had an ‘affirmative trust duty’ to manage Trust lands in accordance with state law, federal legislation, and the State Constitution (Pele A.4: 122). The geothermal land trade, PDF contended, infringed on the historic relationship between Hawaiians and the government (Pele A.5: 122, 131) and ignored the cultural importance of Native Hawaiian’s relationship to their ancestral home (Pele A.6: 123). Furthermore, by destroying precious natural resources, the government was perpetuating historic discrimination against the Indigenous community by depriving them of opportunities for economic and social improvement, which the Trust had been established to provide (Pele A.6: 137). Additionally, they were denied the right to object, a right guaranteed under US civil

rights law (Pele A.5: 105; Pele A.6: 141). By making this claim, they intentionally linked Native Hawaiian rights to US civil rights and implied there were parallels between Native Hawaiian discrimination and mainland subjugation of ethnic minorities and black Americans.

The importance and uniqueness of Puna was repeatedly stressed by PDF. It was described as Pele's home, a place of spiritual, cultural, and religious importance to Native Hawaiians, with unique customs, traditions, and practices (Pele A.6: 141). Hawaiian rights, PDF declared, as defined and protected in the law, had to be interpreted differently due to the unusual circumstances of the local geography and culture.

The defendants countered the state had the right to use Trust land for public purposes (Pele Transcript of Court Proceedings 15 Nov. 1990: 6), regardless of traditional Hawaiian use and beliefs. Their fear was that protection of Native Hawaiian rights would 'elevate gathering rights above traditional [as in Western] notions of fee simple ownership' and be an unlawful government imposition on private property (Pele A.7: 245).⁷⁵ Although this issue was not resolved in Pele, it became the focus of the arguments in *Public Access Shoreline Hawai' v Hawai'i County Planning Commission* (examined in Chapter Seven).

When the case was not dismissed, the defendants altered their position, asserting PDF had not met the requirements required in Kalipi for standing through oral testimony (Pele A.10: 324). They demanded PDF provide Western forms of evidential proof to support their allegations. It was a denial of Indigenous knowledge and Native Hawaiian perspective on history, heritage, and identity, and it transformed the case into an Indigenous rights claim for political recognition, self-identification, and Indigenous rights protection. With so much at stake, PDF, over the very vocal opposition of the defense, brought in as counsel an attorney from the mainland experienced in Native American rights and federal land trust issues (Pele A.8: 252). Tom Moore was the attorney involved in the Dedman case, another PDF

⁷⁵ Known as a 'taking' under the US Fifth Amendment of the State and Federal Constitutions.

trust-related geothermal legal action. He supplied supplementary political capital in the courtroom and his presence was a constant reminder to the court of PDF's alliance with larger, mainland minority groups. Moore helped the lead attorneys from the non-profit Native Hawaiian Legal Corporation (NHLC) take Pele beyond an access rights case. Together they claimed it was not a land issue, but a First Amendment US Constitutional rights concern — the right to free speech.

The PDF legal team researched the intent of the 1978 Constitutional Amendment, Article XII §7, and determined the framers' goal was to create an amendment that was as broad as possible to provide the state powers to protect Native Hawaiian rights, to prevent interference with those rights, and to ensure that all attempts to overturn Native rights in court would be restricted by the passage of the Article (Standing Committee Report #57 cited in Pele A.8). For the rest of Pele, PDF would concentrate on proving they had the right to object as a special class of impacted citizens, to self-define, and to determine what defined Hawaiian culture.

While the rhetorical battle was pursued in court, PDF continued their activism outside in the public sphere. The Pele Supreme Court trial would eventually be impacted by two of their other cases, *Blue Oceans Society v Watkins*, discussed later in this chapter, and PASH, examined in Chapter Seven. Both cases were decided during Pele and influenced the final ruling in 2002. In the end, research for the Blue Oceans Society case would supply the needed tangible evidence of Native Hawaiian historic use of Puna and provide documented ethnographic proof of the extent of the Native Hawaiian practices impacted. PASH would determine the government had an obligation to consider the impact of development on Native Hawaiian culture and heritage. In all three cases, national environmental organizations would come forward with substantial political, economic, and social capital to join the Native Hawaiian effort to protect Indigenous heritage, rights to practice, and natural resources.

Component Issues and Arguments

There were three component elements to the PDF court arguments. They were:

- 1) The state's disregard for laws protecting civil rights, Native Hawaiian rights, and natural resources
- 2) A narrow interpretation of Hawaiian identity, practices, and traditions
- 3) A conception of Hawaiian culture only as defined by Western standards

First Component: State Disregard for Native Rights Protections and Trust Provisions

During the trials, PDF focused on four instances where the state overruled or disregarded legislative requirements for the protection of Native rights and the preservation of natural resources. First, the Governor declassified Wao Kele 'O Puna, a Ceded Lands property, from the Natural Area Reserve System (NARS) to create a geothermal zone in the middle of a former conservation district (Pele A.4: 101-102). To Hawaiians, NARS status was an authorized form of land and resource preservation in line with Hawaiian ideals. It had been conferred to protect the unique geological features of the Puna Forest Reserve and the Wao Kele O Puna Reserve. Declassification placed government financial objectives over the protection of lands designated 'to better the conditions of Native Hawaiians', and destroyed unique flora and fauna, thereby 'depriving Native Hawaiians of natural resources' for traditional practices (Pele A.6: 137) in violation of 5(f) Trust provisions.

The second instance was the state's elimination of the CCH process. It deprived Hawaiians of the opportunity to testify publicly against state geothermal development plans. Without the CCH process, Hawaiians were rendered voiceless in the public forum, in violation of both US Constitutional First Amendment rights and 42 USC § 1983. For example, they could not object when BLNR violated state law by issuing a construction permit specifically imposing requirements denying Native Hawaiians access to the geothermal site (Pele Transcript of Court Proceedings 15 Nov. 1990: 7), undeveloped land previously used for traditional purposes.

Lastly, to ensure geothermal would succeed, the state created a law so that an inconclusive legislative vote would allow the state to proceed regardless of the public will (Pele A.10: 284). An eventual indecisive state senate vote did allow the public

land trade to pass the legislature and is indicative of how controversial the state's geothermal policies had become.

Second Component: Hawaiian “Standing” or the Right to Object to Development

The issue of standing persisted throughout the Pele trials. The state and defense claimed the only groups entitled to sue over infringement of rights were those Native Hawaiian community members who qualified according to the blood quantum, were active cultural practitioners, and lived within the Puna *ahupua'a*. They asserted PDF did not prove its members were “qualified” Hawaiians, and based their analysis on, according to the PDF attorneys, a “narrow” Western interpretation of Hawaiian identity, heritage practices, and beliefs (Pele A.10a: 288). It was this “narrow” view of Hawaiian identity and heritage PDF proved the framers of Constitutional Amendment XII §7 had tried to anticipate and address in the language of Article XII §7.

Third Component: Demand for Western Forms of Proof of Historic Practices

The defendants' demand for tangible proof of heritage practices highlighted a lack of understanding of the intangible basis of Native Hawaiian spiritual and religious beliefs, and a denial of legal precedent accepting oral evidence. PDF explained traditional gathering in Puna was never restricted by geographically-defined borders. Active lava flows caused *ahupua'a* borders to be constantly shifting, necessitating community relocations and requiring the use of lava tubes for gathering natural resources (Pele A.10a). Hawaiians had to continually find resources needed for cultural practices in new locations. Evidence provided that only in Puna were *ahupua'a* borders not noted on historic maps, WKOP and the PFR were never classified within an *ahupua'a* (Testimony 11 August 1994: 76 cited in Pele 2: 5), and place names unknown (Pele 2: 5). Wele Kele 'O Puna, PDF affirmed, was only a descriptive term to describe either the surrounding rain belt or a Pele clan deity (Testimony 11 August 1994 cited in Pele 2: 5). The defendants' denial of experiential and ancestral knowledge was an imposition of Western standards of scientific proof in lieu of other ways of knowing, and provided the impetus for PDF's investigation to confirm ancient traditional, spiritual and religious use, and evidence of the impact on contemporary Hawaiian heritage.

6.4 Turning the Political Tide: Proving Heritage Claims and the Enduring Influence of Justice Richardson

Within Pele and Pele 2 several elements shifted the direction of the case narratives. A first shift, or *peripeteia*, occurred in Pele when the *Blue Ocean Preservation Society v Watkins* ruling required national and state environmental laws be followed, halting construction of the geothermal project and prompting the production of the state's first Cultural Impact Study. Information subsequently uncovered in the Cultural Impact Study caused a second *peripeteia* in Pele 2, after archaeological evidence was found of the ancient use of lava tubes for religious purposes, and an ethnographic investigation revealed details of previously secret religious practices impacted by the development. The third element was the enduring influence of former Supreme Court Chief Justice Richardson and how his mentorship inspired a generation of Native Hawaiian legal scholars to work on behalf of their community.

6.4.1 The First *Peripeteia*: Blue Ocean Preservation Society v Watkins

The most significant PDF lawsuit occurring concurrently with Pele was *Blue Ocean Preservation Society v Watkins* (or “Blue Ocean”). In that suit, nine local and seven national organizations including Greenpeace, Friends of the Earth, the Sierra Club (Bowman 1991) and Earth First (Carroll 1992: 50) joined PDF to file a new federal court case to stop geothermal in Puna (Dixon 1991). The influential consortium had the financial resources to fight substantial battles and the political capital to build support (Pele A.12: 409). Taking the case globally, they viewed the Puna Geothermal battle as an international political struggle for human rights. Included in their definition of human rights were rights to traditional practices for Indigenous peoples, including Native Hawaiians. ‘It makes no sense for Americans to demand protection for rainforests in developing countries if we’re not going to do it at home’, said Meg Ruby of Greenpeace (Bowman 1991: n.p.).

The twelve organizations collectively had the political clout to force the State Historic Preservation Officer to conduct a survey of Puna's archaeological resources. The survey confirmed the existence of a large network of lava tubes, and one year

before the Pele 2 decision, convinced the Federal Court of the need for an EIS and a more detailed archaeological and cultural study (Pele A.12: 401-402).⁷⁶ The requirement triggered a federal funding freeze stopping the geothermal construction, and ultimately led to the developer abandoning the project due to excessive delays and legal costs (Dawson 2005).

6.4.2 The Second *Peripeteia*: The Native Hawaiian Cultural Impact Study

The *Native Hawaiian Ethnographic Study for the Hawai‘i Geothermal Project* was the first comprehensive, authorized ethnographic cultural impact report in the state, and became the template for conducting studies of this type (Aoude 1999: 184). Significantly, it was completed by Native Hawaiians and used by a Hawaiian group to advance and confirm communal Native Hawaiian legal rights. According to a leading cultural practitioner interviewed, the study was only successful because it was conducted according to traditional protocol by an accepted Hawaiian cultural *kupuna* with Western professional qualifications as a University of Hawai‘i professor and a proficiency in the preparation of academic research studies. It provided evidence of the secret religious practices of Pele worshipers, and in doing so, supplied information necessary for a positive legal decision in Pele 2. According to attorney Richard Neizen, the translation of ‘sociological abstractions into the kind of formal conceptual clarity privileged by the judiciary’ is exceptionally difficult (Neizen 2009: 67). When ‘dynamic, performative, culturally and historically contingent’ practices, such as those of the Pele worshipers, are successfully revealed in court, according to anthropologist Helaine Silverman, they can help to substantiate and legitimize Indigenous land control and rights protection (Silverman 2015: 69).

The study also uncovered another valuable surprise. The archaeological survey disclosed definitive evidence of the ancient use of lava tubes and surrounding surface lands for hunting, gathering, warfare, and burials (Pele 2, 8 May 1994: 56, 66, 44-47). It also revealed evidence that residents of one *ahupua‘a* travelled across lava-covered areas to gather natural resources in unaffected areas (Pele 2: 9). This

⁷⁶ Under the National Environmental Policy Act (NEPA), an Environmental Impact Statement must be prepared whenever federal funding is obligated for a construction project.

information supported PDF's claims of the heritage value of Puna lands and challenged the court's reliance on historic *ahupua'a* residency as the basis for Native Hawaiian rights. The Pele 2 court ruling to extend Native Hawaiian rights beyond *ahupua'a* borders would be based on this newly-revealed information, breaking with one hundred years of legal precedent restricting Native Hawaiian access rights by residency within an *ahupua'a* (Panarella 1998: 480).

6.4.3 The Enduring Legacy of Influence: William Richardson and the Next Generation of Native Hawaiians in Law

Chief Justice William Richardson had retired by the time Pele was heard, but his influence endured in the presence of Native Hawaiian Justice Robert Klein of the Hawai'i Supreme Court, and Melody MacKenzie, one of the lead attorneys on the case. According to interviews with former mentees from the court, Justice Richardson instilled in his protégées a responsibility for public service, a commitment to better the lives of the Native Hawaiian community, and an awareness of the unique culture on which state law was based. Justice Richardson had recruited Justice Klein to the court, and Klein eventually drafted the final Pele decision. Melody MacKenzie was his former clerk and a graduate of the inaugural class of the University of Hawai'i Law School, which Richardson founded. She was also the lead author and editor of the *Native Hawaiian Rights Handbook*, a guide for attorneys and the public on the legal rights of the Hawaiian community, as well as a general introduction to Native Hawaiian cultural practices, beliefs, and values. This type of mentorship, states Native scholar and Professor Jeff Corntassel, is 'critical to initiating a process of community regeneration that takes Indigenous peoples beyond performance and into the realm of everyday practice' (Corntassel 2012: 98).

With this case, Native Hawaiians began to dominate positions of authority. Hawaiians filled positions as judges, plaintiffs, attorneys, as well as cultural, professional, and academic expert witnesses. The attorneys and plaintiffs demonstrated a proficiency in law, knowledge of culture and traditional values, and a confidence in their ability to successfully present information and argue a case. It was a performance of power, and a reminder of the expertise, education, professionalism, and political capital Native Hawaiians had achieved. In the end, where Kalipi introduced the beginning of a power shift between two legal systems,

Pele began the process of shifting the scale more toward cultural and customary Native Hawaiian law and rights. As will be evident in the next case, the PASH case tipped the balance of the scales toward Native Hawaiian rights over Western understandings of law.

6.5 The Process of Identity Transformation: Taking Back the Narrative

The transformation of Hawaiian identity in Pele is apparent in the rhetoric and tactics employed to fashion and support the case assertions. Over the course of the two trials, PDF began to reclaim the historic narrative by introducing a new perspective on Hawaiian heritage and belonging; demonstrating an organized and professional leadership; assuming power in the courtroom; and performing the assertive, educated, self-confident identity needed for Indigenous self-determination.

6.5.1 Reclaiming the Past through a Native Hawaiian Perspective

During the trial, PDF members redefined their identity by reconsidering the past from a new Native Hawaiian perspective. They re-conceptualized the historical relationship between Native Hawaiians and the government regarding the Ceded Lands Trust, and proposed an alternative narrative from an empowered Indigenous viewpoint. In this new alternative narrative, they expanded concepts of Hawaiian heritage, reconsidered the Hawaiian relationship to place, and reassessed the extent of the injury of geothermal development. Each alternative viewpoint contributed toward providing new insights into how government processes had the potential to impact their culture and the future of their community.

Reconceiving the Ceded Lands Trust

According to the authorized historic record, the Trust was created by the US Government to legitimize possession of another nations' land, in lieu of resolving the issue of the seizure and overthrow of a political ally. In the new enabled retelling of the narrative, the modern Trust was the continuation of a socially constructed "trust relationship" initiated by Kamehameha I in 1840 between the *ali'i* and the common people (Pele A.6: 137). It was 'imposed during the period of the Hawaiian Kingdom and continued through Hawai'i's annexation to the US in 1898' (Pele A.5: 122; Pele

A.6: 137). To support this re-conceived Hawaiian narrative, PDF members testified about how the continuity of heritage relationships supported shared communal memories, which contributed to their sense of belonging and identity (Pele A.6: 137, 142; A.12: 416; A.13: 408). In this reinterpretation, the Ceded Lands Trust, previously a political construct, was transformed into a heritage narrative deserving of cultural protection under an additional set of laws. More importantly to the Hawaiians, according to Hom and Yamamoto, the new narrative intentionally reframed collective memories, or “decolonized the narrative” (Thiong’o 1986), needed for shaping and reinforcing a positive group identity (Hom and Yamamoto 2000: 1747). Symbolically, the Ceded Lands represented the Indigenous nation that was taken away but never dismantled or lost. Preserving it supported the notion of national continuity and reclamation. Corntassel concurs, suggesting that taking back the historical narrative is essential in the transition from powerless victim to empowered survivor, and critical for the path to self-determination (Corntassel 2012: 86).

Expanded Definitions of Hawaiian Heritage

Along with the re-conception of the Trust relationship, PDF asserted that a fixed legal definition of traditional practices was not appropriate (Pele A.7: 241). Instead, PDF explained Hawaiian heritage was based on the transmission of ancient shared traditional values dating to AD 300 (Pele 2: 8). Heritage practices in the Pele case, they continued, were particular to the *‘ohana* in Puna (Pele A.7: 241-244; Pele 2: 7), and indicative of the diversity of Hawaiian cultural activities and the local specialization of traditional practices throughout Hawai‘i (Pele A.2: 33). Other Native Hawaiian customs, myths, and activities may still remain hidden, only to be revealed when threatened. Hawaiian heritage, therefore, could not be clarified easily by Western legal language or principles (Pele 2: 7).

Based on this new narrative, PDF concluded that legal definitions of Hawaiian traditions should not be narrowly construed, but instead, per Justice Richardson in *Kalipi*, considered on a case-by-case basis after local ethnographic interview and testimony (Pele A.1: 7). With these assertions, PDF insisted only Hawaiians could define their culture and practices, not the government or other political authorities.

Expanded Understanding of Hawaiian ‘Ohana (Family and Community)

In Pele, the definition of Hawaiian identity was additionally clarified to the court through an Indigenous lens. PDF’s investigation of the 1978 Con Con proceedings in Pele 2 provided the first evidence in the testimony of delegate Desoto, who claimed Hawaiians had a legal basis for rights grounded in community affiliation. Hawaiians were inclusive, adding community members according to social affiliation, rather than blood relations. In the lawsuit, PDF refuted the claim that its members weren’t “qualified” Hawaiians, by arguing that Hawaiians traditionally grounded a sense of belonging on *‘ohana* (family) relationships but did not limit membership to blood relatives (Pele 10a: 288). Together, community members, Hawaiians, their non-Hawaiian partners and friends, gathered traditional materials, worshiped, and lived a sustainable lifestyle. ‘Any right’, claimed Desoto, ‘enjoyed by the native Hawaiian is also truly enjoyed by those who are non-Hawaiian’ (Frenchy Desoto cited in Debates in the Committee of the Whole on Hawaiian Affairs, 1978 Con Con: 437, cited Pele 2: 27). Native Hawaiian delegate Ontai reaffirmed these statements, determining that rights were no longer exclusive for Hawaiians but needed to be extended to *‘ohana* (Calvin Ontai cited in Debates in the Committee of the Whole on Hawaiian Affairs, 1978 Con Con: 437, cited in Pele 2: 27).

Heritage as Responsive and Reactive

Another area of reconsideration was a conception of a fixed Hawaiian relationship to place. Early in the case, PDF stated traditional practices were tied to *ahupua‘a* and were site specific (Pele 1 A.6: 141). After the defendants tried to limit the range of practices protected to those items listed in HRS §7-1, PDF altered their position creating a more adaptable, flexible version of Hawaiian culture, one more responsive to modern social and political circumstances. Hawaiians, they explained, had always been “multi-local” as environmental, civil, and economic challenges had necessitated changes in residency from district-to-district and island-to-island (Pele 2: 10-11). Primary traditional values along with cultural and spiritual ties were carried to new locations, including customary practices such as gathering, sharing, respecting the land, and sustaining resources (Ibid.). In their new locations, individuals adopted the subsistence practices of their new *ahupua‘a*, and gathered the resources that grew in the area, or would continue to gather where they were taught (Pele 2: 10).

Ancestral narratives associated with familial sites of genealogical origin were, however, still highly valued and transmitted across generations. ‘A [traditional] subsistence living’, PDF told the court, ‘requires a person to adhere to cultural practices, norms and values in order to maintain [spiritual] order, harmony, balance and respect for the resources and deities associated with those resources’, wherever they may be in the islands (Pele 2: 11). The court’s continued insistence on residency, argued PDF, was not applicable in the Puna area. This was a very significant point that would be discussed throughout the Pele case and would ultimately be decided in the PASH case. Justice Klein would confirm that Hawaiians did not have to be residents in the Puna *ahupua‘a* to have standing in the case.

Reassessment of the Extent of Injury

While Hawaiians were reconceiving the historical past, they were reconsidering the impact government policies were having on Native Hawaiian heritage. In the earlier arguments, Native Hawaiians viewed themselves as targets of a government action depriving the community of natural resources essential for traditional sustainable practices (Pele A.6: 137). The practices had been created to help ‘better the [economic and social] condition of Native Hawaiians’ (Pele A.7: 241-244). As the case evolved, the defendants questioned the impact of the development on Pele worship and Hawaiian identity.

This injury was interpreted as psychological, and therefore more personal, with a deeper, longer lasting wound. ‘Desecration of Pele[’s] body and home, PDF claimed, ‘destroys the self-esteem and dignity’ of her worshipers (Pele A.12: 408) who have a ‘fragile native Hawaiian identity’ (Emmett Aluli cited in CCH Testimony 6 June 1989). Angry over the threat to their self-worth and self-confidence, PDF perceived the injuries as causing ‘irreparable harm to resources essential to the subsistence, as well as the cultural and spiritual customs and beliefs of Hawaiians’ (Pele A.13: 450). With assertive and proactive rhetoric, PDF claimed geothermal will ‘suck out Pele’s lifeblood’ (Pele A.13: 451), and ‘she will no longer manifest herself to the living Hawaiians’ (Pele A.13: 450). The destruction of the only living Hawaiian god was portrayed as the crucial link between contemporary Native Hawaiians and their ancestral society. Severing the link ‘places an unfair and intolerable burden on [our]

beliefs in Pele’, and upsets the balance of nature between Hawaiians, the spiritual world, flora, fauna and the *‘āina* (Pele A.13: 451). ‘Remove one element of the system [such as Pele] or introduce a destructive foreign element, and complex interrelationships begin to unravel’ (Pele A.13: 443). The injury had become life-threatening: without links to the ancestral past, heritage could be shattered and the unique Hawaiian identity could be lost.

6.5.2 Assuming Power in the Courtroom

With this case, Native Hawaiians, for the first time in the state, began to dominate the courtroom. From the beginning of the case there were Native Hawaiian lawyers from a non-profit Native Hawaiian law firm representing a Native Hawaiian organization with a Native Hawaiian membership. The lawyers came from communities protesting existing and historical injustice, so they were viewed by Hawaiians and non-Hawaiians as advocates and activists, as well as practicing professionals (Benham 2007: 513). As the case progressed, there were Native Hawaiians who testified as witnesses (Pele 2: 12-19) and those who provided professionally-produced, scholarly reports.

Crucially, the researchers who completed the EIS cultural impact study straddled the Hawaiian and professional communities and were accepted in both the Hawaiian and legal communities as accomplished academics as well as *kupuna* (cultural experts, elders). They were led by Professor Davianna McGregor, PDF activist, professor and *kupuna*, who had previously proven her knowledge of Hawaiian history and culture in the Kalipi and Kaho’olawe cases through expert testimony, in the academic community with her ethnographic analyses, and in the Hawaiian community with research on the culture of rural Hawaiians. McGregor and her team knew the appropriate protocol to follow when approaching Native Hawaiian ‘tradition bearers’ in the Puna community (Pele 2: 11). Therefore, they had the credibility to cultivate relationships and codify previously hidden, privileged information on religious practices, as well as to effectively present it in the appropriate rhetoric of the court. According to Native Hawaiians interviewed, without her demonstrated knowledge, experience, and education (some of it acquired through the Pele case), the Hawaiian elders in Puna would not have cooperated, and the EIS cultural survey needed to

substantiate PDF's claims would not have been completed. Inside the courtroom, this EIS cultural survey was considered more "authentic" and valuable than data collected by outside researchers, and therefore it garnered more attention (Ibid.).

6.5.3 New Indigenous Legal Concepts Based on Heritage Values

Special places to which communities relate are often only known locally until they are threatened, and then their value and meanings are articulated and elevated (Gentry 2013: 518). It does not mean that these sites are more valuable, but they develop new meanings and significance to the local community. In Pele, for example, Wao Kele O Puna was initially described as a rainforest ecosystem, but after the court required an EIS, Wao Kele O Puna was reconsidered, personified as a plaintiff deserving of legal rights equivalent to those of a human being, and presented as a *Native Hawaiian* rainforest ecosystem (Pele A.12: 410-411, emphasis added). This revolutionary concept of land as entitled to legal rights equivalent to those of a human being, in particular a Native Hawaiian, was not only a more complex and nuanced description of the relationship between Hawaiians and their environment, but also demonstrated an increased level of legal sophistication. The demand for ancestral land protection on the basis of an Indigenous epistemological spiritual relationship predated the well-publicized Maori use of this concept to protect the Whanganui River by 25 years (Roy 2017).

Indigenous traditional knowledge, per Assmann's theories, is not open to the scrutiny of Western "experts" since it is traditionally guarded as sacred knowledge. What was revealed during Pele was evidence of a truth not communally known and shared. It was the conscious revealing of ancestral memory to create a new objective legal "truth" from a subjective traditional "truth" (Assmann 2008).

6.6 Redefining Hawaiian Identity: An Empowered Perspective

The innovative campaign for environmental and heritage preservation in Pele, combined with renewed interest in Native traditional practices, underwrote a new Native Hawaiian movement for cultural awareness and produced an empowered Indigenous identity. With this case, Hawaiians began to abandon the distorted self-image imposed through repetitive past encounters with controlling authorities, and as

Nancy Fraser calls it in *Rethinking Recognition*, ‘to repair internal self-dislocation’ (Fraser 2000: 109) needed for sovereignty.

The four factors involved in this identity transformation each contributed in a different way. By developing a successful strategy for activism, Native Hawaiian activists gained organizational experience, increased Indigenous civic participation and built confidence in their abilities. Alliances with national and international environmental organizations elevated their concerns and culture beyond Hawai‘i, provided legal and economic support for their efforts, and built political and social capital for future endeavors. The increase of Native Hawaiians in authorized positions of power in the courtroom shifted the cultural framework of legal interpretation toward an Indigenous perspective and demonstrated Native Hawaiian academic and professional leadership capability. Lastly, preparation of the first CIA in Hawai‘i informed the Indigenous community, and state, that ancient Native Hawaiian religion, traditions, and practices had survived, and prioritizing economic development over preservation of Native Hawaiian rights threatened those elements of state culture that make Hawai‘i unique.

The development of a new empowered Hawaiian identity can be seen to have occurred both intentionally and unintentionally. It was the intention of the PDF activists to create an effective program for rights protection and greater levels of land control. The process of formulating and implementing a successful strategy both inside and outside the courtroom required education and experience. However, once those elements were acquired, they changed the perspective and capabilities of the activists. They were more engaged, capable, and self-confident than before, an unintentional but certainly anticipated outcome. They no longer perceived themselves as subjugated victims, but in taking back the historical narrative, as emboldened survivors.

Alternatively, in the development of their media campaign to build support for their cause, the PDF activists had to intentionally present images of strength, proficiency, and determination. Their audience needed to be convinced that support for this cause would be used effectively, particularly when both donations and political

commitments were required. The performance of a capable Native Hawaiian persona left an indelible impression on the audience as well as on the Hawaiian performers. According to Heidegger's theorization of performativity, it is not just words that are needed to build and preserve memories of an engaged and adept community, but the force, energy, and emotions behind the words. Text could have documented the urgency of their message, but it was through the spoken rhetoric, photographs, and videos in PDF's campaign that the extent of Hawaiians' passion, fear, and anger could truly be infused into words and images (Heidegger 1962: 262) to sway an observing public.

The use of dramatization is a familiar form of presentation for Native Hawaiians and may account for the success of their strategy. Oral transmission of knowledge within the Hawaiian community traditionally built communal memories and helped to develop a supportive society with shared values. The continuation of oral knowledge transfer may help explain how Indigenous heritage managed to survive decades of domination and assimilation. When Hawaiians transferred conveyed narrative messages in this manner to others outside the community through a multi-faceted program of activism in video, newspaper, TV coverage, and public demonstrations, it was to reify their heritage, solidify their cause, and evoke the same strong emotional responses. Pele, the goddess of the volcano became the repetitive voiced symbol representative of Hawaiian tradition and culture, and her Indigenous protectors the brave champions of environmental protection and religious and minority traditional rights. Through repetition, the narrative was reinforced and confidence in the authenticity of the story was delivered.

In a sense, a more powerful memory of Pele and her potential destruction was constructed by building empathy for the characters presenting. An observing public saw and heard the impassioned voices of impacted Native Hawaiians speak about the potential injury to their lives, families, and communities. The people shown demonstrated pride and confidence, were well-spoken, educated, informed, orderly, and controlled Indigenous peoples. It can be said they performed a new Native Hawaiian identity with power and purpose.

The Hawaiians were not alone in using a multimedia campaign to effect change. Faye Ginsburg, a Professor of Culture and Media at New York University, maintains that multimedia presentations of Indigenous heritage concerns in the 1980s and 1990s contributed to the birth of a movement she calls “indigenous media” that created far more than products for entertainment value. In her work with Aboriginal Australians, Ginsburg noted media became a vehicle to circulate cultural and political information ‘to themselves, to majority others in the nations in which they live, and to the broader transnational polity known as the “Fourth World”’ (Ginsburg 1993: 557). By creating media presentations, she asserted, Indigenous “cultural activists” self-consciously used media not only to strengthen and build their own communities, but also to transform them through what she calls “strategic traditionalism”, or the use of culture and heritage as tools to achieve political ends.

It was a powerful means of collective self-expression: a form of resistance and assertion of traditional rights in response to Native political dis-enfranchisement and economic disadvantage. Based on Ginsburg’s analyses, there were significant impacts on identity based on the use of various new communicative technologies. Indigenous producers of media stressed the importance of the ‘activities of production’: the social relations built creating the media, and the struggle by creators to make visible their cultural and historical realities (Ginsburg 1993: 575). The collective processes at work producing the media was ‘not separated from movements for cultural autonomy, social justice and claims to lands’, but an integral part of their movement for Indigenous rights and recognition (Ibid.).

Seen in this light, the development of a strategic multimedia campaign in support of *PDF v Paty* was a contributing element of Native Hawaiian identity transformation, providing an outlet for codifying and expressing a positive, powerful and assertive Indigenous contemporary Native Hawaiian identity. According to a movie produced immediately after the 1992 Pele decision by Oscar-winning director Steven Okazaki called *Troubled Paradise*, with this case and PDF’s demonstration of effective advocacy, pride returned to Native Hawaiians (Brennan 1992: N26).

From the standpoint of performativity, the use of a multi-faceted campaign to defeat geothermal development was an attempt to repair misrecognition by contesting the dominant culture's depiction of Native Hawaiian identity, and reestablishing control over representation in the "politics of recognition". This type of action, according to Nancy Fraser, is a performance of identity by 'joining collectively to produce a new self-affirming culture of their own – which publicly asserted, will gain the respect and esteem of society at large. The result, when successful, is "recognition"' (Fraser 2000: 110).

The most important transition in Pele was the new awareness that heritage protection was both critical to Native Hawaiian survival and could be used as a tool in the legal battle for recognition and rights. This use of heritage shifted Native Hawaiian perceptions of what heritage "is" to the population, to a realization of what the use of heritage can "do" in achieving political objectives. This was part of a growing movement in the US by Indigenous peoples away from assertions of cultural nationalism toward new articulations of political sovereignty (Young M. 2004: 84). In this new era, Hawaiians were learning to use their culture to make themselves visible through rhetorical presentations (Ibid.).

While Pele 2 was taking place, opposition was building to yet another large-scale project on the Big Island of Hawai'i. In this instance, residents of Kohanaiki were witnessing the continuous loss of oceanfront land to foreign real estate investors' construction projects. Opposition to the project threatened growth of the tourism industry, a major component of the state's economic base, by suggesting heritage and environmental preservation were more important than fiscal growth. To Native Hawaiians, this was the landmark battle they had been preparing for and it arrived at a propitious time; allied environmental groups were still heavily focused on saving the Wao Kele O Puna rainforest in Puna. The next chapter will examine *Public Access Shoreline Hawai'i v Hawai'i County Planning Commission* and will explore the controversial ruling that propelled Native Hawaiian heritage into a US Constitutional discussion that remains unresolved to this day.

CHAPTER SEVEN PUBLIC ACCESS SHORELINE HAWAI‘I V HAWAI‘I COUNTY PLANNING COMMISSION - ADDING WINDOWS AND DOORS

He ali‘i ka aina; he kauwa ke kanaka (The land is a chief; man is its servant)

Mary Kawena Pukui, Hawaiian Proverbs and Poetical Sayings

Where *Pele Defense Fund v Paty* started off as a Native Hawaiian access rights case, *Public Access Shoreline Hawai‘i v Hawai‘i County Planning Commission* (PASH) had its roots in an effort to protect the beach of Kohainiki on the island of Hawai‘i from privatization and large-scale real estate development. The Native Hawaiian involvement was initially minimal, as PASH, an environmental organization consisting of concerned local citizens, sought to enlist a Native Hawaiian, Angel Pilago, to add a cultural element to their environmental dispute.⁷⁷ PASH’s leaders felt that if all environmental claims were dismissed, the Native Hawaiian cultural rights claim could be prioritized and elevated as the illegal prevention of constitutionally guaranteed practices.⁷⁸ In the end, however, the Native Hawaiian component would not only save the beach, it would expand Native Hawaiian rights momentarily. Significantly, the efforts taken to achieve this result unified disparate Native Hawaiian groups in a show of ethnic pride, civic participation, and Indigenous nationalism. PASH’s success in court also elevated the importance of Native Hawaiian traditional practices in Hawai‘i, and demonstrated a new, valuable opportunity for Native Hawaiians in utilizing their heritage to control the development of traditional land.

⁷⁷ Source: Mililani Trask website. [Online] Available at: <http://www.trask4oha.com/community.html> [Accessed 13 April 2018]. Mililani Trask noted that Rothstein approached the Native Hawaiian activist leader for ‘Hawaiian support for his effort’ since he could not find applicable laws for non-Hawaiians that would help preserve the beach of Kahanaiki.

⁷⁸ In his five pages of county testimony at the Hawai‘i County Planning Commission hearing on 8 Nov 1990, Jerry Rothstein of PASH only mentioned Native Hawaiian rights as an afterthought in four lines. The remainder of his testimony was about the environmental impacts of development.

To legal scholars, the PASH case is ‘the best known case involving Native rights’ (Brophy 2006: 789), and one of the most significant decisions in the history of modern-day land use regulation in Hawai‘i. Political from the start, the case pitted wealthy foreign investors and development advocates against a public recently made aware of the fragility of state environmental resources and the significance of Native Hawaiian customs and traditions. The various state courts struggled to balance the needs of landowners with the preservation of Native Hawaiian rights to customary and traditional practices. In an unusual procedural shift, the Hawai‘i Supreme Court justices sought answers on how best to achieve a fair balance by requesting additional information from the various lawsuit participants and allowed *amicus curiae* (friends of the court)⁷⁹ briefs to be submitted from interested experts who were not party to the lawsuit. Numerous Native Hawaiian organizations representing tens of thousands of members stepped forward to present evidence, demonstrating, for the first time, the presence of a multitude of organized Native Hawaiian groups with educated leaders, all dedicated to protecting and expanding Native Hawaiian rights, culture, and identity, and to achieving higher levels of sovereignty.

It is important to note that the PASH case was significantly different from the previous cases, and therefore required an alternative approach for the case examination. There were two reasons for this. Firstly, unlike *Kalipi v Hawaiian Trust Company* and *Pele Defense Fund v Paty*, the PASH case was not initiated based upon a dispute over Indigenous access rights, traditional practices, or land control. Instead, it began as a dispute over who had the right to participate in a Contested Case Hearing, then evolved into a case about the continuation of legal protections for a specific class of people. Secondly, the Indigenous participants within the case changed over the course of the various trials so that a transition in identity could not be traced within the performance of one set of individuals. Instead, the PASH case began with a few Native Hawaiian participants, and over the course of the case the number of Native Hawaiians increased as the court reviewed Native Hawaiian pre-trial hearing testimony, and the Hawai‘i Supreme Court allowed Native Hawaiian

⁷⁹ Amicus Curiae briefs are written essays submitted to the court to provide judges with supplemental analyses and information that have bearing on the case.

organizations to submit *amicus curiae* briefs. As a result, the analysis of transformation for this case required a wider perspective, focusing heavily on transitions not within one set of voices, but from a multitude of voices, starting with the pre-trial Native Hawaiian oral and written testimonial statements, and comparing them to the tone and content of the much later *amicus curiae* textual arguments.

With such vast differences between the three cases, the question may arise as to why this case was selected for examination at all. The PASH case was selected for this analysis because it follows a particular line of legal reasoning and precedent for Native Hawaiian traditional and customary rights and is also considered in legal and scholarly literature as the critical successor case to Kalipi and Pele (MacKenzie 2015; Panarella 1998; Jarman and Verchick 2003).

Most of the PASH case legal issues were far too complex and not efficacious for this dissertation. However, the case did contain narrative elements that are highly relevant to this study. This chapter will focus on three of those elements:

- 1) The Hawai‘i County Planning Commission hearings that led to the legal case
- 2) The impact of the Pele decision on the PASH case
- 3) Native Hawaiian responses in defense of attacks on their rights, identity, and heritage.

To distinguish between PASH as a legal action, and PASH as an organization, “PASH case” will be used in this chapter to refer to the land claim case, and “PASH” alone will refer to the environmental organization. Both the case and the organization are known in legal literature and academic discussions as simply “PASH”, rendering distinction between the two cumbersome. The use of the two terms will help to clarify the differences.

7.1 The Socio-Political Context: The Impact of Foreign Investment

7.1.1 Sugar Leaves and Foreigners Arrive

Leading up to the PASH case, the 1980s saw a boom in foreign real estate speculation in Hawai‘i, particularly from Japanese investors. From 1986 to 1989 Japanese investment in Hawai‘i totaled 5.2 billion dollars, an astonishing number compared to the total foreign investment of 8.4 billion dollars from 1970 to 1989 (Aoude 1999: xxvi). By the 1990s, nearly every five star resort in Hawai‘i was either built or owned by the Japanese (Pacelle 1995: B1). Their investments corresponded to a dramatic increase in tourism, as visitor totals went from 3.9 million to 6.6 million within the decade (State of Hawai‘i 1999; Snyder 1980). Some tourists came to enjoy the islands on vacation, while others sought to purchase second homes, expanding the need for additional commercial, retail, and entertainment venues. To keep up with the demand for housing, hotel rooms, and other facilities, the Japanese developers searched for large plots of land on which to construct high-end luxury properties. Hawai‘i, the largest of the occupied islands, was a frequent choice for their projects, with three projects in development during the early part of the decade.⁸⁰ However, the Japanese arrived unaware of the existing state land use statutes that differed from the mainland and imposed limits on the exclusive use of private property.

Meanwhile, on the island of Hawai‘i the economy was in transition as the sugar plantations, the main source of employment for local residents, were closing, leaving many residents without work. Generations of plantation workers, the children and grandchildren of immigrant contract laborers, had been socialized to work within the paternalistic hierarchy of the sugar industry (Ekholm-Friedman and Friedman 1994: 240). They welcomed the opportunity for new jobs in the hospitality industry for it had the potential to replace the lost positions and fill the vacated patriarchal role (Ibid: 220).

⁸⁰ Besides Kohanaiki, the other two proposed projects were Capital Project, a recreation park, and Mauna Lani, a global village.

The local Native Hawaiian community did not agree. For one hundred years Native Hawaiian enclaves, such as the ones near Kohanaiki, had struggled to protect vestiges of cultural and traditional practice by maintaining their autonomy (Ibid.: 252) in what Samson calls a ‘shadow society’, or a community dominated over, forced out and marginalized by processes of Western economic expansion (Samson 2015: 4). As the strongest opponents of large scale real estate development on Hawai‘i Island (Ibid.: 251), they were against the plans because the resorts threatened their way of life, heritage sites, and both natural and cultural resources.

7.1.2 Native Hawaiian Poverty and Foreign Wealth

The luxury developments would also highlight the vast disparity in income between visitors, new residents, and Native Hawaiians. Although they made up thirty percent of the total residents, Native Hawaiians were at the bottom of the social hierarchy (Native Hawaiian Study Commission Report 1983 cited in Blaisdell and Mokuau 1990: 55). In fact, they were one of the most socioeconomically disadvantaged groups in the state and nation (Kana’iaupuni 2005: 1), with the lowest mean family income (Ibid.: 6), the highest unemployment rate, and the highest rate of incarceration (Blaisdell and Mokuau 1990: 55). If they received jobs in the hospitality industry, they would be low-paying service positions with few opportunities for advancement, since less than half of all Native Hawaiians finished high school, and only six and a half percent graduated college (Ibid.). To survive, many relied on family and community networks of economic and social support and depended on access to public beaches for communal gathering and traditional subsistence fishing for food, all of which were threatened by planned coastal developments.

7.1.3 New Pathways for Sovereignty

However, it was a new age for Native Hawaiian activism. The increased focus on Native Hawaiian land rights issues from the Pele case sparked interest within the Indigenous community for using heritage narratives and values to underpin new land claims in an effort to overcome economic disadvantages, advance political goals, and preserve traditional culture. Native Hawaiian activists began to examine past forms of Indigenous sovereignty to uncover alternative justifications and pathways for

increased land control. The outcome was the creation of new Native Hawaiian organizations, each with an alternative model for political, economic, and cultural sovereignty. With this surge in political activism in the late 1980s and early 1990s came a new sense of identity and purpose. Native Hawaiians began self-identifying as *Kanaka Maoli* (the ancient name of the pre-contact population), reconsidering their collective past, and exploring new forms of nationalism for a more sustainable future (Aoude 1999: xxviii).

The movement for greater self-determination was not without its setbacks. The Pele lawsuit, heard concurrently with the PASH case but on the other side of the island, highlighted disagreements within the Native Hawaiian community over whether geothermal energy should be shared for the economic benefit of Native Hawaiians or if the area should be protected to preserve Pele and practices associated with her worship. To non-Hawaiians the conflict revealed internal differences between Native Hawaiian groups over the strategies and goals of various sovereignty groups (Osorio 2003: 217), casting doubt on the probability of effective coordination and leadership. Within the Native Hawaiian community the conflict highlighted the inherent difficulties in community unification among a population fragmented by geographic divides and hampered by memories of collective trauma. In the PASH case, it would take a legal challenge to existing Native Hawaiian access rights to bring the different local and state groups within the Indigenous community together for a demonstration of collective Indigenous power.

7.2 Legal Precedents and Relevant Statutes

The PASH case covered many aspects of Native Hawaiian rights. All three statutes protecting Native Hawaiian traditional and customary rights and practices, HRS §7-1, HRS §1-1, and Article XII §7, along with the precedents set within the Kalipi and Pele decisions, were discussed during the PASH legal arguments. A brief review of the legal rulings noted in Chapters Five and Six will help set the foundation for understanding the complex narrative in the PASH case to follow.

The modern foundations of traditional and customary Native Hawaiian rights were established in Kalipi, where the relationship between notions of exclusivity in Western law and rights to traditional and customary access for Native Hawaiians were explored. The case decision established a balancing test, to be applied on a case-by-case basis, to decide if Native Hawaiian access rights could be claimed in a legal proceeding (Kalipi Decision Sections 4 – 7 1982: 7). The key to balancing competing interests between Native Hawaiians and private property owners, the court determined, was by limiting Native Hawaiian rights to:

- 1) Items listed in HRS § 7-1 unless other historic practices could be proven
- 2) Residents of the *ahupua'a* in which the listed items were to be gathered
- 3) Undeveloped land

Native Hawaiians had to be blood descendants of the original inhabitants of the Hawaiian Islands, and their traditional and cultural practices had to have existed before the 1893 overthrow of the Monarchy. The Kalipi court attempted to leave room for future interpretations of Native Hawaiian rights by stating HRS §1-1 contained a “Hawaiian usage” clause that could encompass other Native Hawaiian customary rights beyond the ones listed in HRS § 7-1 (Kalipi Decision Sections 8 1982: 6, footnote 4: 8). Otherwise, claimed the court, without some limitations there would be nothing to keep any Native Hawaiian from entering another’s property to gather the items enumerated in the statute (Kalipi Decision Section 7 1982: 5). The results would be in ‘conflict with understanding of the traditional Hawaiian way of life in which cooperation and non-interference (*aloha*) with the well-being of other residents were integral to parts of the culture’ (Ibid.). This statement reflected Justice Richardson’s interest in honoring and preserving Native Hawaiian values by integrating them into state law. The prevalence of the “*aloha* spirit” in the state, and its previous integration into the law, would heavily influence the PASH case decision.

The Pele court explored the Kalipi understandings of Native Hawaiian rights by examining the 1978 Constitutional Convention reports, which noted Article XII § 7 ‘should not be narrowly construed’ (Pele Decision 1992: 1271). To better understand

what this would entail, the Pele court looked at the intent of the statute, and subsequently overturned all understandings of Native Hawaiian access rights since the Nation of Hawai‘i in determining ‘that some traditional rights might extend beyond the *ahupua‘a* (Ibid.). By extending Kalipi rights beyond the *ahupua‘a* borders, the Pele court set the foundation for a broad extension of Native Hawaiian rights in the PASH case. Since the two cases were heard simultaneously, and Pele was decided first, its ruling set precedent for the PASH case and altered the course of the subsequent case proceedings.

7.3 The Case and its Legal Narrative

The PASH case narrative began, like Pele, before an actual legal action was filed. In 1990 Nansay, a Japanese real estate developer, applied to the Hawai‘i County Planning Commission (HCPC) for a permit to build a gargantuan mixed-use hotel, residential and commercial shoreline development with multiple entertainment venues.⁸¹ PASH and Pilago were against the project and objected, along with numerous local Native Hawaiians, in local construction permit hearings. PASH and Pilago subsequently brought the case to court as a claim against HCPC’s assertion that they did not have standing to participate in a Contested Case Hearing (CCH) challenging the developer’s plans. In court PASH argued for standing on the basis of general membership use of the shorefront property for recreation, and for the continuation of a single Native Hawaiian member’s customary and traditional practices (Malani Pai). Angel Pilago joined the suit as an independent Native Hawaiian fighting for traditional rights and heritage site protection.⁸² Together

⁸¹ The planned development was to include two hotels with 1050 guestrooms, 330 multifamily residential units, 380 single family homes, a beach club, artisan’s village, child center, golf course, clubhouse, shopping center and wastewater treatment plant. It would cover 450 acres with 7200 feet of shoreline.

⁸² A significant number of archaeological sites were noted on the property in 1986 at the state Land Use Commission hearings. Nansay’s archaeologist, who was not Native Hawaiian, noted there were 105 sites of significance, including historic trails, petroglyphs, stone cairns, a religious site, a heiau (temple), and 11 burial sites (Rosendahl testimony, Land Use Commission (LUC) Hearing Transcript 22 Oct. 1986: 142-145). However, the 1990 Special Management Area permit application, also prepared by non-Hawaiian archaeologists, noted there were 108 sites, 77 of which were deemed ‘significant solely for their information content’ (Helber, Hastert and Kimura Planners for Nansay Hawai‘i 1990: 6). Fifty of the 77 were examined for ‘data collection’ ... and no preservation work was deemed necessary. Only 14 sites were to be ‘preserved as is’ (Ibid: 9).

PASH and Pilago claimed rights that were individual and collective interests separate from those of the general public. Therefore, they felt they had met the legislated requirements for requesting a CCH.

PASH used the testimony of numerous Native Hawaiians at the HCPC hearings as evidence of collective Indigenous community opposition. The Native Hawaiians who testified included Malani Pai, the PASH Hawaiian member, who objected to the potential impact on, and loss of access to, nearshore ponds for collecting *opae* (shrimp) used in traditional fishing practices (Pai Testimony HCPC Hearing and 8 Nov 1990 cited in PASH case A.3: 63). Janet Tamanaha and Pali Mench also testified, claiming the beach access supported the ‘lifestyle of our ancestors’ (Tamanaha Testimony HVPC Hearing 8 Nov 1990: 78, Mench Testimony HVPC Hearing 8 Nov 1990: 36-37), as did Eugene Gregory, who felt continued beach access was vital to ‘perpetuat[ing] the heritage of our Hawaiian culture’ (Gregory Testimony HVPC Hearing 8 Nov 1990: 36).

The lower court accepted PASH and Pilago’s argument and declared the county had erred in denying the CCH. The court voided the issued permit and sent the argument back to the HCPC for a new hearing. Nansay and HCPC appealed to the Intermediate Court of Appeals (ICA). They lost that case with the court’s decision that Native Hawaiians were ‘relieve[d] of any burden to come forward to assert their rights’ due to a ‘constitutional duty on agencies to determine if rights exist’ and held state government agencies ‘responsible for [any] loss of [Native Hawaiian] rights’ as a result of incomplete pre-permit analysis (PASH case A.24: 738). Thereafter, Nansay appealed to the Hawai‘i Supreme Court.

7.3.1 The Amicus Curiae Briefs

In the state Supreme Court, numerous Native Hawaiian organizations came forward as *amicus curiae* (friends of the court) to speak on behalf of PASH, Pilago, and the Indigenous community. In total, eight *amicus curiae* briefs were tendered, six in support of Native Hawaiian rights protection, one in support of Nansay (Land Use Research Foundation), and the final one from the state, objecting to Nansay’s claim that Native Hawaiian rights constituted an illegal “taking” of guaranteed land

ownership rights under the US Constitution. The combination of *amicus curiae* briefs and additional supplemental answering briefs from PASH, Nansay, the state and county, transformed the original argument over standing into a defense of Indigenous rights in the state of Hawai‘i, an investigation into the legislative history of Hawaiian statutes, and an examination of alternative ways to balance Native Hawaiian rights with Western concepts of exclusivity in land ownership.

7.3.2 The Landmark Rebalancing of Native and Western Understandings of Law

The Hawai‘i Supreme Court’s final PASH decision stated that ‘the western concept of exclusivity is not universally acceptable in Hawai‘i’, noting that they realized ‘this premise clearly conflicts with common understandings of property’ (PASH case Decision 1995: Section 2.4). In a groundbreaking statement, the court noted that even though Kalipi and Pele had discussed traditional and customary access rights, the PASH ruling was “not completely” dependent on those decisions (Jarman and Verchick 2003: 209). Instead, the court intended to ‘forge a compromise’ between differing interests in land when a project was in the planning stage by balancing cultural and development interests to see if ‘one outweighed the other’ (Ibid.). In order to actualize this plan, Western and Native Hawaiian forms of law needed to be more equally balanced, which the court accomplished through its ruling.

7.4 Case Strategies: Planned and Unplanned

7.4.1 A Useful Alliance Intentionally Created: PASH and Pilago

PASH’s strategy of enlisting a Native Hawaiian to participate in an environmental case was of great use to both parties. For PASH, it provided a critical legal basis for their case. For Angel Pilago, the Native Hawaiian who was party to the lawsuit, and Milani Pai, the Native Hawaiian PASH member, the alliance created new opportunities to:

- Negotiate the value of Native Hawaiian participation in environmental lawsuits

- Utilize the substantial financial and political resources of powerful mainland environmental organizations to further the community’s sovereignty objectives
- Protect natural resources vital to Native Hawaiian culture and traditional practices

On a personal level, their participation would change their lives. Pilago would found Kohanaiki ‘Ohana, one of the groups that filed an *amicus curiae* brief in the PASH case; enter politics, rising to Vice Chair of the Hawai‘i County Council; and run for Mayor of Hawai‘i Island. Malani Pai would sue the US Federal Government over his family’s forced removal from their traditional lands, located within the newly established national park celebrating Native Hawaiian culture and heritage adjacent to Kohanaiki, and echoing the PASH case, claim Native tenant rights and aboriginal title were never extinguished with US land ownership, and the eviction was thus another “taking” (*Pai ‘Ohana v US and Bryan Harry*).⁸³

7.4.2 An Unplanned Organizational Action

Although PASH and Pilago’s attorneys, the Sierra Club Legal Defense Fund⁸⁴, adopted a complex legal approach in court, no one overriding strategy was developed by the Native Hawaiian organizations to direct the PASH discourse. Instead, all of the disparate Native Hawaiians groups participated independently. The intrinsic value of their actions is that they inadvertently presented themselves as a combined legal force representing an ethnic “nation” to the state, the citizenry, and importantly, to the Native Hawaiian community itself. Their collective action proved that when the issues were fundamental, profound, and threatened the future existence of Native Hawaiian heritage sites and practices, the community could make a dramatic and important impact.

⁸³ The case was ‘Ohana v US and Bryan Harry, in his capacity as the Pacific Area Director of the National Park Service, US Department of Interior.

⁸⁴ In 1997 the Sierra Club Legal Defense Fund changed its name to “Earthjustice Legal Defense Fund”. It considers itself America’s largest nonprofit environmental law organization “fighting for justice” and “a healthy world”. It represents thousands of national and international environmental and environmental justice organizations, as well as local resource protection groups.

7.5 Legal Narrative Analysis

Numerous forms of analysis were used in reviewing the extensive documentation involved in the PASH case. Legal analysis was utilized to decipher the subject and focus of the transcripts and archival case records retrieved. Narrative analysis was employed to review all written documentation from the initial hearing through the various levels of state court. Within the transcripts, briefs and other case documents, Native Hawaiian testimony was examined to determine if speakers oriented comments toward political or cultural claims, if heritage narratives were included, and if statements were made related to specific sites or to traditional practices. Of particular interest was the linguistic tone, attitude, language, and content employed throughout all of the case briefs.

The narrative analysis revealed that the PASH case attorneys presented the multifaceted lawsuit with two interwoven narrative arguments. The first narrative argument concerned legislated local planning commission requirements in granting permits and questioned their legal authority for cultural review and interpretation. This was an administrative discussion, which dealt with the division of governmental responsibility. However, it is the second narrative that is most relevant to this exploration. This narrative was both philosophical and political. It concerned fundamental issues of Indigenous political recognition and whether Native Hawaiians had recognizable interests separate and distinct from the rest of the population. This narrative went to the heart of ongoing historic conflicts between Native Hawaiians and the state and formed the basis for a determination of the extent of the government's obligation and responsibility to protect Native Hawaiian rights, identity, and heritage.

7.5.1 The Impact of the Pele Decision

Unlike the previous two cases, the PASH case narrative *peripeteia* came from within the legal system. It emanated from the Pele ruling, issued as the PASH case ICA was hearing oral arguments. The Pele decision's extension of Native Hawaiian gathering rights beyond the *ahupua'a* was radical, as it overturned one hundred fifty years of Hawaiian jurisprudence to drastically 'challeng[e] traditional Anglo-American

notions of property law' (Bederman 1996: 1433). This major departure from existing legal understandings of Native Hawaiian access rights required fresh judicial scrutiny in the PASH case and changed the focus of the court discourse. Instead of continuing the court discussion of standing, the justices asked the parties involved in the suit, Nansay, PASH, and Hawai'i County (Pilago's claims were dismissed for lack of evidence), for supplemental legal insight on the foundation for Native Hawaiian access rights. The court's acceptance of *amicus curiae* briefs from Native Hawaiian organizations introduced novel perspectives to the legal rights discourse. By abandoning *ahupua'a* residency restrictions, the Pele decision had set the foundation for the determination in the PASH case that Native Hawaiian heritage rights were inherent, could extend throughout all of the islands, and applied to all Hawaiians regardless of blood quantum.

7.6 Identity Transformation: Defending Tradition and Customary Rights

The transition to a more empowered Native Hawaiian identity began during the HCPC hearings in 1990 and continued through the various levels of the state courts. Four components in the case and its narrative contributed to the transformation and were evidenced through court performances in speech or in written submissions. The transformation was evident in:

- An increase in ethnic affiliation and political engagement
- An evolution in mindset from victims to survivors
- A shift from a defense of rights to a demand for political recognition
- A reconsideration of Native Hawaiian collective narratives of the past

These component changes over the course of the case were supported and encouraged by judicial activism for Native Hawaiian political, social, and economic advancement and empowerment. Collectively the changes transformed the courts, the law, and the Native Hawaiian population.

7.6.1 Increased Ethnic Identification and Political Engagement

Unlike Kalipi, where the Native Hawaiian plaintiff spoke as a *kuleana* owner but did not initially define his identity as Indigenous, or Pele, where the plaintiffs argued as traditional religious practitioners, Native Hawaiians in the HCPC hearings and PASH case identified from the start of the dispute as Indigenous people with a unique identity separate from the general population. At the HCPC hearings held on 28 September 1990 and 8 November 1990, sixteen people came forward identifying themselves as Native Hawaiians out of forty-eight who testified. This was a notable percentage considering the considerable cultural obstacles to personal confrontation in an open, recorded venue. The exact number of Native Hawaiians present at the hearing was not identified in the transcripts, but records indicate approximately two hundred people attended this hearing. According to a senior planning official at the Hawai'i County Planning Department this was a striking increase over the average of twenty-five who typically show up. Based on the 'booing' noted in the transcript when Nansay's supporters testified, it can be deduced a significant number of those in attendance were Native Hawaiians (HCPC Hearing Testimony 8 Nov 1990: 86), indicative of the importance of this protest to community members, the substantial growth in Native Hawaiian ethnic affiliation and political activism, and an increased willingness to engage publicly and vocally.

The Native Hawaiians who testified stated they came forward at the hearings for the sake of their children, families, and Indigenous colleagues (Moanakeala Akaka Testimony HCPC Hearing Testimony 28 Sept 1990 cited in PASH case A.8: 233), representing a collective community of 'Native Hawaiians who couldn't be here' (Keanaania Testimony HCPC Hearing 8 Nov 1990: 54-55). In their remarks, they expressed an awareness of the critical need for collective Native Hawaiian representation and noted they had set aside their traditional values of *aloha* and humility to demonstrate the critically important nature of their protest against continuing processes of Indigenous land displacement and historic ethnic discrimination (HCPC Hearing Testimony 28 Sept 1990: Freitas 47-48, Nauka 83-84). With PASH, Native Hawaiians realized the Western system of law placed great importance on individual testimony, and they rose to the challenge and demonstrated it.

7.6.2 Awareness of a Critical Need for Public Representation

In their impassioned pleas, the Native Hawaiians demanded recognition and protection of their rights, heritage sites, and traditional practices. Their testimony stressed the importance of site access for traditional practices (Freitas Testimony Hawai‘i County Hearing Transcript 8 Nov 1990: 75) and transmission of oral knowledge to future generations (Olga Nauka Testimony Hawai‘i County Hearing Transcript 8 Nov 1990: 83). Native Hawaiian heritage, they explained, was fundamental to their identity and the future of their ethnic community. Using collective pronouns continuously, those testifying declared “they” had no choice but to fight on the legal level. According to Malani Pai, Native Hawaiians had been ‘forced into a position that if “we” don’t say anything “we” stand to lose the most culturally valuable remains of our history’ (Pilago Testimony HCPC Hearing 8 Nov 1990: 12 cited in PASH case A.1: 12, emphasis added). Explaining their testimony outside of court, Mehealani Pai, father of Malani Pai clarified that ‘tak[ing] away [access to heritage sites for traditional and customary practices] from Hawaiians is like taking part of your Hawaiianness away from you’. (Mehealani Pai cited in Big Island News Broadcast 26 June 1993). Repeating recent statements made in Pele, they claimed loss of access to ancestral sites was the ‘final blow’ and a possible ‘death’ to Native Hawaiian culture and identity (Olga Nauka cited in Big Island News Broadcast 26 June 1993). ‘Somebody [with] no past’, declared one participant, ‘has no future’ (Ibid.).

By the time the PASH case reached the Supreme Court the numbers of Hawaiians represented in the dispute had increased exponentially. Different Native Hawaiian groups filed *amicus curiae* briefs, embodying tens of thousands of Indigenous voices, all recently formed to work toward alternative plans for economic and social advancement and sovereignty.⁸⁵ Importantly, the majority of the Native Hawaiian *amicus curiae* briefs filed included Native Hawaiian legal representation, indicative of an increase in the number of Native Hawaiian attorneys in the state, and revealing

⁸⁵ Ka Lui Hawai‘i noted they had 18,000 primarily Hawaiian members (Ka Lui Hawai‘i cited in PASH case 1.16: 494), Kona Hawaiian Civic Club stated they had 148 members (Kona Hawaiian Civic Club cited in PASH case A.19: 576), and OHA which Trustee Moanakeala Akaka stated represents 23,000 ‘native Hawaiians’ (Akaka testimony at the Hawai‘i County Hearing cited in PASH case A.8: 233).

the mounting interest in having Indigenous experts, rather than non-Native experts, develop and present legal claims from a Native perspective in an attempt to regain power.⁸⁶ Collectively the organizations projected an image of Native Hawaiian confidence and proficiency through demonstrations of professionalism and legal agility, and proved an increased level of Indigenous organization, professionalism, civic participation, and ethnic identification not seen previously in the state courts.

7.6.3 Evolution in Mindset from Victims to Survivors

After reviewing the entire case proceedings, two very different perspectives on Native Hawaiian identity were identified. The first was found in the HCPC hearings. In their testimony, Native Hawaiians presented themselves as injured victims of historic trauma, which a Native Hawaiian Cultural Impact Assessment consultant interviewed noted limits a Native Hawaiian's ability to move forward. These Hawaiians asserted they were tired of fighting and begged the government to rescue them through preservation of land, resources, and access rights.

After the case went to court, however, another self-representation emerged: a collective identity with a survivor mentality that commanded attention and demanded recognition and, in some cases, restitution, for continued injustices. This identity materialized after Nansay's attorneys attempted to convince the court Native Hawaiian access rights had no legal basis and no place in the modern state. The survivor identity therefore emerged from, and in response to, directed attacks on identity and heritage. The transition from one identity to the other is apparent within the language employed and how arguments were constructed throughout the HCPC hearings and PASH case.

The Shift from a Victim Mentality

At the HCPC hearings, Native Hawaiians testified that they were victims of unfair policies and Kohanaiki was yet another instance of the continuation of a historic

⁸⁶ One Native Hawaiian *amicus curiae* brief was delivered from OHA, with representation by attorneys and professors Jon Van Dyke and Sherry Broder, well known in Hawai'i for their support for the revival of Native Hawaiian culture. Van Dyke was the author of *Who Owns the Crown Lands of Hawai'i*, and Broder was the Deputy Chief Attorney for the 1978 Con Con. She is also credited with drafting the Con Con provisions creating the Office of Hawaiian Affairs (OHA).

process of land appropriation (Freitas Testimony HCPC Hearing 28 Sept 1990: 73-74; Nauka Testimony HCPC Hearing 28 Sept 1990: 84). Like previous generations, they were being forced off traditional lands for the economic benefit of foreign visitors (Gregory Testimony HCPC Hearing 28 Sept 1990: 36, Nauka Testimony HCPC Hearing 28 Sept 1990: 83). Nansay's planned destruction of historic and cultural sites to build the resort and limit access would, according to Angel Pilago, cause 'great turmoil', upsetting families and impacting Native Hawaiian identity and sense of belonging (Pilago Testimony HCPC Hearing 28 Sept 1990 cited in PASH case A.6: 187). Others who testified acknowledged they did not have political power and begged the hearing officials for preservation of their ancestral sites and traditional practices as a relief from their continued suffering (Nauka, Pilago, Freitas Testimonies HCPC Hearing 28 Sept 1990: 47, 85, 47).

Of all the issues discussed, one issue was particularly disturbing to those who testified. From the plans presented at the hearings it was evident that the project would only satisfy investment-backed expectations without protecting historic sites (PASH case A.32: 883). Native Hawaiians testifying expressed horror at the developer's lack of respect for the significant number of archaeological and ancestral remains found on the property, particularly plans to remove those deemed "insignificant" by non-Native Hawaiian experts (HCPC Hearing 28 Sept 1990 cited in PASH case A.6: 187).⁸⁷ Nansay's disregard for the impact this disturbance of heritage and loss of access to religious and cultural sites would have on Native Hawaiian contemporary traditional practices was viewed as a great insult (HCPC Hearing 28 Sept 1990 cited in PASH case A.8: 233; PASH case SC A.28: 830), and a capitalization on Native Hawaiian culture while simultaneously denying living cultural practitioner's protections for traditional practices. Those testifying felt the developer's use of an actively used religious site, a *heieu* (ritual platform for a

⁸⁷ The archaeological sites were noted in the Testimony of Paul Rosendahl, Nansay's archaeologist from the Land Use Board Hearing Transcripts when the state was trying to decide whether to change the zoning at Kohanaiki to allow resort development. Many of the archaeological sites were deemed 'insignificant for cultural value' and were to be destroyed during development. Ancient Hawaiian remains found were to be disinterred and placed in communal cairns. Included in the report were a full range of pre-historic and historic sites, including historic trails, habitation sites, burial sites, petroglyphs and one religious *heieu* (temple platform).

temple) in an ‘interpretive’ and ‘enhanced’ ‘entertainment venue’ for hotel visitors’ enjoyment (Planner Tom Fee Testimony cited in HCPC Hearing Transcript 28 Sept 1990: 14, 19) was ‘shameful’ (Moanikeala Akaka Testimony cited in HCPC Hearing Transcript 11 Aug 1990: 31) and a form of ‘desecration’ (Pilago Testimony cited in HCPC Hearing Transcript 11 Aug 1990: 12). The resulting Native Hawaiian feelings of powerlessness and resentment against continued domination and discrimination, according to Indigenous scholar Glen Coulthard, were “dispowering”, or worked against overcoming Native voicelessness. They required a positive attitude, he affirmed, as a precondition for healing and reconciliation (Coulthard 2014: 110-112).

The Native Hawaiian rhetoric in the HCPC testimony began to change as the hearings progressed. Some of those testifying stated that after years of ineffective, but respectful protest they had reached a point where stronger and more forceful means of remonstrance were needed (Nauka Testimony HCPC Hearing 28 Sept 1990: 84). Moanakeala Akaka, an OHA trustee, declared Native Hawaiians ‘have had enough’ (Akaka Testimony HCPC Hearing 28 Sept 1990: 31). ‘For years and years we have been giving, and giving, and giving, and giving [through aloha]. And what have we gotten back? Heartache’ (Freitas Testimony HCPC Hearing 28 Sept 1990: 84). Her statements, as an elected trustee of a quasi-governmental agency and a member of the Native community, signaled the beginning of the shift in identity. Akaka asserted that the continuous loss of land to foreigners in the Native Hawaiian ‘homeland’ was unacceptable (Akaka Testimony HCPC Hearing 28 Sept 1990: 31). Her assertion was a reference to the nascent sovereignty movement toward greater Indigenous sovereignty and a public affirmation of the changes to come with a shift in perspective and authorized power.

Emergence of a Survivor Mentality

Evidence of the emergence of a survivor mentality can be found in the Native Hawaiian *amicus curiae* briefs, where a distinctive change took place in attitude and perspective as compared to the mindset exhibited at the HCPC hearings. The arguments in the *amicus curiae* briefs had a different voice and perspective from other written submissions in this case and transitioned the court discussions away from a defense of Native Hawaiian rights and identity into more intellectual and

philosophical discussions of the value of Native Hawaiian culture to Hawai‘i and the obligations of the state to the Indigenous population. The briefs portrayed, in sophisticated linguistic style and complex legal arguments, a passionate and assertive Native Hawaiian identity boldly demanding recognition of past harm.

The *amicus curiae* briefs are strongly worded with a forceful tone. The court allowed no oral arguments for groups who were not party to the suit, so the intense, dramatic language within the briefs was the only legitimate form of expression available to embody Native Hawaiian sentiments and build legally and politically effective arguments. The briefs contained an angry tone channeled to “perform” within the constraints, limitations, regulations, and procedures of the court. One example is the brief submitted by PKO, Kalamaula Homestead Association and Native Hawaiian Environmental Defense Fund (NHEDF), which used specific culturally and politically charged trigger words, demanding restitution through recognition of Native Hawaiian rights for the ‘Indigenous people who had been subject to “conquest” and “annihilation”’ (PKO, Kalamaula Homestead Association and NHEDF cited in PASH case A.43a: 1226, emphasis added). In their brief, US complicity in the overthrow of the Nation of Hawai‘i was seen as ‘unprecedented, [and a] legally suspect act’ (Ibid.). By stating ‘the life of injustice is preserved forever in the life of the land’ (PASH case A.41: 1141), they referenced the state motto⁸⁸ which had been adopted from the Indigenous Nation of Hawai‘i, and avowed Native Hawaiians would always be reminded of past unfairness and discrimination because so much Native displacement and resource destruction had already taken place. They strategically used a passive voice, an effective legal writing technique (Gopen 2006), to intentionally highlight what they wanted listeners to emphasize, “Indigenous” and “injustice”. And to herald the start of a more assertive movement for renewed sovereignty, their brief used literary illusions to create imaginary images such as, ‘the sword of justice will unite those who bear malice to the [injured] ‘*āina*’ (PASH case A.41: 1141).

⁸⁸ The state motto is ‘the life of the land is preserved in righteousness’.

7.6.4 Shifting from a Defense of Rights to a Demand for Political Recognition

Although some of the language in the *amicus curiae* briefs may be attributed to non-Hawaiian legal professionals contributing to the court narratives, the passion and controlled rage in the majority of the *amicus curiae* briefs emerged from Native Hawaiians who were sensitive to the extent of perceived injuries and had a deep understanding of the impact of historic trauma. The Native Hawaiian Indigenous attorneys and organizational leaders infused their briefs with culturally insightful observations and clarifications. Rather than just defending and protecting existing rights, they used this opportunity to forcefully declare and assert new demands. In doing so, they were challenging the structure of domination, and per Fanon, upsetting the reproduction of an identity imposed on them to maintain the status quo (Fanon 1986).

One argument particularly illustrates this point. During the case, Nansay continually argued that the state was effectuating an unconstitutional “taking” of property rights in violation of the US Constitution by sanctioning Native Hawaiian access for customary and traditional practices on private land. It was a very serious accusation that, if proven, would expose the state in the US Supreme Court to challenges over HRS §7-1 and §1-1. To deflect attention away from any challenge to the laws protecting Native Hawaiian rights, the ‘Ohana Council, a nationalist organization that supported Hawaiian independence, turned the argument around completely. They contended that by limiting Native Hawaiian traditional and customary practices to private land that was undeveloped, the court was, in fact, engaged in a “taking” of not Nansay’s property, but Native Hawaiian rights, which could also be construed as another form of property right in Hawai‘i, since they had been protected as such historically in the state (PASH case A.39: 1073; PASH case A.41: 1123-1124). With this claim, ‘Ohana Council took control of the case narrative and was no longer defending Native Hawaiian rights; they were confidently and determinedly seizing control of the court narrative by referencing accepted tangible legal precedent based on Native Hawaiian cultural practices and traditional values.

7.6.5 Reconsideration of Native Hawaiian Collective Narratives

Other techniques were also used effectively to build sympathy and support in the courtroom. To build conclusive statements, the participating Native Hawaiian organizations and their legal teams often reconsidered accepted heritage narratives of the ancestral past and presented new interpretations to support their legal assertions. The new interpretations posited that their ancestors were not victims of global expansion and colonization, but innovative people who demonstrated strength, maintained traditional values, and intentionally set precedents in law to protect future generations of Native Hawaiians from assimilation and loss of identity.

Several of the Native Hawaiian *amicus curiae* briefs were particularly notable for their re-interpretations of heritage. For example, Ka Lahui Hawai‘i, one of the first Native Hawaiian organizations to create a modern Indigenous national government entity with a representative legislature⁸⁹, submitted a brief stating Native Hawaiian rights to gather ‘existed in Hawai‘i since time immortal’, ignoring the establishment of the *ahupua‘a* system and the codification of laws under the Nation of Hawai‘i (Ka Lui Hawai‘i brief cited in PASH case SC A.21: 647).

The Pele Defense Fund’s brief focused on the arrival of Westerners and declared the Nation of Hawai‘i’s legal system emerged through a controlled change where ‘ancient laws ... were gradually displaced, modified and added to’, in effect maintaining Native Hawaiians were always in charge of legislative procedures and governance in the previous Nation, and never relinquished control to colonizers (PDF brief cited in PASH case A.23: 697). Additionally, the ‘Ohana Council’s court submission declared the historic rights of commoners were always enforced in the Nation of Hawai‘i regardless of tenancy, disregarding the nineteenth century *kuleana* restrictions tied to residency (PASH case A.40: 1124).

And in a particularly novel departure from the accepted recollection where the king insisted post-Māhele that only “some” elements of the ancient subsistence lifestyle

⁸⁹ The Ka Lahui Hawai‘i constitution was ratified at their initial Constitutional Convention in 1987. (Ka Lahui Website. [Online] Available at: <https://kalahuihawaii.wordpress.com/ka-lahui-hawaii-constitution/> [Accessed 15 April 2018].

were to be preserved to save Native Hawaiian identity and culture, the entire story was restructured. In the new version, the *ali'i* used their authority 'in an enlightened and supportive fashion' (OHA brief cited in PASH case A.28: 831) to 'insure that [all] Hawaiian tradition, culture and heritage survived the revolutionary transition from the old land tenure system to the new private property system' (PASH case A.39: 1068). In this re-conception, the Nation of Hawai'i leadership did not only save elements of the old system, the *ali'i* deliberately prioritized the protection of custom as they adopted Western legal principles.

Evidence of the concurrent discussions in Washington about US complicity in the Monarchy's overthrow appear in PKO, Kalamaula Homestead Association, and NH Environmental Defense Fund's brief. The brief states the US Government realized the illegality of its actions and immediately intended to honor and respect the sovereignty of Native Hawaiian people by adopting Article 1-1 directly, placing Native Hawaiian customary law historically and legally above Western law from the early twentieth century, overturning narratives of legal precedent, US history, and Native loss of legal protections (PKO, Kalamaula Homestead Assn, and NH Environmental Defense Fund brief cited in PASH case A.44: 123).

The last *amicus curiae* brief submitted came from PKO, and included a final declaratory statement underlying many of the Native Hawaiian claims. The statement proclaimed the superiority of the nineteenth century legal precepts over contemporary state law and announced, 'Hawaiian Kingdom [law, the basis for HRS 7-1 and Article 1-1] is superior to American law' (PKO brief cited in PASH case A.44: 1230), an assertion that the values and understandings of the Indigenous past should have priority in the present. By Austin's speech act theory, the Native Hawaiians were performing an action, the preparation and delivery of new heritage narratives, for a practical purpose (Austin 1975: 11-12). They were empowering themselves through reconstructed narratives of the historical past with demonstrations of community resolve, determination, and communal commitment.

7.6.6 Taking control: Re-Integrating Cultural Values

While the *amicus curiae* briefs argued for the protection of Native Hawaiian rights and heritage, they also proposed solutions for incorporating Hawaiian values more fully into law as a way to resolve social and political differences. Especially poignant was the brief from the ‘Ohana Council which suggested the re-instatement of Native Hawaiian values was a means to solve land control disputes. The ‘Ohana Council felt state authorities were ‘the modern-day successors to the king and *konohiki*’, and as the governing authority in the islands, ‘carry with them the ancient burdens, obligations and responsibilities toward their present-day tenants ... as a matter of law’ (‘Ohana Council brief cited in PASH case A.41: 1128). By this reckoning, state officials had inherited the ancient royal duties to care for commoners and they needed to fill the role of protector left empty by the departing sugar industry. ‘Ohana Council suggested the state do this by restoring Native Hawaiian values and integrating them more fully into law. They stated, ‘with an ever-increasingly demand to develop the islands, it is even more important to “re-incorporate” Hawaiian traditional and customary values into land use decision-making processes’ (Ibid.: 1120). To their credit, and as a great source of pride to Native Hawaiians, the court would accept this proposal and base their decision on the Native Hawaiian traditional value of *aloha*.

According to Canadian First Nations theorist Glen Coulthard, this integration of traditional values into law and society is an essential part of a program for Indigenous community ‘liberation’. Liberation entails moving from oppressive social and political conditions towards building new forms of Native sovereignty; by casting off the opinions and policies of the colonizer the community builds new forms of nationalism on their own terms (Coulthard 2014: 154). Essential to this process is regenerating traditional values and using respect for those values as the basis to overcome social and economic problems (Canadian Mohawk political scientist Alfred cited in Coulthard 2014: 154-155). In Hawai‘i, casting off Western value systems in lieu of Indigenous values was thus an important step in the “decolonization” process.

7.6.7 Judicial Activism: Rebalancing the Scales

Judicial activism, the influence of personal background, preference, and intent on court proceedings and rulings was very apparent in the PASH case. According to former Chief Justice Walter Heen of Hawai‘i, this is not unusual in the island state as judicial activism has particular application there, especially in relation to Native Hawaiian rights (Heen 2003). Judicial activism was especially apparent in the jurisdiction of Justice Robert Klein, a Native Hawaiian determined to improve the conditions of Native Hawaiians through his decisions in the court. As a high ranking former judicial officer would report during an interview, PASH would provide an opportunity for Justice Klein to prove Hawai‘i is unlike other states due to its unique history and Indigenous heritage, and allow him opportunities to put Native Hawaiian culture back into the law. Not willing to lose a critical opportunity, the judicial officer interviewed noted Justice Klein intentionally elevated this particular case to put Native Hawaiians in positions of significance to all residents and to the state, and to place Hawaiian culture at the forefront of development.

Justice Klein’s interests and authority can be seen in the focus and direction of the discourse. Due to his personal concerns and goals, the Hawai‘i Supreme Court intentionally pursued questions about the fundamental relationship between Native Hawaiian customary law and Western law as well as the role of Native Hawaiian heritage, custom, and tradition in the modern state. This was particularly difficult, as the court is tasked with interpreting existing legislation and did not have the authority to make law. To overcome this hurdle, the court sought to explore existing law by allowing participation by a greater range of experts, in particular Native Hawaiians, to supply alternative interpretations of precedent and its role in social order. By creating a positive environment to introduce Indigenous perspective, and providing a stage for the delivery of this production, Justice Klein afforded an opportunity for Native Hawaiian *amicus curiae* submissions to supply the basis for the decision elevating Native Hawaiian customary law to a position equal to Western common law, and obligating state agencies to consider the impact of their decisions on Native Hawaiian sites, culture, and heritage.

Justice Klein's involvement also protected heritage sites and practices in another, indirect manner. It imposed obligations on government agencies that take years to resolve, increasing project costs to such a degree as to make developments, particularly those containing heritage sites or those used for Native Hawaiian traditionally and customary practices like Nansay's economically unfeasible⁹⁰ (Graham cited in Kamhis 1996). Klein's involvement was critical to the development of a new empowered Native Hawaiian identity in that he enabled, supported, encouraged, and in many ways embodied, the development of a bold, innovative, progressive, and empowered Native Hawaiian identity.

7.7 The Decision and its Impact

The PASH case decision had a substantial impact on Native Hawaiians. It restored pride and built capital necessary for future sovereignty by instigating investigations into past sovereignty, inspiring Native Hawaiian court performance, shifting power in the courts and permitting process, and introducing a new level of Native Hawaiian involvement in land control. With the ruling, it further empowered Native Hawaiians by creating an industry of Native Hawaiian consultants, including Native Hawaiian cultural experts and review producers. The change in ethnic affiliation could even be quantified: in the census data from 1970 only 71,274 people identified as Native Hawaiian or Pacific Islander, but by 2000 the total had increased to 239,655, a strong indicator that a sense of pride had returned and more Native Hawaiians were willing to admit to their Native Hawaiian heritage (Tsai 2009). This can be attributed to effective activism and demonstrations of competence and investigations into the past, all of which occurred throughout the PASH case. As Paul Sullivan wrote in *Customary Revolutions*, 'if Kalipi and [Pele] could be said to have opened a path to the assertion of access and gathering rights ... PASH built superhighways' (Sullivan 1998: 137).

The PASH decision was a very serious departure from Western legal tradition: for the first time, Native Hawaiian rights were elevated by the courts to a position of

⁹⁰ Nansay abandoned the project due to extensive legal costs due to the ruling.

equal importance with Western common law (Graham cited in Kamhis: 1996; Panarella 1998: 485). The case challenged the fundamental principles of the US Constitution involving private property and was such a great departure from US land law that its ruling has been taken to the US Supreme Court but has not yet been heard. To Native Hawaiians however, involvement in this case and its outcome provided unprecedented political recognition by expanding opportunities for traditional and customary practice; elevating Native Hawaiian customary law in importance; and transferring responsibility from the Indigenous community to state permitting agencies for identifying, protecting, and preserving Native Hawaiian heritage sites and practices. It was, quoting radical activist Mililani Trask, ‘a huge victory for Native Hawaiians ... it affirmed our traditional rights under custom and usage and it established an important precedent that distinguished Hawai‘i law from western legal concepts’ (Trask 2016, campaign website for OHA Trusteeship). Importantly, it demonstrated elements of the Native Hawaiian community were organized, informed, and were seizing court power through performance. According to one Native Hawaiian law professor at the University of Hawai‘i, with these efforts, Native Hawaiians were determined to prove and ensure their rights weren’t regulated out of existence. They were ‘starting to learn how to fight in a western way’ (Steven Okazaki cited in Brennan 1992: N26).

Legal scholars Jarman and Verchick conclude this lawsuit is particularly striking in that the court justified a legal decision on the basis of not only Hawaiian law, but ‘native Hawaiian attitude or personality’, which they surmise the justices believed would allow a ‘confrontational rule to work smoothly in practice’ (Jarman and Verchick 2003: 210). They claim the court called forth the state’s appropriated notion of the Native Hawaiian ‘*aloha* spirit’, the non-confrontational social aspect of traditional Hawaiian culture that infuses island culture, to rationalize their ruling.

They credit this turn in legal perspective not just to judicial analysis, perspective, and precedent, but to shifting dimensions of social change caused in particular by pressure imposed by Hawaiian activists attempting to ‘soften’ notions of exclusivity in the real estate market toward encompassing Native Hawaiian ritual practices (Ibid.: 214). With the PASH case, it can be said that the processes for legal and

judicial activism contributed toward this softening process by indicating the emergence of a Native Hawaiian identity that performed offensively and creatively in an informed resistance movement.

The PASH case had immeasurable value on another scale as well. Native Hawaiians saw Nansay's development not as a sole project, but as one part of the continuum of colonizing activities that brought their community into a state of economic and social despair. John Connell (1998), who studies sovereignty in Pacific island states, agrees and argues that developments [like Kohanaiki] continue in the contemporary world to serve to perpetuate the marginalized status of Native peoples. He theorizes transnational globalized corporations create abstract centralized 'theoretical places' of control filled with highly educated, well-paid professionals who operate globally connected businesses electronically through commercial networks of power. These networks exclude local workers who support higher paid employees. The local lowest status service workers, who in Hawai'i are typically Native Hawaiians, have few opportunities for joining the higher levels of the network, and therefore have little opportunity for improved social or economic advancement (Connell 1988: 207-208). To maintain this power structure of domination, a great deal of time, money, and transnational power goes into protecting the theoretical and physical "places" of the rich, including supporting relationships with government authorities and elected officials. Connell posits land control, therefore, is essential in maintaining these theoretical "places" of power. The struggles of Indigenous people in land rights, such as in PASH, increasingly play a large part in this dialectic (Connell 1988: 209). This is especially true in Hawai'i where politics and development are economically co-dependent. Each is reliant on the other for sustainable growth. However, like many co-dependencies, the relationship inevitably falters when one side gains more power. Native Hawaiian experiences in PASH, surviving the onslaught of power from both government and developers, and thriving through a change in attitude and perspective on the past, have disrupted the status quo and have become major factors in their local efforts for sovereignty and land control, and per Connell, in their greater 'globalized movement for social justice' as well (Ibid.).

CHAPTER EIGHT THE CONCLUDING DETAILS - LETTING IN LIGHT

We the people of Hawai‘i, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island state, dedicate our efforts to fulfill the philosophy decreed by the Hawai‘i State Motto, ‘Ua Mau Ke Ea O Ka ‘Āina I Ka Pono’ (the life of the land is perpetuated in righteousness). Preamble to the Constitution of the State of Hawai‘i, taken from the King’s 1843 speech after the British Empire briefly usurped and then returned Hawai‘i to sovereignty: ‘I have given away the life of the land. I have hope that the life of the land will be restored when my conduct is justified.’

Kamehameha III

It is only through righteousness that [Native Hawaiian] national existence is preserved.

Hawaiian Kingdom sovereignty activists

8.1 Introduction

The courtroom is one of few public spheres that afford Indigenous communities the opportunity to challenge the political hierarchies of power (Habermas 1989). They enter the court to reject imposed notions of inferiority, gain control over their collective past and ancestral lands, and achieve increased levels of participatory parity. In their efforts, they build legal narratives, the building blocks of court arguments, to present their arguments. These narratives are not merely stories, but consciously constructed versions of a “truth” framed as an argument with a definitive objective. The narratives are presented to the court to address threats to normative conditions and to find ways to overcome those threats (Bruner 1991). Indigenous court participants deploy their heritage, such as their values, traditions, communal memories, and the intangible spiritual and religious relationships they have with their ancestral lands, to build and substantiate their narrative arguments to achieve increased land control. Using three Native Hawaiian land claim cases in Hawai‘i as my case study, this dissertation investigated how the use of heritage by Indigenous people in land claim lawsuits for the return or control of land impacts their identity

and heritage. The investigation revealed that a new empowered identity emerged in court over time and through experience, fostering pride among the Hawaiian people, stimulating cultural memory, increasing group affiliation, encouraging greater interest in communal activities and boosting Indigenous engagement in Native Hawaiian activism.

8.2 Indigeneity, Hawaiian History and the Law

The first two chapters (Chapters One and Two) presented historical, political, legal and cultural elements informing the investigation, including issues concerning Indigenous culture, belief and tradition, Native Hawaiian relationship with land, and efforts for cultural and political sovereignty. The third chapter (Chapter Three) delineated a theoretical framework of performativity for analyzing the findings.

8.3 The Methodological Approach

As discussed in the methods chapter (Chapter Four), the investigation was carried out through two phases. The first phase included a literature search for elements that contributed to the Indigenous discourse of subjugation and marginalization in Hawai‘i; an examination of theoretical perspectives on law, heritage and identity as social constructs; and an exploration of the construction of individual and collective identity, from both a Western and an Indigenous framework. Two sessions of fieldwork followed. Archival legal data on Native Hawaiian land claim lawsuits was collected and sorted using elements of grounded theory for constant comparisons, coding, and thematic sorting (Bryman 2016; Silverman 2005) with content analysis (Pickering 2004). I conducted informal, semi-structured ethnographic interviews and participant observation within the Native Hawaiian community in consideration of Indigenous protocol (Denzin and Lincoln 2008; Kovach 2009; Smith 2006). Interviews clarified the intrinsic meaning behind spiritual beliefs and cultural and traditional practices and provided perspective on political issues.

In the second phase, three land claim lawsuits were examined in relation to their socio-historical and socio-legal context to frame the issues in their arguments. A qualitative mixed method approach of ethno-historical (Andrews 2009), socio-legal,

and legal narrative analysis (Andrews 2007; Bruner 1987; Clandinin 2007) and content analysis (Pickering 2004) was used to examine the case documents and narratives. The information investigated included the strategy chosen for the argument, the argument itself, as well as the choice of language, and tone. The interviews were only used to clarify the intrinsic meanings of cultural statements in the lawsuit documentation, and to elaborate on political or social actions leading to or resulting from the lawsuits.

8.4 A Summary of What This Thesis Examined

The thesis focused on narrativity, and the role of legal narrative construction in Indigenous empowerment processes. Narrativity is a form of communication that helps human beings place themselves relative to their world (Connelly and Clandinin 1990). It can also be a form of resistance to the social order (Brooks and Gewirtz 1998). There are two relevant forms of narrative used in the process of Indigenous empowerment in the courts: heritage and legal narratives. Heritage narratives, which are used for building and supporting individual and communal memories and senses of belonging (Lowenthal 1996; Sørensen and Carman 2009), provide the foundation for Indigenous land claim arguments. Narrative is also used in law as a way to structure the rules used to establish and maintain social order (Bradney, Cownie, Masson and Newell (2000). Significantly, those rules may be used to direct, force or coerce the actions of some members of society in order to maintain the desired social structure. One way it does this is by intentionally creating ethnic and racial identities. In doing so, the law creates and sustains hierarchies of power, subjugating some groups and elevating others.

Legal narratives play a vital role in empowering less powerful, subjugated or marginalized people, including those within Native communities. Legal narratives are the basis of all court cases and are always in service of an objective. They are strategically constructed as part of court arguments to present versions of the “truth” to win a case in court. Indigenous land claim cases are based on heritage narratives. Only those portions of heritage narratives that are applicable to building the legal narrative are employed. In the end, the final legal narrative created may be

significantly different from the original, and if convincingly supported, can challenge the content of older heritage narratives. By presenting new forms of communal narratives, negative self-images can be overturned, challenging the hierarchies of power, as was argued to be the case here.

This examination explored how marginalized Native Hawaiians used the courts as a way to confront their lack of power, gain political recognition, and restore control over ancestral lands. This included the intentional manipulation of communally accepted Native Hawaiian heritage narratives to structure empowering legal narratives for the three lawsuit case studies. The analysis focused on Native Hawaiian participation in the process of legal narrative construction and sought to determine if transformations in self-perception and in memorialization of the past were evident in the language of the court documents, or in records of court performances. The investigation, in particular, explored the rhetoric, tone, and strategy in the rhetorical and written presentations. It was evident through this analysis that the intent of the lawsuits was threefold: to have the court recognize specific Native Hawaiian rights; to have it clarify those rights; and to develop a body of judicial rulings further expanding Native Hawaiian protections for traditional and customary access rights. The unintentional outcome was that Native Hawaiians were empowered by participating in the process, and that their communal narratives were reframed.

8.4.1 The Impact of Legal Narrative Construction on Heritage and Identity

With these cases, Native Hawaiians began to shift from a mindset of victimhood to a survivor mentality, and from there to an engaged, empowered and self-confident identity. This identity transformation took place over time as the case narratives gradually evolved from a defense of rights to a demand for recognition. The process of researching, building and presenting court narratives helped to foster this new Native Hawaiian identity. Positive images of strength were projected for developing strategic organizational alliances, and for the creation of a complex multimedia campaign. The emerging identity enabled, supported and performed sophisticated court arguments, and demonstrated a newly engaged, informed, organized and determined Native Hawaiian consciousness, empowered to pursue new strategies to

achieve sovereignty. These demonstrations of strength and capability inspired pride within the community, encouraged greater ethnic affiliation, and spurred new activism and forms of nationalism. In doing so, the Native Hawaiians involved in these cases challenged the power structure in Hawai‘i, upsetting the maintenance and reproduction of an imposed Native Hawaiian identity. Importantly, their actions also effectuated a shift in political power, with greater acknowledgement of the importance of Native Hawaiian culture, values and traditions in the state, more legal protections for Native Hawaiian practices, and a greater role in land control processes. According to Professor Jonathan Osorio, Native Hawaiian scholar, activist, and head of the University of Hawai‘i’s Kamakakūokalani Center for Hawaiian Studies, these advancements in legal protections for Native Hawaiian rights also encouraged community members toward greater levels of Indigenous civic engagement (Osorio 2003: 234).

8.4.2 The Role of Professional Experts in Formulating, Building and Supporting the Cases

All three cases were influenced by the judicial activism of Native Hawaiian Supreme Court Justices. Judicial activism is the use and application of personal experience, ethnicity and intentions by judges in legal decision making. Justice William Richardson wrote the decision in the Kalipi case, and also mentored Native Hawaiian Supreme Court Justice Robert Klein, who wrote the Pele and PASH decisions. Richardson’s influence was extensive, as he also mentored Melody MacKenzie, a lead attorney on the Pele case, and a consulting attorney on the PASH case.

Professional experts provided testimony in all three cases. In Kalipi, a non-Hawaiian translator and a Hawaiian cultural expert, who was also an academic, participated. In Pele, the lawyers were Native Hawaiian, as was every expert presented by the PDF team, including the cultural and academic experts. Consulting attorneys came from the Native American Rights Fund. In PASH, there was only one Native Hawaiian plaintiff, and several Native Hawaiian cultural experts testified.

8.4.3 The Measurable Changes over Time in the Structure of the Cultural Claims

With the sequential progression of the three land claims, there was an increased complexity and sophistication in the way the cultural claims in the narratives were structured. A transformation was evident within the language, tactics, and strategy employed to support the narrative and case assertions. The contributing elements became more detailed and the language more nuanced and targeted. This resulted from an upsurge in culturally informed and experienced Native Hawaiians participating in the development of the narratives, an increased number of educated Native Hawaiians involved in the cases, and the formation of strategic alliances with organizations that provided specialized expertise for the particular case.

8.4.4 The Impact of Increased Indigenous Political Leadership and Land Control on Native Hawaiian Identity and Heritage

There is substantial evidence of a dramatic interest in ethnic affiliation, Indigenous nationalism, and civic participation after the Pele and PASH rulings. After PASH, there were significant increases in membership in Native Hawaiian sovereignty organizations (Carroll 2000). For example, Ka Lui Hawai‘i, (one of the first modern non-official Native Hawaiian constitutional governments formed), was founded in 1987 with 250 members, and by 1993 had 18,000 members. (Kame‘eleihiwa 1993: 67-68). Native Hawaiians also began to vote, particularly in elections focused on Native rights and sovereignty. This is very unusual in a state that has the lowest voter turnout in America (Sutter 2012). According to Carroll, 73% of Native Hawaiians voted in 1996 for choosing delegates for the creation of a Native Hawaiian government (Carroll 2000: 650). The purpose was to create an entity that could negotiate with the federal government over self-determination.

8.5 Case Analysis: Narrativity and Performativity

The analysis of the cases revealed that participation in the process of narrative construction per Judith Butler (1990, 2014) and Nancy Fraser (1990, 1995, 2000), was a performative act. With each case the identity performed was more self-confident, more assured, and more proficient and experienced in building narratives. Amy Allen (1998) theorizes another aspect of performativity: as a rebalancing of

power relationships. From her framework, Native Hawaiian participation in land claims itself was a performative act since as the cases proceeded Native Hawaiians filled more authorized positions in the court and were therefore political agents for change. In this new role, they performed power, and were therefore the embodiment of power. Through the effective demonstration of power Native Hawaiians took the opportunity to create an economic and political use value for heritage, negotiating its application by environmental organizations to the mutual benefit of both groups.

The Native Hawaiian involvement in lawsuits was an attempt to re-establish ownership over the past, thereby asserting authority in the present and influence over the future (Smith and Waterton 2009: 84). The court participation had a transformative “decolonizing” effect on the Native Hawaiian participants, and changed their perceptions of possibilities for the future. This process of decolonization, per Sium, Desai and Ritskes (2012), is a constant Indigenous re-negotiation over power, identity, meanings of place and concepts to reclaim authority. Tuck affirms that sovereignty and empowerment, however, are not based on land control alone. Decolonization, or casting off imposed images of Indigenous inferiority, is a psychological process of change, a constant ‘re-negotiation of power, identity, meanings of place and concept of sovereignty’ (Tuck and Yang 2012: ii). Thiong’o (1986) views such efforts as conscious attempts to overturn negative self-images, a critical part of the Indigenous empowerment process he calls “decolonizing the mind”, or overcoming the imposed feelings of inferiority.

Evidence of this “decolonizing process” can be found in the narratives themselves. In the first instance, Native Hawaiians reconceptualized their past through narratives by rebuilding them based on new research and restructuring them from an Indigenous perspective. Within the language of the narratives, the Native Hawaiians developed forms of resistance. This resistance was against the imposition of an authorized identity by the government. The language of resistance and resolve in the court narratives, because it was repeated, became the norm in the discourse between the authority of power, the law, and the Native Hawaiians (Butler 1990). Brooks and Gewirtz (1996) agree, adding that the process alone of creating the narrative can be a form of resistance to the social order. Participation in court narrative construction

afforded participants the opportunity to create and recreate forms of reality, or norms (Mertz 1992). By imagining the possibilities of their own reality, Native Hawaiians were able to conceive a new future with the power to re-consider their own versions of the past. According to Youngblood Henderson (2002), these were some of the new ‘weapons’ required for building a Native legal consciousness based on Native values and understandings.

Secondly, within the narratives, the Indigenous plaintiffs rejected the government’s-imposed definition of identity, and redefined “Hawaiianness” on their own terms. Alfred (2009) notes this positive internal communal transformation was needed in addition to external recognition in order to build a positive self-image. This redefinition was also affected by the upending of the norm of Native Hawaiians being non-confrontational and non-litigious. Another contributing element to the redefinition was the assertion in the narratives of identity on the basis of, among other things heritage values, heredity, and relationships to place, in lieu of the government definitions by blood quantum. What was being created was a modern Indigenous identity shaped by the politics of recognition. Group and individual identity that had been distorted by the repeated interactions with the dominant “other”, the foreign non-Indigenous authoritative power that had created their subjugation, was being discarded and Indigenous self-images began to reflect a more positive and assertive identity (Fraser 2000).

8.5.1 Limitations and Potential Areas of Investigation

One particular event after the last case could add to our understanding of the empowerment process. It was not investigated due to the time limit of this dissertation, but has the potential to provide insight into the impact on identity and heritage.

After the PASH case, the Hawai‘i state legislature was pressured by the real estate community to draft legislation imposing new restrictions on Native Hawaiians for access to private property, thereby limiting the scope of the landmark PASH ruling. Two bills were subsequently created and proposed in the state senate. Native Hawaiians responded to the limitations in the proposed bills swiftly and dramatically.

A coordinated plan of protest was developed by *kumu hula* (hula teachers) from all over Hawai‘i. As a result of their calls to action, hundreds of protesters descended on the state senate for a twenty-four-hour vigil, drumming and chanting to stop the legislation. The combined effort demonstrated a widespread Native Hawaiian awareness of judicial rulings, an interest in proposed legislative activity, and an increase in willingness to publicly activate. The Native Hawaiian protest was successful, and the bills were both defeated. An investigation of this unusual, but successful protest would help to clarify the ways in which Native Hawaiians were empowered to use traditional heritage practices to fight legislative battles, and whether such actions were a result of the court cases. It could also shed light on perceptions among Native Hawaiians of heritage value and use, increasing our understanding of the ways in which heritage and identity are impacted by participation in the law.

In considering the applicability of this study to other Indigenous efforts for empowerment, it must be noted that in Hawai‘i, the law is unusual. Hawai‘i has state law that legally recognizes and incorporates custom. The custom that it recognizes is Native Hawaiian. The unusual dual legal system and unique history of Hawai‘i include judicial precedent protecting Native Hawaiian rights and practices. This provides a strong basis of judicial precedent for Indigenous land claim lawsuits. Farran (2009-2010) notes that this is not necessarily true elsewhere, even in states where customary law has been adopted. She has determined that plural legal systems exist among Pacific Island nations, but in those states fundamental rights are framed in their constitutions as individual rights, which may work against, or frustrate Native self-determination efforts (Farran 2009-2010). This suggests that other Indigenous communities struggling for sovereignty may not have as strong a legal foundation for their arguments but can use the findings as a source of inspiration and ideas, rather than as a guide for duplication, in their own empowerment efforts.

By entering into the legal process for land claims, Native communities can overcome the negative self-images that have resulted from colonization. Education is necessary in order to understand the complexities of the legal system, as well as to strategize for narrative construction, and help rebuild positive and empowering communal

narratives from a Native perspective. Such a transformation is not necessarily dependent on the outcome of the case, for the process of court participation is empowering on its own. For other Indigenous groups undertaking self-determination efforts this thesis demonstrates that the development of strategic alliances with other more powerful groups is a useful asset in shifting the dominant discourse of state power in their favor. More importantly, however, participation in the process of building a legal narrative and defending it has the potential to transform Indigenous identity positively. The process requires that Indigenous participants control their story and defend it.

To conclude, this dissertation set out to examine how heritage is used in legal land claims for empowerment by marginalized Indigenous communities. By exploring not only the cultural basis for the claims, but how the Indigenous participants framed and defended their court presentations, I was able to document a process of heritage and identity transformation through the law that might have been predicted but was never before proven. The findings conclusively show that researching building, presenting and defending intentionally created legal narratives based on heritage has a transformative impact on identity. In this way, the study has importantly demonstrated a linkage between heritage and identity. It has shown that not only does law create some forms of identity, but it can foster and legitimize new forms as well.

While it may often seem as though actions are stronger than words, the redefining of the Native Hawaiian identity via the court cases described in this thesis shows the power of the spoken and written word via narratives, and the ability of a narrative to have a strong and lasting impression on a group. That the Native Hawaiians are able to be empowered by shaping and performing their narrative in a public environment truly shows how change starts small and from within, but through performativity and legal systems that allow narratives to be shared, can have a strong impact on a much larger group.

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INDEX OF HAWAIIAN WORDS

| | |
|---------------------|---|
| <i>Ahu</i> | Heap, pile, collection, mound, mass; altar, shrine, cairn; a trap-like stone enclosure made by fishermen for fish to enter |
| <i>Ahupua'a</i> | Traditional sustainable land divisions for agricultural and social order; typically from the upland mountains to the sea where resources were shared, and defined by geographic landmarks |
| <i>'Āina</i> | Land, or 'that which feeds', spiritual as well as physical environment |
| <i>Akua</i> | Supreme god; spirit; supernatural force; devil; idol; spirit |
| <i>Aloha</i> | Love; peace; affection; greeting; salutation; sympathy; pity; charity; greeting; kind; lovable; mercy; compassion |
| <i>Ali'i</i> | Hereditary royal; chief; aristocrat; commander; royal |
| <i>Ali'i Nui</i> | High chief or supreme royal |
| <i>Aumakua</i> | Genealogical descendants of a god |
| <i>Heiau</i> | 'Pre-Christian place of worship, shrine; some heiau were elaborately constructed stone platforms, others were earth terrace' |
| <i>Hoa'āina</i> | Native tenants, or caretakers |
| <i>Hula</i> | Traditional dance of Hawai'i, used to convey traditional narratives through dance; usually accompanied by mele, or chanting |
| <i>Kama'āina</i> | [Child] of the land (Handy and Pukui, Kinship); Native-born; acquainted; familiar; host |
| <i>Kahuna</i> | Priest, sorcerer, magician, wizard, minister, expert in any profession, (whether male or female); oven cooking or to cook |
| <i>Kanaka Maoli</i> | Indigenous people of Hawai'i, per Forman and Serrano, historically meant 'full-blooded Hawaiian person'. They assert in modern times the term applies to all people of Hawaiian ancestry, regardless of blood quantum |
| <i>Kapu</i> | Taboo; forbidden; prohibited; sacred; not allowed; consecrated; holy, no trespassing |

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|----------------------|---|
| <i>Konohiki</i> | Headman; overseer; land manager; under chief |
| <i>Kuleana</i> | Right; responsibility; privilege; obligation; interest; authority; portion; jurisdiction; claim; tenure; reason; cause; small piece of property; land parcel granted by Nation of Hawai‘i |
| <i>Kumu</i> | Teacher; master; model; example; beginning; goal; bottom; base; foundation; beginning; origin; initiate; start; create; reason; justification; motive; cause |
| <i>Kūpuna/kupuna</i> | Grandparent; teacher; ancestor; of grandparents generation; elders; starting point; source; growing |
| <i>Maka‘āinana</i> | Commoners in Nation of Hawai‘i, literally ‘the people of the land’ or people that attend the land; eyes of the land ⁹¹ |
| <i>Mālama</i> | To take care of and care for; to tend; maintain; preserve; protect; serve; honor; to keep or observe; support. According to Kanahele, it also means wisdom or intelligence (Kanahele 1986: 455) |
| <i>Mana</i> | Life energy; person power; strength |
| <i>Mele</i> | Chant or song; accompanies hula |
| <i>Mō‘i</i> | Sovereign, supreme chief; king; queen |
| <i>Moku</i> | Traditional district containing numerous ahupua‘a |
| <i>Nui</i> | Great; greatest; grand; principal; maximum; plenty |
| <i>‘Ohana</i> | Family; kin group; related; used to denote respectful belonging in community. |
| <i>Pele</i> | Goddess of volcanoes |
| <i>Pono</i> | Righteousness; proper; moral; correct; fair; goodness; excellence; well-being; upright; moral; accurate; just; fair; fitting; duty |
| <i>Pule</i> | Prayers |
| <i>Wahi pana</i> | A valued storied place |

I have utilized guidelines established by the University of Hawai‘i *Style Guide for Hawaiian* for the use of diacritical marks: the ‘*okina*, or glottal stop, which will

⁹¹ Source: Forman and Serrano 2010: 3.

appear as a single reversed open quotation (‘) and the macron (-), which appears over various letters. When I am quoting published texts, I use the author’s spelling and diacritical marks. In my work I spell Hawaiian words with diacritical marks. For clarity, I have italicized Hawaiian words, with English translations in parentheses. It should be noted that Hawaiian words do not have single word English equivalents. The most common equivalents are included in the parentheses.

Unless noted otherwise, definitions are from Ulukau, the online Hawaiian Dictionary comprised of: Hawaiian Dictionary (Ka puke wehewehe a Pukui/Elbert) Kuleana kope © 2003 na ka Hale Pa‘i o Ke Kulanui o Hawai‘i; Māmaka Kaiao Kuleana kope © na ka ‘Aha Pūnana Leo a me ka Hale Kuamo‘o,

Place Names of Hawai‘i (Pukui/Elbert/Mookini) Kuleana kope © 1974, 2004 na ka Hale Pa‘i o Ke; Kulanui o Hawai‘i; a me ka Hawai‘i Place Names (John R.K. Clark) Kuleana kope © 2002, 2004 na ka Hale Pa‘i o Ke Kulanui o Hawai‘i; nona wale nō ke kuleana o ia huahana.

LEGAL TERMINOLOGY

The following is a list of legal terms:⁹²

- Amicus Curiae* Latin meaning ‘Friend of the Court’. Amicus Curiae is usually a person or group of people who are not party to a lawsuit, but have a strong interest in one of the issues involved. They will petition the court for an opportunity to submit a brief, in the hope of influencing the court’s final decision.⁹³
- Allodial Title** Land freely held, without obligation of service to a superior overlord. It is a real property absolute ownership system where the owner has an absolute title free and clear of a superior landlord, like a superior sovereign government. Land held in allodium is not subject to taxation. The only land in the US that is allodial is on Native American reservations. Allodial title is usually reserved for governments.
- Blood Quantum** Federal and State of Hawai‘i regulations stating quantity of Hawaiian ancestry by percentage of blood for qualification of government benefits as “Hawaiian”. This blood quantum dates to the Hawaiian Homes Commission Act of 1920, which stated that applicants for homestead properties must have fifty percent Hawaiian blood to qualify and one-quarter Hawaiian blood to inherit. The governor of Hawai‘i signed a bill in 2017 lowering the inheritance percentage.⁹⁴

⁹² All definitions are from Barron’s Law Dictionary, Sixth Ed 2010 by Gifis, unless noted otherwise.

⁹³ Cornell University Legal Information Institute. [Online] Available at: https://www.law.cornell.edu/wex/amicus_curaie [Accessed 10 August 2017].

⁹⁴ Source: Indian Country Today. [Online] Available at: <https://indiancountrymedianetwork.com/news/politics/keeping-hawaiian-lands-native-hawaiian-hands/> [Accessed 20 April 2018].

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|----------------------------|--|
| Brief | A written document prepared by attorneys and submitted to the court on behalf of clients, concentrating on the points conveying to the court the ‘facts of his or her client’s case, as statement of the questions of law involved, the law that should apply, and the application that he or she desires of the court; it is submitted in connection with an application, motion, trial or appeal’. ⁹⁵ |
| Common Law | A system of common law from England adopted in the US during the US Revolution. It has its foundation in ancient customs of the state that were universally and generally applied. Common law is founded on judicial precedent rather than on statutory law, and is not based on fixed rules, but on principles, justice, reason, and in consideration of the social needs of the community. |
| Cultural Impact Assessment | ‘In 2000, the Hawai‘i State Legislature passed Act 50 amending Hawai‘i’s Environmental Impact Statement Law, HRS §343, to require [EAs and EISs] ‘include the disclosure of the proposed action on the cultural practices of the community and State’ and to amend the definition of “significant practices to include adverse effects on cultural practices”’. ⁹⁶ |
| Decision | A court’s term for a ruling that will settle a dispute, as in a “final decision”. |
| Eminent Domain | The right of a government to take private property for a legitimate public use, such as a utility easement. The owner’s consent is not required, but the Fifth Amendment to the US |

⁹⁵ Gifis 2010: 65.

⁹⁶ (Forman and Serrano 2012: 60).

Constitution states that ‘just compensation’ must be provided, otherwise it is an illegal “taking”.

Environmental

Impact Statement

‘[A]n informational document prepared in compliance with rules adopted under [state law] and which discloses the environmental effects of a proposed action on the economic welfare, social welfare and cultural practices of the community and State, effects of the effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects’ (Forman and Serrano 2012: 61).

Fee Simple

Fee simple ownership is a freehold estate and absolute ownership and control of privately owned land, including rights ‘free of any condition, limitations or restrictions to particular heirs’. Fee simple land can be inherited without restrictions.⁹⁷

Fully Developed

This term applies to property including ‘lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure’ (State v Hanapi 1998). ‘Factors characterizing “fully developed” property may also include: all necessary discretionary permits have been issued; there is a “substantial investment in infrastructure on or improvements to the property; and, the property owner’s expectations of excluding practitioners of traditional and customary rights are high, while Native Hawaiian practitioner’s expectations of exercising those rights are low’ (PASH/Kohanaiki Study Group Office of State Planning, On Native Hawaiian Traditional and Customary Practices Following the Opinion ...

⁹⁷ Gifis 2010: 214.

in PASH cited in Forman and Sorzano 2012: 62 emphasis added)

| | |
|-----------------|---|
| Justice | Judge in a higher court, i.e., a Supreme Court. |
| native Hawaiian | All persons eligible to be beneficiaries of the Hawaiian Homelands Program ⁹⁸ . |
| Native Hawaiian | Inclusive of all people with Hawaiian ancestry ⁹⁹ . |
| Plaintiff | The party to a suit who brings the claim, or lawsuit, to court. |
| Police Power | The ‘inherent power of state governments ... to impose upon private rights those restrictions that are reasonably related to promotion and maintenance of the health, safety, morals and general welfare of the public’ ¹⁰⁰ . Included are such restrictions as zoning laws and environmental regulations ‘imposed by state and local governments pursuant to the police power’ ¹⁰¹ . |
| Ruling | Used interchangeably with “decision”, or “rendering a decision” for the purposes of this examination, a ruling is a decision that affects the public. |
| Quiet Title | A lawsuit brought to the court to determine ownership of a parcel of land. A “quiet title” action is a suit brought to the court to resolve problems involving the instruments of ownership before conveyance of land from one party to |

⁹⁸ MacGregor, Matsuoka, Minerbi and Kelley 2002:10.

⁹⁹ Ibid.

¹⁰⁰ Gifis 2010: 401.

¹⁰¹ Ibid.

another. Quiet title actions are used in Hawai‘i when landowners want to resolve ownership of kuleana properties, especially when they are situated in the middle of another property.

Special

Management Area ‘The land extending inland from the shoreline as delineated on the maps filed with the authority as of June 8, 1977, or as amended ... The “authority” refers to “the county planning commission, except in counties where the county planning commission is advisory only, in which case authority means the county council or such body as the council may by ordinance designate’ HRS §205A-22.¹⁰²

Special Use

Permit ‘The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified’ HRS §205-6(a).¹⁰³

Standing

‘A party’s right to make a make a legal claim or seek judicial enforcement of a duty or right’¹⁰⁴, or “the legal right of a person or group to challenge in a judicial forum the conduct of another, especially in respect to governmental conduct”¹⁰⁵.

Traditional and

¹⁰² Statute cited in Forman and Serrano 2012: 68.

¹⁰³ Ibid.

¹⁰⁴ Black’s Law Dictionary 313 9th Ed 2009: 1536 cited in Forman and Serrano 2012: 69.

¹⁰⁵ Barron’s Law Dictionary 6th Ed 2010: 512.

| | |
|------------------|---|
| Customary Rights | <p>The rights granted to Native Hawaiians under state law for traditional, customary and religious practices. These rights are stated in the Hawai‘i State Constitution, Article XII §7:</p> <p>‘The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights’.</p> |
| Taking | <p>The setting apart or selective setting apart of private land for a specific public purpose, such as for a public building or military base. It can also refer to the appropriation of land in the government taking of property when exercising the power of eminent domain. It can also be defined as to acquire property by will, inheritance, or possession, or to obtain land legally by possession or illegally by theft.</p> |

APPENDICES

| | | |
|------------|--|-----|
| APPENDIX 1 | LIST OF PELE DEFENSE FUND CASES | 254 |
| APPENDIX 2 | TABLE OF LEGAL CASES RELEVANT TO PELE | 255 |
| APPENDIX 3 | NATIONAL ADVERTISEMENT (NEW YORK TIMES 21 SEPT. 1988)..... | 257 |
| APPENDIX 4 | ENLARGED SECTION – PELE DEFENSE FUND INFORMATION | 258 |
| APPENDIX 5 | ENLARGED SECTION – HERITAGE-BASED INFORMATION | 259 |

Appendix 1 List of Pele Defense Fund Cases

Pele Defense Fund Cases (Selected cases and Dates of Decisions, PDF v Paty highlighted)

Dedman v. BNL

1987 69 Haw. 255, 740 P.2d 28

Plaintiffs included individuals who would form PDF in February 1987

Plaintiff Attorneys: Yuklin Aluli, Steven Moore, Native American Rights Fund; Allan Murakami, Melody Mackenzie, NHLC
Argued land intended for use was sacred and geothermal would impinge on rights to practice. Challenged BNL
approvals for geothermal development in Kilauea Middle East Rift Zone. SC ruled that geothermal development did not
impinge on freedom of NH rights to exercise their religion

Pele Defense Fund v. Puna Geothermal Venture; Pele Defense Fund (Appeal)

1990 8 Haw.App. 203, 797 P.2d 69; 1992 ICA 827 P.2d 1149 No. 15011

Plaintiffs: PDF, Robert Petricci, Steve Phillips, Gregory Pommerenk, Deborah Pommerenk, Delan Perry, and Jennifer Perry
Attorneys for Plaintiffs: Thomas E. Luebben, Albuquerque, Anthony L. Ranken.

Opposed granting of permit for geothermal by Hawai'i County Planning Commission to Puna.

Aluli v. Lewin

1992 73 Haw. 56, 828 P.2d 802 with reconsideration denied 73 Haw. 625, 831 P.2d 935

Plaintiffs: PDF, Noa Emmett Aluli, MD, Karl Kirkendall; Michael Laplante, Robert Petricci, Steven Moser MD

Attorney for Appellants: Anthony Ranken

Attempt to stop construction due to potential eruptions with hydrogen sulfide release. Denied relief and went to appeal.
SC imposed conditions for continued development, and stopped construction. Developer ended project and left the
state.

Pele Defense Fund v Puna Geothermal Venture. (Supreme Court)

1994 SC 77 Hawai'i 64, 881 P.2d 1210

Appellants: PD; Kapoho Community Association; Robert Petricci; Jennifer Perry; Steve Phillips; and Aurora Martinovitch, v.
Puna Geothermal Venture; John C. Lewin, M.D., Director of Health; State of Hawaii, Department of Health.

Attorney for Appellants: Anthony Ranken

Challenged State Department of Health's approval of permit for geothermal development. Property owners had grounds
to sue; administrative hearings are "contested case" hearings and are required by law before permits are issued.

Pele Defense Fund v. Paty, William et al (Pele 1 Lower Court)

1991 CC No. 89-089

Attorneys for Plaintiff: Moses Kealoha, Douglas Ing, Leonard Zalopany, John Arisumi and Herbert Arata members of the
Board of Land and Natural Resources.

Attorneys for Defendants: Warren Price, III, Attorney General of Hawai'i; William M. TAM, Deputy Attorney General;
William Paty, Chairman of the Board of Land and Natural Resources, State of Hawaii

Pele Defense Fund v. Paty (Appeal) (Pele 1 Intermediate Court)

1992 SC 73 Haw. 578, 614 n.26

Supreme Court sent the case back to Circuit Court for a full trial, reversing the lower court ruling. Campbell violated
Article XII §7 of the Hawai'i State Constitution by preventing them from entering the property for Customary and
Traditional practices.

Pele Defense Fund v. Paty (Pele 1 Supreme Court and Federal Case)

1992 SC 837 P.2d 1247 No. 15373

1993 507 U.S. 918, 113 ; SC.1277, 122 L.Ed.2d 671 (Federal Case - Denied)

Attorneys for Plaintiff: Alan T. Murakami (also Melody K. MacKenzie, Paul Nahoia Lucas, Yuklin Aluli and Steven C. Moore,
of NHLC), Steven C. Moore, attorney for the Native American Rights Fund.

Native Hawaiian rights extend beyond the ahupua'a in which they reside .They are burdens to the landowner which go
with the land. Ownership of land contains an obligation to allow access by Native Hawaiians for traditional practices.

Pele Defense Fund v. The Estate of James Campbell (Pele 2 Lower Court)

1994 CC No. 89-089, WL 34205862

Defendants were enjoined from excluding Native Hawaiians from property for subsistence or cultural traditional purposes

Pele Defense Fund v. The Estate of James Campbell et al. (Pele 2 Supreme Court)

2002 CC 89-089, 2002; 2002 WL 34205861

Attorneys for Plaintiff: Alan Murakami, NHLC, James Dombroski, Steven C. Moore, Native American Rights Fund
Confirmed Hawaiian access rights to former Monarchy lands, now in private hands. Case expanded Kalipi ruling and
stated Hawaiians could come from other areas to access the land for traditional practices. Permanently enjoined Campbell
Estate from activities that would interfere with NH practices in Wao Kele O Puna.

Wao Kele o Puna v. Waihee

1991 C CC. 91-3553-10

Attorneys for Plaintiffs: Sierra Club Legal Defense Fund

Charged State did not comply with environmental law in issuing the geothermal permit and lacked a complete EIS. State
abandoned project and engaged in a settlement whereby they agreed to not do any geothermal until there was an EIS.

Appendix 2 Table of Legal Cases Relevant to Pele¹⁰⁶

| Year | Type of Hearing | Issue Contested | Plaintiffs | Claims, among others | Legal Decision |
|-----------------------|---|--|--|---|---|
| 1982 | Administrative | Kahauale'a Conservation District Use Application | Lopez | Religious and Cultural Practices | |
| 1982 1984 | Administrative | Kahauale'a Geothermal Resource Subzone Hearing | Lopez, Aluli, Dedman | Religious and Cultural Practices | |
| 1985 | Administrative | Kilauea Middle East Rift Geothermal Resource Subzone | Lopez, Aluli, Dedman With Counsel | Religious and Cultural Practices | |
| 1985 | Administrative | Kilauea Middle East Rift Zone Conservation District Use Application | Lopez, Aluli, Dedman With Counsel | Religious and Cultural Practices | |
| 1987 | Legal Case State Supreme Court | Dedman and Aluli v BLNR, Campbell and True Pacific Geothermal Venture 69 Haw. 255, 740 P.2d 28 | Dedman and Aluli | Statutory and constitutional claims §5(f) Trust Violations State infringed on right to worship Pele | Court affirmed BLNR decision, denied claims |
| 1988 | Legal Case US Supreme Court | Dedman and Aluli v BLNR, Campbell and True Pacific Geothermal Venture 485 US 1020 SC 1573, 99 L.ED. 2d 888; 488 US 1020 | Dedman and Aluli | | Court denied petition |
| 1989 - 1990 | Legal Case State Circuit Court | Ulaleo and PDF v Paty Civil No. 88-00320 ACK | May 25 – death of Ulaleo | | Ulaleo dies |
| 1989 | Legal Case State Circuit Court | Aluli, Kirkendall, LaPlante, Petricci, Moser and PDF v Lewin MD, State Dept. of Health Civil No. 89-358 | Aluli, Kirkendall, LaPlante, Petricci, Moser and PDF | Environmental | |
| 1988- 1990 | Legal Case Federal District Court, Federal 9 th Circuit Court of Appeals | Ulaleo and PDF v Paty and Board Members of BLNR 902 F.2d 1395 | Ulaleo and PDF | To invalidate land exchange | |
| 1989- 1991 | Legal Case State Circuit Court | PDF v Paty, chair of BNLN, and Board Members of BLNR, Campbell Estate and True Geothermal Ventures Civil No. 89-089 | PDF | Religious and Cultural Practices and to invalidate the land exchange | Plaintiffs lack standing to file claim |

¹⁰⁶ Source: *PDF v Paty* 1992: SC A.10: 285 citing *Dedman* 259-267, and *PDF v Paty* 1992: SC A.6: 232-233; A.10 284-286.

| | | | | | |
|-----------|---|---|-----|---|--|
| 1991-1992 | Legal Case - Appeal State Supreme Court Remanded (sent back) case to Circuit Court for retrial | PDF v Paty, chair of BNL, and Board Members of BLNR, Campbell Estate and True Geothermal Ventures No. 15373 | PDF | Religious and Cultural Practices; and to invalidate the land exchange | |
| 1991 | Legal Case State Court | Wao Kele O Puna, Greenpeace, Big Island Rainforest Action Group, Blue Ocean Preservation Society, Citizens for Responsible Energy Development with Aloha ‘‘Āina, Friends of the Earth, Greenpeace Foundation, Oahu Rainforest Action Group, PDF, Rainforest Action Network and Sierra Club v John Waihee, Governor, State, and State officials ¹⁰⁷ | | Religious and Cultural Practices | |
| | | | | Religious and Cultural Practices | |
| | Legal Case – State Supreme Court | | | | |

¹⁰⁷ Noted in PDF v Paty 1992: SC A. 399-400 by Campbell Estate in Brief

Appendix 3 National Advertisement (New York Times 21 Sept. 1988)

Display Ad 9 -- No Title

New York Times (1923-Current file); Sep 21, 1988;
ProQuest Historical Newspapers: The New York Times with Index
pg. A11

| | | | |
|---|--|---|--|
| <p>To: Senator Daniel Inouye, 722 Hart Office Bldg., Washington, DC 20510</p> <p>A Washington Post exposé of the Hawaii cable project named you as the driving force behind that destructive boondoggle. The cable and the geothermal drilling of Pele will cost Americans millions in tax dollars, and will assault the Hawaiian environment and the rights of Native Hawaiians.</p> <p>As Senator from Hawaii, you should be protecting Hawaii's incredible beauty. And as Chair of the Senate Indian Affairs Committee you are supposed to support Native religious freedom. Please reverse your position now.</p> <p>Name _____ Address _____</p> | <p>To: Mayor Dante Carpenter, Hawaii County, 25 Aupuni Street, Hilo, Hawaii 96720</p> <p>Please withdraw your support for geothermal development on the Big Island. It will lead to further industrialization and destruction of the natural beauty and quality of life which all Americans have admired, till now. I feel you should support the Native Hawaiian people who are fighting to protect their land and culture.</p> <p>Name _____ Address _____</p> | <p>To: Governor John Waihe'e, State Capitol, Honolulu, Hawaii 96813</p> <p>Industrialization of Hawaii, via massive geothermal energy projects and undersea pipeline boondoggles—which we all pay for—will destroy the quality of life that made Hawaii a vacation paradise for Americans. Please withdraw your support for such counterproductive developments, and instead support the Native Hawaiians who are fighting to preserve their culture, religion and environment.</p> <p>Name _____ Address _____</p> | <p>To: Pele Defense Fund, P.O. Box 404, Volcano, Hawaii, 96785</p> <p>I support your efforts to preserve the Big Islands' beauty and your traditions and culture.</p> <p><input type="checkbox"/> I have mailed the coupons.</p> <p><input type="checkbox"/> Here's a tax deductible donation of \$10 _____, \$35 _____, \$100 _____, \$1000 _____, other _____ for education and litigation. (Checks payable to: Pele Defense Fund)</p> <p>Name _____ Address _____</p> |
|---|--|---|--|

COME TO HAWAII

Swim in polluted water, Breathe toxic fumes, See ugly electric towers.

Help us prevent the industrialization of Paradise. Here are the details:

1. The largest and most expensive energy development ever on the Big Island of Hawaii is now getting underway—geothermal drilling on the slopes of the active Mauna Loa volcano, at Kilauea. One drilling site sits in the midst of a glorious and unique Hawaiian rainforest. (See Box A) The whole project is only a few miles upwind from Hawaii Volcanoes National Park and from neighborhoods where thousands of people live. *None of these places will ever be the same.*

2. To Native Hawaiians, the drilling itself is a brutal violation of our religious beliefs. (See Box B) For us, the volcano is a manifestation of Pele, the living Goddess sacred to Native Hawaiian religion. To violate Pele by drilling into her body is as outrageous to us as someone bulldozing the Sistine Chapel would be to Christians. But you don't have to be religious to be horrified.

3. The developers say geothermal drilling does not harm the environment. Nothing could be less true. Geothermal production releases to the air a toxic, corrosive gas called hydrogen sulfide, which smells like rotten eggs or stinking sewage. At low levels the odor is annoying, and can be sickening to the very young, the ill, the elderly, and pregnant women. At higher levels, the gas can kill. Depending on the wind, even normal operations may make life unpleasant for nearby communities. These include the National Park, where two million visitors come each year, a major economic resource. How do you think visitors will react to the stink? And what of non-normal events? What if there's an accident?

4. Remember, the drilling is into an active volcano. Earth movements are common. So are lava eruptions and cracks in the Earth. Only one such event could break-up the wells and pipelines, releasing a toxic cloud over thousands of homes. It could also blow over the spectacular black sand beach at Kalapana, and around the bend to Kona. The developers say this risk is small, but they are gambling with our homes, our future, and as we'll see, our money.

Box B.

DESECRATION OF PELE

The Hawaiian Religious Viewpoint



The United States is supposed to guarantee freedom for all religions worship, but it looks like it doesn't apply to all religions. The Hawaiian religion, still observed by thousands of us, is different from Christianity or Judaism or Buddhism. Like Native Americans, our religion is in Nature. To Hawaiians, our Gods and Goddesses are alive and with us. On the Big Island, the Goddess Pele appears to us daily in all her forms. She is the volcano, the lava, the steam, the heat, the vapor. Her family is present in the fern, certain shrubs, certain native trees. She is the land itself. We pray to her daily. Many of our chants and hula are for her and about her. We believe some of us are descended from her. This is the way we have believed for thousands of years. For us it is a sacrilege to drill holes into Pele's body, to capture her steam, to destroy her rainforests. All so some people can make money. Such things should never be done to sacred places. But when we argue that point in courts or commissions they don't take us seriously. As with all other American Indian religions, the U.S. courts give Hawaiian religion no legal protection. This is not right. It is not respectful of Hawaiian people. It is also a violation of American law protecting all religious worship. Nonetheless, we will continue our struggle to stop geothermal drilling of Pele, in the courts, and by appealing to the American public. Please join us.

Ralph Palikapu Dedman, fisherman, Panaha'u, Hawaii (President, Pele Defense Fund)
Nes Emmett Ahi, physician, Kona, Hawaii (Vice President, Pele Defense Fund)
Lahua Lopez, environmental activist (Secretary-Treasurer, Pele Defense Fund)



Here is an artist's conception of what the Big Island of Hawaii may look like if plans proceed for the new geothermal energy development, undersea cable, and industrialization. Thousands of electrical towers, 87 feet tall, marching across the land. Noxious fumes. Huge trucks barreling through serene neighborhoods. A metals smelting plant pouring toxic waste into the sea. Rainforest destruction. Pollution of the sea. Overbuilding of cities. Higher utility rates, higher taxes, destruction of our quality of life. And for Native Hawaiians, the ultimate insult to Pele. Is this what you want for Hawaii? Is this the Hawaii you love? If not, you can help change the future. Please mail the coupons.

5. Then there's the noise. When geothermal wells are first vented, the closest sound to it is a 747 taking off. Except this takeoff can last eight hours for several days per week. Then there'll be clanging pipes and huge tractor-trailer trucks climbing up and down the once serene hills, night and day. For people who moved to this place for its wonderful rural quality, and for a peaceful future for their kids, that dream might be destroyed.

6. Power lines. Huge new electrical towers and power lines will crisscross the southern part of Hawaii. Worse, if the next stage proceeds (an undersea cable), more than 1,000 electrical towers, 87 feet tall (as tall as a nine-story building) will march across the island. The route is directly over The Saddle between Mauna Loa and Mauna Kea. Right now that route offers visitors one of the most magnificent, unusual and uncrowded scenic drives in the world.

7. One of the developers, Campbell Estate, says it hopes to generate at least 300 megawatts of electricity from their geothermal projects. Public officials want 500-1000 MGW. But as the Big Island only uses about 110 MGW, the big question remains: What on earth is such excess energy for? Two things: the rampant industrialization of this island, and, via the under-water cable, to ship power to Oahu and Maui so they can develop even more.

8. Here on the Big Island, the plans include a missile launching facility, expanded resort and condo development, expanded cities and worst of all, a metals smelting plant. This will service the ocean mining industry, converting metal-bearing ocean crust into manganese, cobalt and nickel. The plant will also produce a huge toxic waste problem, with the poisons to be dumped into ocean trenches. These same trenches are now among our richest fishing grounds. So much for our local fishermen. So much for Kona billfishing. And so much for our coastline. And for Hawaii, it will be a step from which there's no going back.

9. The developers tell us new jobs will result. But none of these industries are labor intensive. Anyway, the few high paying skilled jobs will be filled by people imported from the mainland. The local people will wind up with jobs as janitors, sweepers, bus boys and maids. Is that the economic help we need? Miserable jobs in an industrial slum? No. What we need is this: Clean water and air. Our fishing grounds and our beaches preserved. And if it's our economic welfare that's the goal, then we'd greatly appreciate the release of some Hawaiian Homelands for agriculture, as was promised long ago.

10. Now for the science fiction part; transmitting the surplus power to Maui and Oahu by an undersea cable. Here's the problem: The Big Island-Maui portion of the cable must cross a deep, treacherous, geologically unstable channel,

at a depth of 6,500 feet. That is seven times deeper than any cable has ever been laid. So far, no one has any idea how to build such a cable, but they're going for it—funded by the power company, the State of Hawaii and the U.S. government. For Hawaii residents that means much higher utility rates, and higher state and federal taxes. (Mainlanders pay only once).

11. The developers claim that building this fantasy cable system will cost "only" one and three quarters billion dollars. (If true that would cost every family in this state more than \$6,000 in new interest and taxes.) But independent analysts put the real cost much higher—more than four billion. And when the money is spent, what will we have? We'll have a fragile undersea cable (maybe) that could be destroyed at any time. We'll have the further overdevelopment of Oahu and Maui. On Hawaii, we'll have toxic fumes, noise, ocean and air pollution, fields of electrical towers, higher rents, higher taxes, higher utility bills and a decimated rainforest. We'll have a direct blow at tourism and at our lifestyle. What a deal.

12. Do alternatives exist? Of course they do if only we reject that industrial vision of Hawaii. Our true energy needs can be met by expanded use of wind, biomass, solar energy, waste heat recovery, more efficient architecture and most of all, conservation. (Merely converting Oahu residences to solar water heating would save 140 MGW). Such steps would not destroy our islands' beauty, the land, the ocean, or the quality of life.

Box A.

RAINFOREST BODY COUNT



LANALANA
Happy Face Spider

OU Hawaiian
Honeycreeper

IO Hawaiian Hawk

The Hawaiian rainforest is unique in the world. 98% of the native plants, insects, birds and animals can be found nowhere else on the planet, but here. But many of these are now endangered as are all three above. With geothermal drilling, the destruction will be vast and permanent. You can stop it.

Until now, Native Hawaiian people who sponsor this ad, acting to protect our religion, have not sought outside support. But two geothermal projects are blazing forward. We need your help. Everyone who lives in this state has a stake in the outcome. In fact Hawaii is part of the dreams of every American. So please join us. Send the coupons. Help with a donation. Post this ad in a public place. Keep in touch. *Mahalo*.

PELE DEFENSE FUND
P.O. Box 404
Volcano, Hawaii 96785

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DESECRATION OF PELE

The Hawaiian Religious Viewpoint



The United States is supposed to guarantee freedom for all religious worship, but it looks like it doesn't apply to all religions. The Hawaiian religion, still observed by thousands of us, is different from Christianity, or Juddaism or Buddhism. Like Native Americans, our religion is in Nature. To Hawaiians, our Gods and Goddesses are alive and with us. On the Big Island, the Goddess Pele appears to us daily in all her forms. She is the volcano, the lava, the steam, the heat, the vapor. Her family is present in the fern, certain shrubs, certain native trees. She is the land itself. We pray to her daily. Many of our chants and hula are for her and about her. We believe some of us are descended from her. This is the way we have believed for thousands of years. For us it is a sacrilege to drill holes into Pele's body, to capture her steam, to destroy her rainforests, all so some people can make money. Such things should never be done to sacred places. But when we argue that point in courts or commissions they don't take us seriously. As with all other American Indian religions, the U.S. courts give Hawaiian religion no legal protection. This is not right. It is not respectful of Hawaiian people. It is also a violation of American law protecting all religious worship. Nonetheless, we will continue our struggle to stop geothermal drilling of Pele, in the courts, and by appealing to the American public. Please join us.

**Ralph Palikapu Dedman, fisherman, Punalu'u, Hawaii
(President, Pele Defense Fund)**

**Noa Emmett Aluli, physician, Kaunakakai, Molokai
(Vice President, Pele Defense Fund)**

**Lehua Lopez, environmental activist,
(Secretary-Treasurer, Pele Defense Fund)**

Appendix 5 Enlarged Sections – Heritage-based Information

1. The largest and most expensive energy development ever on the Big Island of Hawaii is now getting underway—geothermal drilling on the slopes of the active Mauna Loa volcano, at Kilauea. One drilling site sits in the midst of a glorious and unique Hawaiian rainforest. (See Box A) The whole project is only a few miles upwind from Hawaii Volcanoes National Park and from neighborhoods where thousands of people live. *None of these places will ever be the same.*

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4. Remember, the drilling is into an *active volcano*. Earth movements are common. So are lava eruptions and cracks in the Earth. Only one such event could break-up the wells and pipelines, releasing a toxic cloud over thousands of homes. It could also blow over the spectacular black sand beach at Kalapana, and around the bend to Kona. The developers say this risk is small, but they are gambling with our homes, our future, and as we'll see, our money.

Until now, Native Hawaiian people who sponsor this ad, acting to protect our religion, have not sought outside support. But two geothermal projects are blazing forward. We need your help. Everyone who lives in this state has a stake in the outcome. In fact Hawaii is part of the dreams of every American. So please join us. Send the coupons. Help with a donation. Post this ad in a public place. Keep in touch. *Mahalo.*

PELE DEFENSE FUND
P.O. Box 404
Volcano, Hawaii 96785