Naue: Sacred Bones and the Politics of Native Place in Hawai`i

By

Nathan L. Ratner

Faculty Advisor: Dr. J. Kehaulani Kauanui

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If there is anything Native Hawaiians will come to know it's eviction. They evict us when we're alive, they evict us when we're dead. We are never safe. Our responsibility is to protect our sense of place.

- Punahele Lerma
Introduction

This is Joseph Brescia’s beachfront house at Naue on the Northshore of Kaua’i. Without previous knowledge, one would never know just by looking at the house that it sat on top of six known burials and that another twenty-four burials lay in the yard. Yet that is precisely the situation in this otherwise quiet, remote area. Archaeological testing conducted in 2007, which was paid for by Brescia as part of the preliminary building permit, uncovered thirty sets of Native Hawaiian remains on the property dating from the Thirteenth century. Subsequently, Naue became the center of nearly three years of continuous conflict between Native Hawaiians, the homeowner, and the state of Hawaii over the treatment of the burials and the
disposition of the house. In the end, as is made clear in the image; Brescia’s house was built with the state’s blessings.

Naue is what scholar and visual artist Karen Kosasa refers to as a settler colonial site of erasure. Such sites are symbolically and materially constructed in such a way that both the evidence of a Native Hawaiian past and the continued subjugation of Natives in the present are hidden in plain sight so that settlers like Brescia can, “visualize their activities as beginning positively from a terra nullius [land that belongs to no one] and not negatively over the ruins of another culture.” Brescia’s house literally conceals the burials and the pre-colonial past they represent beneath a façade of settler paradisal pleasure. This type of settler erasure is part of the ongoing remaking of Hawai`i from Native place into settler space and Naue is exemplary of the means used to forcefully effect this transformation.

For Native Hawaiians, na iwi kupuna (the bones of the ancestors) mark Naue as a Native place, physical evidence of their status as the original occupants of the archipelago. Moreover, the bones endow the site with mana (spiritual power) meaning that it too is sacred. The battle at Naue was over whether Naue should be treated as a cemetery, in which case no development could occur, or residential property.

Legally, the critical question at Naue was how the rights of the burials to remain in place undisturbed interacted with Brescia’s property rights. Native Hawaiians effectively worked inside and outside of the law to malama na iwi kupuna (protect the bones of the ancestors), demanding that the site remain undeveloped.
They argued that Naue’s past as a sacred burial site determines its present. However state and private archaeologists responsible for evaluating Naue’s significance denied that Naue’s past is determinate of its present based on interpretive frameworks structured by the binary of prehistory. This binary posits that Natives did not possess “history” before contact with the West. This notion, formed by Europeans’ belief in their superiority, lies at the foundation of the settler colonial process of eliminating Native claims to land so that it can be remade as part of settler society. State officials and the court used the archaeological frame to justify solicitously interpreting the law in Brescia’s favor. The precedent set by the Naue decision undermine the legal protections already in place for the burials and essentially leaves the means of protecting unmarked burial sites at the discretion of developers. The house is thus a symbol of and testament to settler colonial hegemony in Hawai‘i as it dissolves Naue as a sacred burial ground and it constructs it as beachfront property. At the same time as a result of Native action it is a public symbol of settler abuse. The site is registered with the bureau of conveyances as a house lot that contains thirty burial sites. The chilling image of a beachfront house standing on top of a Native Hawaiian burial ground is a symbol that cuts through the delusional constructions of Hawai‘i as paradise to reveal the violence of settler colonialism.

This thesis analyzes the legal, cultural and political battle over Naue through the governmental denial and Kanaka Maoli (Native Hawaiian) expression of Naue’s sacredness. It traces how Native Hawaiians straddle the temporal boundary of pre and post contact imposed by American colonialism to protect Naue from destruction due
to settler development. The three chapters of the work provide historical background for the case, closely examine the case itself, and explore the complex interactions between contemporary Native Hawaiian culture and settler colonial eliminatory praxis in the conflict over Naue.

Herein I document and critically analyze how Native Hawaiians conceive of and protect na iwi o kupuna (the bones of the ancestors) from desecration by settler colonial development and the logics and practices that continue to drive the profane treatment of Native burial grounds. Kanaka Maoli pre-Christian burial practices did not use unified symbolic markers such as headstones. Native Hawaiians had a wide array of burial rituals and practices that varied from family to family. For maka`ainana (commoners), the family was responsible for burying their deceased. The family chose the location with great intention and generally used a particular location for generations. Instead of marking the sites, which could risk subjecting the iwi to enemies who wished to do them harm, the locations were huna (hidden, secret) and passed on orally only within the family.

The iwi lay in rest while the world changed around them. In 1893 the Kingdom of Hawai`i was overthrown by a group of white plantation owners. Then in 1898 the Hawaiian Islands were illegally annexed by the United States and territorially incorporated through the Organic Act of 1900. These colonial events left foreigners in political control of Hawai`i.

The location of many of these burial grounds have either been forgotten due to colonial displacement of Natives during the late nineteenth and twentieth centuries
and the attempted elimination of Hawaiian language, or are known by Kanaka who do not reveal their location publicly or, if they do reveal it, are ignored by the state and county governments. The end result is that Native Hawaiian unmarked burial sites are uncovered during development. The kupuna (ancestors) are thereby reintroduced into a world vastly different than the one in which they were buried, a world marked by capitalist exploitation of land and settler cultural hegemony.\textsuperscript{6} Throughout most of the twentieth century, the disposition of such burials was solely at the discretion of the property holder. If the titleholder had interest in using the land where the burials were interred, the burials were removed and either discarded, kept as keepsakes, or reburied elsewhere.\textsuperscript{7} This generally wanton treatment of the remains continued until the 1988 Native Hawaiian occupation of Honokahua, a site on the West side of Maui where over 1000 sets of remains were removed to build a Four Seasons Hotel. In response to this event, the Hawaii state legislature passed legal protections for unmarked burial sites over fifty years old by amending Hawaii Revised Statute (HRS) 6E, the statute on historic preservation, in 1990. The revisions established the State Historic Preservation Division (SHPD) within the Department of Land and Natural Resources (DLNR) and five Island Burial Councils, which were to be administered by the SHPD.
Each burial council represents particular islands in the archipelago, Hawai`i Island, O`ahu, Moloka`i, Maui/Lana`i, and Kaua`i/Ni`ihau. HRS 6E statutorily mandates that the Island Burial Councils be made up of Native Hawaiians and large landowner interests, with Native Hawaiians having the majority. The primary responsibility of the councils is to vote to make a legally binding determination on whether the remains on a site must be “preserved in place” or if they can be “removed and reinterred.” In other words, the council votes to determine whether the remains must be left where they were found. The burial councils can only make recommendations to the SHPD for the particular measures used to protect burials and construction on the site. During the course of the eighteen years between the passage of the protections and the events with Brescia’s house at Naue, development interests have undermined the protections granted by the law to the point where at Naue the Kaua`i/Ni`ihau Island Burial Council (KNIBC) made a determination of preserve in place, yet it was deemed legal to construct the house on top of the burials. While structures had been built on top of burials prior to Naue, those cases were in urban
centers while Naue is on the remote North Shore of Kaua`i. During the permitting process for the house, Native Hawaiians opposed construction on the site by asserting that constructing the home on top of the burials constituted desecration.

**Theoretical Framework**

My work is grounded in histories and theories of settler colonialism. Scholars Edward Cavanaugh and Lorenzo Veracini define settler colonialism through its practices. On their blog, “Settler Colonial Studies,” a precursor to the newly published peer-reviewed journal of the same name, they write, “Not all migrants are settlers; as Patrick Wolfe has noted, settlers come to stay…And settler colonialism is not colonialism: settlers want Indigenous people to vanish (but can make use of their labour before they are made to disappear).”

Settler colonial societies seek to reproduce their vision of their home society. This reproduction extends beyond repopulation to the importation of law, economies, and aesthetics. Scholar Patrick Wolfe, in his book, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event*, posits that the settler colonial impulse to destroy native communities in multiple senses of the word, coalesce into a *logic of elimination*. Importantly, “the primary motive for elimination [of the Native] is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism’s specific, irreducible element.” A critical step in this process is that the land be emptied of Natives so that settlers can fill it.
In Hawai‘i, plantation owners in the nineteenth and twentieth centuries drew in laborers from Asia. The recent collection of essays *Asian Settler Colonialism: From Local Governance to the Habits of Everyday Life in Hawai‘i* edited by Candace Fujikane and Jonathan Y. Okamura engages the question of how to view Asian communities who at one time suffered significant discrimination. As Fujikane states, the work, “calls for a methodological and epistemological shift away from predominant accounts of Hawai‘i as a democratic, ‘multicultural,’ or, ‘multiracial’ state by showing us instead the historical and political conditions of a white- and Asian-dominated U.S. settler colony.”¹² This statement is an acknowledgement that post-annexation gains made in Hawai‘i have come as a result of the subjugation of Native Hawaiians. In her collection of essays *From a Native Daughter: Colonialism and Sovereignty in Hawai‘i*, scholar Haunani-Kay Trask expands on this notion of exclusion by stating that:

> Modern Hawai‘i, like its colonial parent the United States, is a settler society; that is, Hawai‘i is a society in which the indigenous culture and people have been murdered, suppressed, or marginalized for the benefit of settlers who now dominate our islands. In settler societies, the issue of civil rights is primarily an issue about how to protect settlers against each other and against the state. Injustices done against Native people, such as genocide, land dispossession, language banning, family disintegration, and cultural exploitation, are not part of this intrasettler discussion and are therefore not within the parameters of civil rights.”¹³

Trask here illuminates the dynamics of the ways in which settlers configure law to conceal the violent means of their own dominance. Naue is exemplary of this dynamic by revealing how the non-recognition of Native claims to land is embedded
within the evaluative frameworks utilized by the archaeologists and bureaucrats tasked with preserving burial sites. Similarly, Wolfe’s book details how in the Australian context, “the global scope of anthropological theory became whittled down for local appropriation to Australian settler-colonial ends.”\(^{14}\) In Hawai`i, the work of anthropologists, archeologists, and historians is deeply implicated in the legal battles between the settler-state and Native Hawaiians.

Examining and theorizing Kanaka Maoli uses of tradition to support their legal claims is a critical part of this work. How are we to critically understand for instance, the statement by one of the Native Hawaiian activists at Naue that, “[Occupying Naue to protect it from construction] is not a political thing, it’s a spiritual thing,”?\(^ {15}\) This statement mirrors those made about Kaho`olawe by Native Hawaiians who occupied this uninhabited island off the Southwestern coast of Maui to stop the U.S. Navy from using it as a bombing test range. During the criminal trespassing trial brought against those Kanaka activists, “Special Prosecuting Attorney Robert Manekin asked the defendant Walter Ritte, "Is it not true that you were politically, as well as spiritually, motivated to go on the Island?" Ritte replied, "I was motivated because I am Hawaiian."\(^ {16}\) These statements are difficult to theorize because for both Naue and Kaho`olawe, their sacredness was first expressed and practiced publicly in conjunction with protests over destructive treatment of those places. As critical theorists, how are we to interpret these statements? My interlocutors absolutely believed in Naue’s sacredness yet, before excavation for
Brescia’s house revealed the burials, most of those who became intimately involved in opposing the house did not know that Naue was such an extensive burial ground.

Contemporary uses of tradition in the context of Native Hawaiian political action has been a subject of scholarly inquiry and debate for nearly thirty years. Yet, the methodological issues arising from the “invention of tradition” debates of the early 1990s between Jocelyn Linnekin, Roger Keesing, and Haunani-Kay Trask have still not received adequate theoretical resolution. This is in part due to its micro-political focus. However, the debate raised significant macro-political issues that since the year 2000 only James Clifford and Greg Johnson, both of whom are not anthropologists, have taken up in earnest. Foremost among the issues raised by the debate is: how can scholars accurately theorize Native Hawaiian cultural change without reifying the colonial notion that Native authenticity can only exist through the consistent maintenance of practices from contact through the present?

The debate has focused on Linnekin and Keesing’s application of the deconstruction of tradition explained in Eric Hobsbawm and Terence Ranger’s volume *The Invention of Tradition*, as well as Roy Wagner’s work, *The Invention of Culture*, to Native Hawaiian nationalism in the 1980s. The fundamental theory behind the “invention of tradition” is that tradition is continuously invented through the experiences of those who live it and evoke it towards particular objectives. The authors intended to criticize the notion that tradition was passively accepted but rather constructed to uphold power structures and provide cogent symbols of nationalist purity around which to unite a population. In “Defining Tradition: Variations on the
Hawaiian Identity,” Linnekin applied this theory of cultural construction to the Hawaiian nationalist movement where she focused on a number of examples to draw out the tenuous historical foundation upon which Hawaiian traditional claims rested. The most notable example was that of Kaho`olawe—the smallest and only uninhabited island of the eight major islands in the archipelago—where Linnekin pointed out that Native Hawaiian claims that the island was sacred were inconsistent with the island’s documented history. Since World War II the island had been property of the U.S. Navy, which used it as a bombing test site. In the 1970s, Native Hawaiians organized the group Protect Kaho`olawe Ohana (PKO) and engaged in protests, heroic occupations of the island, and litigation to stop the Navy from bombing the island. The PKO steadfastly claimed that the island was historically sacred and thus should be treated as such in the present. In the article, Linnekin theorizes that, “The island is certainly “sacred” today to many Hawaiians, so that for the Kahoolawe [sic] movement the island’s “real” history is largely irrelevant.”

Linnekin continued to theorize that:

Kahoolawe [sic] is an effective rallying point for the Hawaiian protest movement, but not because it was traditionally more sacred than any other ancient settlement area and not because Hawaiians now living regard their actual ancestors as being buried there. Kahoolawe [sic] has acquired a new meaning for Hawaiians as a political and cultural symbol of protest, which is entirely distinct from its historical significance as a tabooed land. The bombing of the island is a graphic example of disregard manifest by white colonists for native lands and culture; in this sense, Kahoolawe [sic] is an apt focus for Hawaiian protests.
The gist of Linnekin’s argument is that the Hawaiian nationalist movement adapted a particular vision of the island’s past as sacred in order to serve a particular set of political ends. Linnekin relies exclusively on Native Hawaiian examples to theoretically open the concept of tradition. In doing so Linnekin acknowledges that in Hawaii “traditional” refers to the era before Captain Cook’s arrival in 1778 while simultaneously stating that, “As a self conscious category, tradition is inevitably “invented.” Neither nationalists nor rural ‘folk,’ of course, ‘invent’ tradition out of whole cloth; rather, they constantly imbue it with dynamic content and interpretation.”¹⁹ This stance recognizes the notions of pre-contact culture as the basis for authenticity while positing that traditions are in a constant state of flux. Other than to distinguish rural Hawaiian communities as sources of authentic culture, the topic of authenticity goes largely undiscussed in this piece.

Picking up on this unresolved aspect of her theory of tradition, Linnekin takes up the issue in the article “Tradition, Genuine or Spurious,” (1984) that she co-wrote with anthropologist Richard Handler. The question they ask and attempt to answer in the article is, whether tradition is a natural object passed down passively through generations or a symbolic construct that undergoes continual redefinition? In line with her previous piece this article firmly situates tradition as a process of construction. As the title to the article implies, this theoretical bent leaves Handler and Linnekin with the dilemma of how scholars can distinguish spurious or fake traditions from genuine ones. The two scholars conclude that, “Traditions are neither genuine nor spurious, for if genuine tradition refers to the pristine and immutable
heritage of the past, then all genuine traditions are spurious. But if, as we have argued, tradition is always defined in the present, then all spurious traditions are genuine.”

This theoretical interpretation of tradition was intended to take a progressive stance towards the category of tradition and open it to give weight to Native nationalist invocations of tradition without uncritically accepting their claims.

In Roger Keesing’s 1989 article, “Creating the Past,” he takes Linnekin’s arguments a step further to claim that Hawaiian Nationalists “drew on Western conceptions of Native culture to idealize their past in the service of their political project in the present.”

In the piece, Keesing looks closely at vague references to his understandings of a few of the traditional claims made by Hawaiian Nationalists. He claims that each of these claims are based off of an “invented past” and specifically formulated by a contemporary socio-political process that constructs indigeneity as contrasted to what is Western. His gaze is across all of Polynesia however he puts special emphasis on Hawaii.

Scholar Haunani-Kay Trask radically critiques the claims of invention made by both Linnekin and Keesing in, “Natives and Anthropologists: The Colonial Struggle.”

Trask broadly refutes the authority of anthropologists to define and contest Native practices as inauthentic. Trask states that, “For Hawaiians, anthropologists in general (and Keesing in particular) are part of the colonizing horde because they seek to take away from us the power to define who and what we are, and how we should behave politically and culturally.”

What was at stake in this debate is no less than the
authority of anthropologists themselves. Trask contested the power of non-Native scholars to critically analyze Native culture by arguing that anthropologists are epistemologically unqualified. Trask writes later in the piece:

While bureaucrats are happily dividing up who is and is not Native, the substance of what constitutes things Hawaiian is constantly asserted by anthropologists against Native nationalists. Of course, the claim to knowledge by anthropologists is their academic training applied to the field. Native nationalists' claim to knowledge is their life experience as Natives.24

In response to accusations that Kanaka Maoli “invented” pasts for political ends, Trask here flips the lens to focus on the ways that Native Hawaiians are invented from the outside in the present to serve settler political ends. Native Hawaiians she posits define what it means to be Native through their own lives and being held to the standard of a historically constructed past by a scholar is tantamount to a colonial imposition. Trask then discusses the “Kaho`olawe Island, Ethnic Significance Overview,” written by anthropologist Dennis Keene for the U.S. Navy in response to Native protests. Keene quotes Linnekin’s statement that Native Hawaiians are protesting the bombing of Kaho`olawe because it is an expedient, “political and cultural symbol of protest,” to conclude that Native Hawaiian claims of the island’s sacredness are “fakery.”25 Trask sees the report as an example of, “the connection between anthropology and the colonial enterprise.”26 Trask makes it clear with this piece that Native Hawaiians have their own history telling practices, as well as understandings of their own traditions.
Linnekin responded by refining her position in “Text Bites and the R-Word,” and in “On the Theory and Politics of Cultural Construction in the Pacific.” In the former piece Linnekin responds to Trask by noting the almost identical characterization of tradition in that it is ever changing. Linnekin also states that at the PKO’s request she wrote a lengthy critique of Keene’s report. The latter piece addresses the theoretical, ethical, and political issues of the construction of culture literature in a nuanced and passionate defense. Linnekin seeks to situate the theory of cultural construction in order to articulate it in such a way so that it can be used without demanding exclusive ethnographic authority and does not require abandoning critical judgment. Linnekin concludes this piece by acknowledging that talking about culture in printed medium which spans temporal and spatial boundaries inherently produces disagreements as tradition is intimately bound up in Native identity as well as a scholarly one.

Scholar Margaret Jolly weighed in on the debate with her piece, “Specters of Inauthenticity.” In the article Jolly criticizes the dichotomy of tradition as either passively received as it is handed down through generations or a contemporary machination of a political actor that is embedded in the theory of Hobsbawm’s introduction to The Invention of Tradition and in Keesing’s writings. Jolly recommends an approach to tradition, which compares the temporal constructions of multiple traditions as a means to move away from the language that provokes accusations of inauthenticity.
Jeffrey Tobin attempted to summarize and clarify the “invention of tradition” debate in his article, “Cultural Construction and Native Nationalism: Report from the Hawaiian Front.” Tobin explains that,

Both Trask and Linnekin recognize that Hawaiian culture has been drastically transformed by colonization, and that certain Hawaiian values have survived. Linnekin sees the resulting culture as political, whereas Trask sees Hawaiian culture as incidentally politicized. Linnekin locates culture in a relevant political context, whether that context happens to be pre- or post-"contact." She consistently understands culture as a political process. For Trask, culture is. Sometimes culture is surrounded by a colonial context, and then culture is politicized. But the politicization is incidental to the culture per se.27 Tobin here is bringing the concept of motivation into the debate. While both Linnekin and Trask agree that Native Hawaiian culture inevitably enters into the political realm due to settler colonialism, Tobin’s argument is that Trask’s conception leaves space for Kanaka Maoli to engage non-politically with culture, even if they are conscious of the politics of that engagement, whereas Linnekin’s theory posits that the process of cultural construction is infused with politics. While Tobin’s summation of Trask is accurate, I believe that he over-reduces Linnekin’s much more nuanced argument. Tobin describes Linnekin’s conception of cultural process as speaking to individuals’ motivation whereas I do not read her as speaking to individuals’ motivations at all. As his primary example, Tobin delves into the 1977 trespassing trial for those who occupied Kaho‘olawe. The primary question at that trial was whether the individuals’ motivations were political or spiritual. Tobin states that despite the defendants’ claims that theirs was a spiritual motivation, Linnekin would argue that the true impetus was
political. In “Defining Tradition,” however, Linnekin specifically notes that contemporary Native Hawaiians believe that Kaho’olawe is sacred. Her argument was that the evidence she found showed that the island had never been treated as sacred in the way that activists were demanding it be treated. While Linnekin is adamant that tradition never exists outside of its political context, she is nuanced in describing the implications of that conception so as not to preclude spiritual motivations. I read the crux of Linnekin’s project as criticizing the separation of the spiritual and the political as a false choice.

Scholar James Clifford reconceptualized the debate by developing what he calls articulation theory. The theory, which Clifford wrote about in, “Indigenous Articulations,” posits that:

The whole question of authenticity is secondary, and the process of social and cultural persistence is political all the way back. It is assumed that cultural forms will always be made, unmade, and remade. Communities can and must reconfigure themselves, drawing selectively on remembered pasts. The relevant question is whether, and how, they convince and coerce insiders and outsiders, often in power-charged, unequal situations, to accept the autonomy of a “we.”

Clifford attempted to open tradition as a category of theoretical analysis with this work. Articulation theory reorients the focus from the question of historical continuity thus avoiding the dangerous and inaccurate discourses of authenticity while at the same time not reducing all culture to invention. It is interesting to note that while the rhetoric is different, Clifford’s arguments are not so very different from Linnekin’s. But it could be said that Clifford turned Linnekin right side up because if Linnekin deconstructed the historicity of particular Kanaka Maoli claims to arrive at her theory
of cultural construction, then Clifford starts with a theory of cultural articulation, a particular type of construction, to give examples (like those Linnekin examined) historical meaning. The important difference though is that Clifford situates his theory within situations of decolonization whereas Linnekin leaves a more open-ended frame.

In his book *Sacred Claims: Repatriation and Living Tradition*, religious scholar Gregory Johnson takes up the use of tradition in Native Hawaiian repatriation claims through the Native American Graves Protection and Repatriation Act (NAGPRA). Johnson draws heavily on Clifford’s articulation theory in the development of his own ideas of *living tradition*, which is how Johnson makes sense of Kanaka Maoli religious expression within the structural spaces established by NAGPRA. His premise is that tradition is alive in that it only exists insofar as it is performed and enacted by living people. Thus its application can be nothing if not adaptable.

The key theoretical dilemma regarding tradition however in settler colonial contexts is that in order to protect their culture and connection to their pre-colonial past from continuing destruction, Native Hawaiians must assert their traditional status in order to gain legal recognition. Settler colonial law, conversely, regulates Native Hawaiian identity and culture with the express intent to eliminate their claim to territory. This intent is carefully masked and concealed within the language of the law. Trask’s statement that, thinking and acting like a Native is a highly politicized reality, must be given critical weight within the discussion of tradition because,
even though it is not expressly anti-hegemonic, Native ontology cannot be meaningfully distinguished from anti-colonial resistance. James Clifford’s articulation theory comes closest to doing this by situating his theory of tradition specifically within decolonizing contexts, but his is not a wholly satisfying explanation because it relegates the attendant discussion of authenticity to secondary status. This move was designed to open tradition to theoretical discussion and interpretation without burdening it with its political baggage. For Hawai`i, constructing tradition through articulation theory precludes an analysis of the ways that authenticity is constructed, not by Natives but by the settler state. I argue that if we as scholars are to discuss Native tradition, we must first critically examine the ways that the settler colonial state recognizes and, more often than not, denies Native claims of tradition as inauthentic.

Within settler colonial situations, tradition becomes a discursive battleground between Natives and the settler state where each asserts their moral authority. Settlers have their own sense of tradition narratively structured around the transfer of Hawai`i from Native Hawaiians to Americans through which the settlers assert their authority over the land. The assertion of traditional rights by Kanaka Maoli poses an ideological and territorial challenge to the settler establishment because Native tradition undeniably predates and thus supersedes settler claims. In cases where Native claims directly oppose settler interests, the state resolves the conflict by denying in some way the authenticity of the claim. Authenticity is a colonial construct, rejected by Kanaka Maoli in order to assert their own ontologies.
I asked Puanani Rogers, a kupuna (elder), independence activist and one of my primary interlocutors, “how do you know or how do you determine what is culturally authentic?” She looked at me quizzically, “what a stupid question. What do you hope to learn by asking that question?” I responded, “I don’t know. Scholars talk about it a lot but they don’t really seem to get it so I wanted to know what you think. Let me ask it another way. Obviously things aren’t the same as they were here even five years ago let alone prior to Cook’s arrival (in 1778). So how do you…” She interjected, “Of course things are different. When does the world ever stop changing?” I asked her, “So then how do you know what is traditional culture?” She said, “I just know! I feel it in here (she pointed at her na’au).” She paused, and then said, “I have never thought about that before. That is a bad question but people who don’t understand ask questions like that so now I have an answer.”

Rogers here raises important criticisms, not about the answers of whether something is or is not “authentically Hawaiian” but about the very questions that raise the specter of a particular practice being deemed inauthentic. In her answer, Rogers provides a Kanaka Maoli epistemological framework, which contrasts with the one used by the U.S. legal system, a system that relies on documented continuity to establish authenticity. It is a particularly virulent settler colonial practice to intentionally rupture Kanaka Maoli traditions and then to deny their validity through claims of political motivation and assimilation when they resurface in contemporary Native discourse. Rogers rejects the trope of authenticity as part of her personal epistemological decolonization. Pua Kanahele, a highly respected Kanaka Maoli
educator stated, “That’s another way, to me, of knowing something is that you’ve been told by an influence that you cannot see, but you can feel inside as well as outside…you have to pay attention to your na`au.”

Authenticity freezes cultural practice in a particular past. Whereas, Native Hawaiians engage in models that allow for cultural dynamism—paying attention to your na`au (gut, intuition)—to overcome the violent disruptions brought by colonialism.

Scholar J. Kehaulani Kauanui’s book Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity, showed how Native claims to lands formerly owned by the Kingdom of Hawai`i were substantially diminished when the U.S. congress adopted a 50% blood quantum to legally qualify as “native Hawaiian” under the Hawaiian Homes Commission Act (HHCA) of 1921, which allowed those meeting the criteria to apply for homesteads under long-term leases from the federal government. This meant that those who could not sufficiently document their racial ancestry to meet the 50% threshold did not qualify as a Native under the law and thus could not make a claim to homesteading lands. Kauanui’s illuminating research reveals that this racial schema for determining identity was devised by sugar plantation owners as a means of reducing the number of claims to homesteading. Instead of Native Hawaiians, the land was awarded to plantations and the U.S. military at the same lease price of $1 per year. Kauanui’s purpose in writing the text is to decolonize Native Hawaiian identity formation by demystifying, denaturalizing, and critiquing the colonially imposed model of race-based identity. She engages the administrative and ideological structures supporting blood quantum from a position
firmly rooted in a Native Hawaiian genealogical model of identity formation, which
determines identity through ancestral connections and is thus inherently inclusive.
Kauanui’s focus is not solely on either colonial or Native structures and knowledge,
but on both. This positioning allows her to critically examine the history and ongoing
destruction wrought by settler colonialism and the important history of Native
resistance to colonialism, and to delineate a path forward through Kanaka Maoli
epistemology. This lens provides a model for scholarship on native peoples in
contemporary colonial situations.

In “Authenticity, Invention, Articulation: Theorizing Contemporary Hawaiian
Traditions from the Outside,” Greg Johnson suggests that the disputes around identity
and authenticity that rose out of the “invention of tradition” debate have been
resolved through Native scholars coming to prominence. “With Pacific and Hawaiian
scholarship in such good native [sic] hands,” Johnson constructs a position for “non-
natives” to theorize Native Hawaiian tradition by simultaneously avoiding discourses
of essentialism and invention.34 While I wholeheartedly agree with Johnson’s
suggestions for non-Natives attempting to theorize Native culture, I believe that he
misapprehends the significance of the work of Noenoe Silva in Aloha Betrayed:
Native Hawaiian Resistance to American Colonialism, Kehaulani Kauanui in
Hawaiian Blood, and Ty Kawika Tengan in Native Men Remade: Gender and Nation
in Contemporary Hawai‘i, the scholars he holds up as examples. The principal
intervention that the work of three academicians made, building off of the work of
Haunani-Kay Trask, and historians Jonathan Osorio in Dismembering Lahui: A

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History of the Hawaiian Nation to 1887 and Lilikalā Kame‘eleihiwa in *Native Land and Foreign Desires: Pehea La E Pono Ai?*, was to critique colonial knowledge through Native epistemologies. Their contribution to scholarship was the development of frameworks that positioned Native epistemology as the foundation to their critiques of American colonialism in Hawai‘i. While the existence and prominence of Natives scholars is undoubtedly a positive development in the academy, I believe that their particular methodological and theoretical interventions are more important than their indigenous identities. I make this distinction to hold up Silva, Kauanui, and Tengan’s projects as models for scholars of all backgrounds. That is, if one is to theoretically engage Native tradition and culture, one must evaluate the colonial treatment of the particular Native knowledge and practice. For example, one cannot understand the magnitude of the information Silva related from Native Hawaiian language sources without knowing that Hawaiian historiography almost entirely excluded Native language sources in writing the history of Hawai‘i. Similarly, one cannot appreciate Tengan’s explanation of how the Hale Mua revitalizes Native masculinities without first apprehending how missionaries, capitalist business concerns, and more recently the U.S. military have systematically sought to destroy Native gender models and reshape them.

Examining tradition through this paradigm of decolonization, culture as process and culture as product are shown to be not necessarily oppositional. Cultural essentialisms based on Native epistemologies are necessary to produce contemporary Native symbols. The Protect Kaho‘olawe Ohana’s (PKO) website has a section
entitled “History” which recounts the island’s post-contact use as a penal colony, ranching land, and ordinance test range; the exact same history that Linnekin detailed. In a separate section entitled, “Mo`olelo `Aina” (story, tale, myth, history, tradition of the land), the website states that based on ancient chants, Kaho`olawe, named after Kanaloa the god of the ocean and foundations of the earth, was an important place where kahuna (priests) and navigators were trained. This differentiation and privileging of oral history over documented history is not an act of invention but an assertion of Kanaka Maoli epistemology. It was also an effective one. In 1990, then president George H.W. Bush issued a permanent moratorium on the bombing on Kaho`olawe. Upon this foundation, the PKO situates the modern significance of the island later in the “Mo`olelo `Aina” by stating, “There are few places left in today’s Hawai`i where one may go to learn about being Hawaiian; Kaho`olawe is such a place.” This statement exemplifies the difficulty in theorizing the deep and intimate connection between place and indigenous identity. As James Clifford explains in “Indigenous Articulations:”

When a community has been living on an island for more than a thousand years, it is not enough to say that its members’ claims to identity with a place are strategies of opposition or coalition in struggles with neighbors, or reactions to colonizing or world-systemic forces…This historical sense of entangled, changing places doesn’t capture the identity of ancestors with a mountain, for as long as anyone remembers and plausibly far beyond that. Old myths and genealogies change, connect, and reach out, but always in relation to an enduring spatial nexus…Thus indigenous identities must always transcend colonial disruptions…claiming: we were here before all that; we are still here; we will make a future here.
According to Clifford’s analysis, the claim that Kaho`olawe is sacred can only be characterized as an essentialism in the loosest possible sense of the term. That is to say that Kaho`olawe is a vital spatial nexus and the process of protecting it from military destruction was the process of transcending colonial disruption to reconstitute Native Hawaiian identity. Clifford’s explanation asserts that Linnekin’s frame only evaluated the metaphorical topsoil of meaning associated with protecting Kaho`olawe. What Linnekin said was true but, as Clifford states, it is not enough. The reason it is not enough according to Clifford is that by theorizing the PKO’s actions as merely oppositional, Linnekin was not able to speak to the ways in which Kaho`olawe generated Native Hawaiian identity, not as a symbol of protest, but as a conduit to something far deeper, approaching the very bedrock of what it means to be Kanaka Maoli.

To simply posit that Kanaka Maoli opposed the bombing of Kaho`olawe as well as connected with it as a source of Native knowledge is still not enough. In the “About” section of the website, the PKO states that Kaho`olawe is a pu`uhonua.39 Pukui and Elbert translate pu`uhonua as a “Place of refuge, sanctuary, asylum, place of peace and safety.”40 James Alelem, a caretaker of Hikini-ka-la (Rising of the Sun) Heiau in Wailua on the Eastside of Kaua`i which is also a pu`uhonua, told me that cities of refuge were places that one could go to escape harm. Thus Alelem explained, even if someone had broken a kapu (taboo) which carried a penalty of death, if that person were within the physical confines of the pu`uhonua, no harm could befall them.41 Using pu`uhonua as a frame through which to view
Kahoʻolawe’s significance reveals that opposing military violence on the island was actualizing, bringing forth the place’s ancient essence. In the minds of the PKO at least, opposing the island’s violent treatment was metonymically linked to spatially and temporally transcending colonial disruption. Kahoʻolawe is thus a recovered place where Kanaka Maoli can escape the everyday violence of settler colonialism and at the same time be wholly Kanaka Maoli. Metaphorically engaging the concept of puʻuhonua, Kanaka Maoli actions to decolonize spaces, both physical and abstract, constitute regenerations of culture. Silva, Kauanui, and Tengan’s interventions are decolonizing strategies that articulate places of refuge where Kanaka Maoli personhood can grow. As Roselani Ferguson, a Kanaka Maoli elder, said to me of the impact of Kauanui’s research, “Growing up we didn’t know that the 50% blood rule was a haole (white person’s) idea. We were ashamed if we didn't have enough blood, but now we know.”

The same symbolic process of decolonization, which could more affirmatively be phrased re-Kanaka Maoli-ization, is occurring with burial site protection in general and at Naue in particular. Dana Naone Hall, a Native Hawaiian poet, community organizer, and protector of Honokahua, said of the meaning of burial sites:

Wherever our Hawaiian ancestors are buried, an island of sovereignty exists. Each time a decision is made to disinter Hawaiian iwi from their place of burial, their home for numberless years, our right to exist is affected. On the other hand, every decision to preserve in place a native Hawaiian burial site strengthens us as a people…As living descendants, we honor those who placed the iwi in their resting places with the intent that they remain undisturbed throughout time. Fulfilling this responsibility, we reaffirm who we are as a
people—that we too have a place here, and it comes from the bones of our ancestors.\textsuperscript{43}

Hall’s statement gives an honest and articulate glimpse of the profound meaning that burial sites have for Native Hawaiians. Protecting Naue was not merely an act of anti-colonial opposition, but was a reconnection of Kanaka Maoli to their pre-colonial past that affirmed their identity as a spiritually sovereign people in the present.

Hall goes on to say that, “in recent years, the State Historic Preservation Division (SHPD) has allowed politics and economic demands to trump laws and administrative rules designed to protect and preserve significant cultural and historic sites for future generations.”\textsuperscript{44} Hall has a unique perspective on the administrative protection of Native Hawaiian burial sites as she was instrumental in the passage of legal protections and has served on the Maui Island Burial Council. At Naue, the SHPD claims that the mitigation measures were appropriate, but appropriate for who? Hall’s words illustrate that it is not enough to prevent physical harm to the bones. For Kanaka Maoli, preservation must allow for dynamic engagement and connection with the site.

The SHPD’s preservation logic is structured by an infrequently discussed branch of applied archaeology called cultural resource management (CRM). Lynne Sebastian, former State Historic Preservation Officer (SHPO) for the State of New Mexico, explains that CRM was created in response to historic preservation legislation in the 1960’s and ‘70’s, primarily the National Historic Preservation Act (NHPA).\textsuperscript{45} This was the federal legislation that established preserving the nation’s historic heritage as a national interest and created the national registry of historic
places. Archaeology provided the technical language, expertise and methods for determining which sites were significant enough to warrant preservation and the method of preservation, broadly referred to as CRM. With the passage of the NHPA, along with the National Environmental Preservation Act and the Archaeological and Historic Preservation Act, Sebastian writes, “The profession and practice of archaeology in the United States changed profoundly over a short period of time. Suddenly, archaeology, which had been largely a pursuit for scholars and avocational enthusiasts, … became an integral part of land use planning and federal agency decisionmaking.” CRM archaeology is located within bureaucratic agencies and in private companies hired to fulfill legislative land use requirements making CRM archaeology largely immune from critical intervention taking place within academic archaeology and anthropology. Sebastian continues to say that:

The practice of CRM archaeology became increasingly standardized and directions taken by the field became the purview of federal and state bureaucracies rather than of the archaeological profession. With rare exception, post-1970’s publishing in CRM archaeology was focused not on evaluating and redesigning current practice, but on creating “how-to” manuals and introductory texts that, unfortunately, often served to reinforce the status quo.

The status quo being reinforced is the colonial perspective on the past and history making practices.

In their book, Appropriated Pasts: Indigenous Peoples and the Colonial Culture of Archaeology, Ian McNiven and Lynette Russell radically critique archaeology on indigenous sites in settler colonies. In particular, they problematize CRM archaeology for its politicized treatment of the question of significance for
determining site preservation. They explain that significance is determined through settler national heritage, which posits that indigenous sites are not significant. This is analogous to the critical historiographic intervention made in the American Indian context by historian Jean O’Brien in her book, Firsting and Lasting: Writing Indians Out of Existence in New England. In the book, O’Brien surveys eighteenth century local New England histories and determines a consistent narrative structure by the discourse of modernity. She draws on Bruno LaTour’s work out of the book, We Have Never Been Modern, to explain that modernity is a purifying settler theology, which held that the prehistoric Indians would naturally be replaced by the settlers who were modern. This led to the factual belief within the histories examined by O’Brien that Indians were extinct when in reality they were not. The same process is applied in determining which sites are deemed historic and worthy of protection under the legislative schemes and which are not.

Hawai`i Administrative Rules Section 13 Chapter 300 (HAR 13-300), the rules relating to burial sites and human remains, states that “‘Prehistoric’ means the period prior to and including the year 1778.” 1778 is the year that Captain James Cook landed in Hawai`i and is widely regarded as the first contact between Europeans and Hawaiians. The notion that prehistory and history is divided by contact with Westerners is thus actively codified in law. If only to underscore this, HAR 13-300 further states that “‘Pre-contact’ means prehistoric.” Much like in New England, this date of “contact” in Hawai`i is a fallacy endowed with factuality only due to the desire for a clear temporal boundary. Silva, through her research into
Native language sources, has found that the nineteenth century scholar Samuel Kamakau documented white people arriving in Hawai‘i before Cook. This underscores the lasting power of colonial historiography and moreover of the ways that settler discourse structures contemporary Hawai‘i on the false presumption of factuality.

The central issue in the Naue case was whether the burials have a claim to the land. That is whether the burials at Naue merit protection concomitant with a cemetery, barring the land from being used to construct a home. Michael Dega, the contract archaeologist of the private CRM firm, Scientific Cultural Surveys Hawaii, hired by Brescia to conduct archaeological testing on the site, stated in his testimony that, he would not define the site as a cemetery because for “pre-contact” burials, he has no standards by which he can say a burial ground is a cemetery.” By “pre-contact” Dega is referring to the period before Captain James Cook’s arrival in Hawai‘i in 1778. Dega here is subtly invoking the concept of “prehistory” which in Hawai‘i, also delineates the period before 1778. Archaeologists use prehistory to differentiate the period before a particular society was literate. Yet, Dega used the idea to justify denying the burials protection on the basis that they categorically did not qualify, implying that there is more to this term than just a temporal marker.

McNiven and Russell explain that the idea of prehistory was developed by the ancient Greeks and Romans to temporally ground their vision of primordial humans, and for the Romans to theorize their colonial experience in Africa. Importantly, “The ancient Greeks spatialized prehistory so that hypothetical primordial peoples of
the past had modern counterparts living on the geographical margins of the world."\textsuperscript{55}

Thus the Romans explained the peoples they encountered in Africa by labeling them “barbaros (barbarians),” the Romans believed that they were living examples of earlier humanity.\textsuperscript{56} These ideas were taken up by Europeans in the seventeenth century to incorporate the peoples and places they encountered in their colonial journeys, and refashioned to label those they encountered in “the new world” as biologically and societally inferior and thus temporally behind. These notions were further fleshed out in the nineteenth century by the development of social and cultural evolutionist thought, which similarly mapped race and culture onto a temporally linear schema where Europeans constituted the pinnacle of human development. It is this specific legacy that Dega draws on when talks about the ineligibility of “pre-contact” burials for contemporary classification.

Prehistory constitutes a colonial binary in Hawai`i which holds that history started in Hawai`i only after Cook “discovered” the archipelago. The implication of this binary is that all practices, material goods, and people rooted in prehistory must make way for the West to cultivate civilization on the land. As the anthropologist William Johnson Sollas wrote in his seminal early twentieth century work, \textit{Ancient Hunters and Their Modern Representatives},

\begin{quote}
The dispossession by a newcomer [,] of a race already in occupation of the soil has marked an upward step in the intellectual progress of mankind. It is not priority of occupation, but the power to utilize, which establishes a claim to the land. Hence it is a duty which every race owes to itself, and to the human family as well, to cultivate by every possible means its own strength.\textsuperscript{57}
\end{quote}
Sollas here is attempting to justify the colonial taking of Australian Aboriginal land by invoking this concept of prehistory infused with social evolutionism. He argues that by virtue of the fact that Aboriginals are racially inferior to white colonial settlers, it is only right for the whites to take Aboriginal land for the good of humankind. Wolfe notes that settler colonialism, “strives for the dissolution of native societies…[and] erects a new colonial society on the expropriated land base.”

Native Hawaiians do not see history in terms of prehistorical and historic, pre and post 1778. They see history as continuous from the beginning of time until the present. Accordingly Native Hawaiians know na iwi kupuna as inherently and eternally sacred. Protecting the 800 year old burials at Naue is as important as protecting the remains of their parents; it is all kuleana (responsibility). In trying to protect the burials at Naue, Kanaka Maoli had to contend with a field of law rooted in settler colonial ideologies, like that of prehistory. Drawing on over a century of Native Hawaiian anti-colonial resistance, those who sought to protect Naue did not simply oppose the permitting and construction of the house for they knew that would result in certain failure. Rather they straddled the colonial binary of prehistory, exploiting it and denying it, to make space in between. The central argument of this thesis is that Native Hawaiians uphold the kuleana to protect the iwi kupuna by working across the colonial binary of prehistory and history, demanding legal protection for the burials as historic while simultaneously opposing cases of profane treatment of the remains by asserting their eternal sacredness. In other words, Native
Hawaiians worked within the legal system through *Chandler* to try and enforce the protections of HRS 6E to their full extent, which supported their actions at the site itself by proving their necessity. In turn their cultural and spiritual activities at Naue bolstered their legal claims by adding urgency and force to the issue.

With Naue, protecting the burials and enacting the kuleana of protecting na iwi kupuna was an intervention demanding recognition on the Kanaka Maoli’s own terms. This is a decolonizing intervention, meant to claim Naue as a place generative of Hawaiian identity. In examining Indian anti-colonial nationalism, scholar Partha Chatterjee theorized that Indian nationalists divided the world into an inner spiritual domain and an outer material domain. He writes, “The material domain of the “outside,” of the economy and of state-craft, of science and technology…The spiritual, on the other hand, is an “inner” domain bearing the “essential” marks of cultural identity…nationalism declares the domain of the spiritual its sovereign territory.” He goes on to show how the two domains were forged in a mutually constitutive manner in the formation of the modern Indian nationalist culture. At Naue we can see the intricate interaction between Native Hawaiians’ rootedness in their culture and their savvy use of American legal mechanisms as a means to pursue their goal of protecting the iwi.

In the American Indian context, Kevin Bruyneel in his book *The Third Space of Sovereignty*, examines how federally recognized Tribes work across the shifting U.S. colonial binary of being inside and outside to claim what he calls the “third space of sovereignty” for their own. Bruyneel writes,
The imposition of colonial rule denotes the effort of the United States to narrowly bound indigenous political status in space and time, seeking to limit the ability of indigenous people to define their own identity and develop economically and politically on their own terms. In resistance to this colonial rule, indigenous political actors work across American spatial and temporal boundaries, demanding rights and resources from the liberal democratic settler-state while also challenging the imposition of colonial rule on their lives.62

Bruyneel’s analysis speaks specifically to the constantly shifting political sovereignty of federally recognized Tribes from the civil war through the present. His point is that Tribes exploit the profound ambivalence about their position vis-à-vis the state on the part of the U.S. Federal Government to achieve particular political ends. I invoke Bruyneel’s theory here to show how Native Hawaiians are themselves operating within the settler-state to achieve their own goals. The critical difference in Bruyneel’s subject matter is that Native Hawaiians are not recognized as a nation by the U.S. Federal government. Yet the dynamics of colonial rule are the same in that the state imposes an arbitrary temporal boundary to support territorial acquisition and while the particularities are different, in the end Native Hawaiians sought to establish a relationship to the settler-state in Hawai`i during the conflict over Naue that allowed them to direct the outcome.

Research

I flew into O`ahu on April 1, 2010 and traveled to the Hamilton Library at the University of Hawaii at Manoa campus. The librarians directed me to a master’s thesis in archaeology called Hawaiian Disposal of the Dead (1961) by Robert N.
Bowen. This was the first academic work to focus solely on Hawaiian burials. In the work, Bowen compiled written sources of Hawaiian tradition around burials as well as wrote about the findings from his research on burial mounds that were being bulldozed to build an Army base in Mokapu, O‘ahu. The librarians also showed me a doctoral thesis in archaeology, *Hawaiian Burials Reconsidered* (1987) by June Cleghorn Jr. and a master’s thesis in Pacific Island Studies by Kimberlee Gaylord called, *Correcting burial wrongs because the dead have rights: an analysis of native Hawaiian burial issues and the associated burial preservation laws in Hawai‘i* (2005). Gaylord’s 2005 thesis is significant in that it is the only academic critique of the Island Burial Council system and its inability to prevent bones from being removed for development. Gaylord had attended law school before her graduate work in Pacific Island Studies so her analysis focuses mainly on the legality of burial council decisions. Her conclusion is that in general the treatment of unmarked Native Hawaiian burial sites is a “travesty.”

There were a number of scholarly works that framed and directed my research. Traditional scholarship about Hawai‘i focused almost exclusively on the Western experience in Hawai‘i. Fortunately in the nineteenth century, a few superb Kanaka Maoli scholars, Kamakau, Malo and Papa Ii, took it upon themselves to document Hawaii’s cultural past. Recently, new scholarship has emerged with the Native Hawaiian experience as its focal point.

Jim Huff, who is good friends with Puanani Rogers, represented himself in the lawsuit that Joseph Brescia brought against tens of people who opposed the building
of his house. As a result, Huff had a set of all of the documents in the lawsuit and the countersuit that the NHLC filed against Brescia and the SHPD, which he allowed me to copy.

Participant observation was the most methodologically tenuous form of data collection. I attended numerous bureaucracy meetings: the April, May, and June KNIBC meetings, the April 24 and June 22 meetings of the Kauai Planning Commission and the April 1 and June 10 meetings of the Kauai County Historic Preservation Commission. I also attended the April 14, 2010 public forum held on the State Historic Preservation Division. It was easy to position myself as an observer at those meetings, as they are public and I could remain silent.

The most ethically difficult experience was when Wilma Holi invited me to a consultation meeting between the Federal and State Department of Transportation administrators and Kanaka Maoli over a proposed bridge project in Wailua, on the East side of Kauai in July of 2010. This was a closed meeting and I was only able to be there as her guest. Another consultation meeting was scheduled for August. Holi also invited me to attend that meeting as her guest. In the week leading up to that meeting, word was spread that a few of the other Kanaka participants had reservations about me attending. When I found out about this, I called Holi and asked what I should do. She told me that she was a kupuna and those that had raised concerns were not. She said that, since I was her guest, I was free to attend but it was ultimately my decision. I did attend the meeting. After the meeting, Holi and I went out to get some ice cream and she told me that, “before you arrived at the meeting, I scolded [them]
for saying such nonsense. They never called me and if they don’t call me and talk to me about it, then they must not be serious about it.”65 When I told her that I went because I realized that I needed to trust her because she was a kupuna, Holi smiled and said, “you are learning.”

One of the Kanaka Maoli participants at the July meeting looked at the Hawaii Department of Transportation officials sitting on the other side of the table and asked them, “when you see a pile of pohaku (stone), what do you see? You see a pile of rocks. I see my kupuna (ancestors).”66 When the person said this statement, I immediately understood that my epistemological truth will never allow me to believe with the same certainty as that person felt, that the pohaku she was referring to were the living embodiment of her kupunas. In trusting Holi, I was simply deferring to an expert. This thesis gives that same space to Native Hawaiian knowledge and accepts the truth that the pohaku are kupuna, and that, in the case of Naue, the bones live.

I conducted field research in Hawaii from February 14th, 2010 to August 17th, 2010. My research focused on Naue, a place on the North Shore of Kaua’i where Brescia, an architect from California, built a family vacation home on top of a Native Hawaiian burial ground in use since the 13th century. Construction on the site, which began in March 2007 was vigorously opposed from the outset by Native Hawaiians throughout the archipelago and non-Natives through its completion in April 2010. The strategies employed by these groups to oppose the construction ranged from attempting to work though the state and county government to direct action in the form of occupying the site itself.
I aimed to understand the legal, cultural, and political events that permitted the house to be built, as well as the Kanaka Maoli (Native Hawaiian) cultural logics deployed in opposition to the construction. As such, I situate the Naue construction within a cultural and political formation that has permitted this and other construction on top of Native Hawaiian burial grounds. Ultimately, I seek to understand the treatments of these dynamics of the struggles over the treatment of these vestiges of a Native past within the remnants of American colonialism and the resurgence of Kanaka Maoli cultural and political consciousness.

I was primarily based on the island of Kaua`i where I stayed off and on for a total of a little over 4½ months. I spent an additional 3½ months on Maui, O`ahu, and Hawai`i Island as well as Berkeley and Alameda, California. I conducted formal and informal interviews, engaged in participant observation, and collected primary and secondary written sources.

My research fell into three main groupings: (1) the motivations, strategies, and cultural paradigms employed in opposing the house, (2) the legal and cultural logics and methods that allowed the house to house to be built, and (3) the structure and dynamics of the sites where forces pushing development confront the forces protecting the burials. I used four primary methods of collecting and interpreting information: formal and informal interviews, participant observation, and discourse analysis.
The interviews I conducted can be divided into four rough categories: Kanaka Maoli cultural practitioners, people who are involved in various aspects of the development industry, Kauai residents, and government officials.

I received notice that I had been accepted into the BA/MA program at the beginning of February 2010 and arrived on Maui in mid-February 2010. I safely positioned myself on the outside as I am white, have no family in Hawaii, and this fieldwork experience was my first time in the archipelago. This positioning was important because it allowed me to openly express my sympathies for the historical and contemporary injustices against Kanaka Maoli. This openness gave me the opportunity to form a bond with my Native Hawaiian interlocutors through the transmission of knowledge in the hope of someday ending those injustices. Those injustices are widespread and are highlighted in statistics such as incarceration rates, average income, high school graduation and matriculation rates. However, the treatment of Native Hawaiians that produce those statistics are systemic and structurally engrained with the socio-political makeup of the state of Hawaii.

I attempted to interview Joseph Brescia at his offices at the Architectural Glass and Aluminum Company in Alameda California. He refused to meet with me. His secretary explained that his lawyer would not allow me to interview him. My thesis adviser, Dr. J. Kehaulani Kauanui, suggested that the interview could be arranged as a conference call with the lawyer on the phone. Brescia also rejected this suggestion. His secretary reported back to me, “I can’t tell you what he said but he
just doesn’t want to talk about it. Usually he is very nice. He is good with kids, he does mentoring. But he is very just upset.\textsuperscript{68}

Formal interviews were one of my primary research methods while in the field. I interviewed Kealoha Blake in Berkeley, California. Blake is a Native Hawaiian who stated that he had left Hawaii as a young adult due to the intense racism that he experienced every day. I also conducted a formal interview with Kalea Levy-Sandfordt, an Native Hawaiian undergraduate student at the University of California, Berkeley.

On April 3\textsuperscript{rd}, 2010, I conducted a formal interview with Alan Murakami and Camille Kalama at the Native Hawaiian Legal Corporation offices in Honolulu, Hawaii. Murakami and Kalama are the lawyers representing Puanani Rogers and Jeff Chandler in their lawsuit against the state of Hawaii and the SHPD over Naue. They explained to me in detail the process that the SHPD had used to test the area for burial and arrive at the outcome of allowing the house to be built. They also gave me insight into the general lack of protection for Native Hawaiian customs in Hawaii state law.

I had three other important formal interviews: Nancy McMahon, Keith Yap and Ian Costa. My interview with Nancy McMahon took place over email as I emailed questions to her and she responded. McMahon made this a condition of responding because she needed to have the questions and her answers screened by the stage Attorney General.

I interviewed Keith Yap at his office at Grove Farm Company on April 20\textsuperscript{th}, 2010. Mr. Yap is the vice-chair of the Kaua`i/Ni`ihau Island Burial Council (KNIBC)
and fills the “Large Property Interest” position on the council. Hawaii Revised Statutes (HRS) chapter 6E requires “Large Property Interests” to be seated on the Island Burial Councils. Grove Farm Company owns approximately 40,000 acres on Kaua‘i, “making it one of Kauai’s largest private landowners,” yet Yap had been one of the most outspoken members against building a house at Naue. Yap explained to me that, with Naue, he thought about, “if it were my family’s remains how would I like to have them treated. If I had voted for the house, my grandmother, who has since passed, would never forgive me.”

I also asked him about whether he and council considered challenging the SHPD’s acceptance of the 16th draft of the Burial Treatment Plan, after the council had unanimously voted to reject it. He responded that, “I have read the laws that created and govern the Island Burial Councils and I don’t think that we have any power to do that. I know that people want to think that we have that power so that we can help protect the iwis (bones) but our only power is to give recommendations and then it is up to the SHPD.”

I interviewed Ian Costa, the Planning Director for Kauai, on May 18, 2010. We talked about development on Kauai. He explained that Kauai was not properly zoned to accommodate the massive amount of single-family home development that Kauai has seen since the 1990s. When I asked him what can be done to moderate the development, he replied, “so long as we are part of the United States, we cannot stop development.”

The majority of my interviews were “informal” which means that they were not pre-arranged and/or were more conversational in nature. I categorize my
experiences with the three primary interlocutors of my fieldwork in the “informal” category because we would get together and “talk story.” Stephen Boggs describes talk story as “a communicative event that involves a search for and, recognition of shared feelings through a number of verbal routines such as recalled events, either personal or folktales, verbal play, joking and conversing.” It was the relationships that I formed with these three primary interlocutors, including Puanani Rogers and Wilma Holi where my methodology was most clearly expressed. I label them as interlocutors because they questioned and thereby helped develop my perspective. Rogers and Holi are considered kupunas (elders) and are held up as “experts” in the community.

Wilma Holi and I would meet every Thursday between 10:00 and 10:30 AM at the Seattle’s Best Coffee Shop in the Kukui Grove Shopping complex. I would buy Holi a large strawberry Moolatte with whipped cream on top and myself a medium cup of coffee. Then we would sit for four or five hours and talk. Holi is the Kauai representative of Hui Malama I Na Kupuna O Hawai'i Nei, the primary Native Hawaiian organization working through the Native American Graves Protection and Repatriation Act (NAGPRA) to repatriate and properly bury Native Hawaiian remains and sacred objects that are held in museums and other institutions around the world. This give Holi unique insight into the treatment of Native Hawaiian remains in the American legal system as she and the group have had to go to court numerous times to have their claims honored.
I was introduced to Puanani Rogers through my thesis adviser, who is a relative of hers. This method of introduction offered me instant credibility and the opportunity to create a deeper relationship with Rogers and her family.

My first face to face meeting took place when Rogers invited me to be a guest on the April 5, 2010 episode of her monthly radio show, “Living Sovereign,” on KKCR, the community radio station on Kaua‘i. Our relationship started with her interviewing me about who I was, what I was doing on Kaua‘i, and why I was doing it. Rogers, as she asked that I call her, and I met multiple times each week for meals or late at night throughout my time on Kaua‘i. She invited me to attend the lu‘au for the first birthday of one of her granddaughters and the birthday/acceptance party for another of her granddaughters who was accepted into the Kamehameha School. I became close to her family and thoroughly enjoyed playing with her grandchildren at family gatherings. At the same time, I was there to do research and at times asked questions that Rogers did not want to answer due to my epistemological frame.

Due to the legal bent of this project, discursive and textual analysis played a large role in my research. I spent significant amounts of time locating and making copies of every newspaper and magazine article, blog entry, and radio and television show about Naue. Joan Conrow, who is a freelance journalist and producer of the blog Kauai Eclectic, and host of the radio show “Out of the Box” on KKCR, devoted significant coverage to Naue. There are youtube videos, numerous articles in “The Garden Island” the Kauai local newspaper, and two shows aired on ‘Olelo, the Kauai
public access channel. In addition I analyzed the three statements written by the group: Kanaka Maoli Scholars Against Desecration.

**Thesis Structure**

Chapter One, Setting the Context: The History of Colonization and Resistance in Hawai`i, shows the history of how Hawai`i has changed around Naue. It begins with a brief explanation of what is known about life in Wainiha Ahupua`a, where Naue is located, prior to heavy Western influence. From there it traces critical changes in the nineteenth century such as introduction of Christianity, the privatization of land, and the formalization of the Kingdom of Hawai`i and its downfall at the hands of American plantation owners. It then examines the political and economic changes wrought by the imposition of American settler colonial rule through the twentieth century while also focusing on Native Hawaiian culture transmission and the emergence of Native Hawaiian nationalism. The chapter culminates in an examination of the burial council system and how it has changed over the twenty years of its existence.

Chapter Two, Burial Preservation and Naue: How a House was built on the Bones of Ancestors, is a close study of the conflict over Naue. It includes perspectives from the people who were engaged. Through this examination the chapter shows the contingencies of American colonial impositions and the Native Hawaiian strategy of working across the binary of prehistory. This in-depth examination also reveals that power of colonial cultural logic inscribed in the
operations of the state.

Chapter Three, The Politics of Burial Protection, theorizes the cultural logics at play in the conflict. Section one shows the dehumanizing impacts of the binary of prehistory when applied to burials. Second two shows some of the dynamics of upholding kuleana within political conflicts. It shows how the connection to the sacred is the ontological root for political action to protect Naue. Section three theorizes the ways that Kanaka Maoli articulated their culture to assert the iwi’s right to Naue.
Chapter One

Setting the Context: The History of Colonization and Resistance in Hawaii

It was a beautiful Sunday afternoon in February 2010, and I had just arrived at the Lihu‘e airport on the Hawaiian island of Kaua‘i. After asking around, I found a troupe of Irish dancers who agreed to let me hitch a ride with them to the North shore of the Island where the room I rented was located. As we were pulling out of the airport circle, a middle-aged white man was standing on the side of the road also signaling for a ride. Feeling generous, they pulled over and let him hop in the trunk of the minivan. We started talking on the way to the North shore. The man’s name was Dan. He had moved to Kauai from Rhode Island about 20 years ago to pursue his love of surfing. He said of his passion, “I may not be the best but nobody enjoys it more.” I asked him what he thought about the situation at Naue where a California man built his house on top of a Native Hawaiian burial ground in spite of staunch Kanaka Maoli (Native Hawaiian) community opposition. Dan’s face suddenly tensed up. “Why are they protesting? The whole [Wainiha] point is developed except for this house.¹ There are bones everywhere [in Hawaii]. Are they going to protest every time they find bones? Then we won’t be able to build anywhere.”²

At first I was surprised, but I was also dismayed by this man’s casual dismissal and criticism of Native Hawaiians trying to protect ancestral remains from desecration. As I spent more time on Kauai, I realized that Dan’s perspective was
common,³ not just among non-Native Hawaiians and non-island born residents, but also with people from all different ethnicities and backgrounds. From Dan’s perspective the rights of the burials to remain undisturbed were far outweighed by the right of the current landowner to build. This attitude is representative of the settler colonial ideology that settler uses of land are inherently superior to Native land uses. This is the logic behind colonial land seizures across the world. In the case of Naue, it informs the value judgment that property rights supercede legal protections for burials. What is particularly informative about Dan’s comments is that, in his estimation, development should always take precedence over the protection of unmarked Native Hawaiian burial grounds. He does not distinguish between Native Hawaiian burial sites of greater and lesser importance. For him, if it’s unmarked, it has no right to protection. Naue and almost all of the unmarked burial grounds in Hawai’i are Native Hawaiian and were used prior to contact with the West.⁴ The belief that pre-contact burial grounds don’t have any rights to remain undisturbed is a function of implicit and explicit settler acceptance of the binary of prehistory. This binary divides time into historical and prehistorical periods. Contact with the West serves as the critical threshold, dividing the periods. The logic of this binary codes all aspects of pre-contact Native life and Natives themselves as prehistorical and thus perpetually inferior to Western ways and Westerners themselves.⁵ The cultural logic formed by this binary is that settler development has priority over unmarked burial grounds because their value belongs to a world that no longer exists. To Dan then, it is a farcical annoyance that Native Hawaiians would protest the removal or
destruction of burial sites impeding the necessary economic processes of the present
day Hawai‘i. To him, Native Hawaiians are clinging to a world that is ancient history.

The logic of prehistory creates peculiar cognitive disconnects between settler and Native Hawaiians. Kanaka Maoli view their history as continuous from the beginning of time. A few Kanaka Maoli families such as the Chandlers have resided in Wainiha, the district where Naue is located, for over 140 years. The knowledge that Naue contained an extensive burial ground has been passed down orally from generation to generation. Yet when archaeologists unearthed remains on Brescia’s property, the archaeologists coded those burials as “discoveries.” Those interred at Naue, who were buried within a dominant culture that valued them as sacred, have been introduced and contextualized by a dominant settler culture which views them primarily as refuse from a previous age.

In order to protect the burials at Naue, Native Hawaiians worked across the binary of prehistory to both invoke legal protections for the burials as historic sites while simultaneously representing the eternal sacredness of na iwi kupuna (the bones of the ancestors) to demonstrate the injustice and violence of the treatment plan for the burials devised by the legal process. Kanaka Maoli have articulated and occupied this interstitial temporal space to at once maintain the essential understanding of their continuous history as a people and gain recognition within Western law as a response to colonial impositions since the formation of the Kingdom of Hawai‘i in 1810. In Colonizing Hawai‘i, Sally Engle-Merry states that,

In order to maintain their independence in an era of imperialism, [the mo‘i (king) and ali‘i (chiefs)] created a nation
that would be recognized as sovereign by other civilized nations. Allegedly “primitive” societies were being annexed by European powers through the Pacific…Consequently Hawaiian ali`i appropriated the practices and institutions of civilization for themselves and for the maka`ainana, the common people who worked the land.\textsuperscript{8}

Kanaka Maoli implemented civilization in the nineteenth century by rapidly becoming literate, formalizing governmental rule through written law, constructing courts prisons, and comporting the body to Western standards.\textsuperscript{9} While Native Hawaiian elites were the first adopters of these practices, however, with the exception of literacy, these “civilized” practices spread unevenly.\textsuperscript{10} Maka`ainana (commoners) were far more skeptical than the elites, who had political incentives, of the value of the new practices when compared to the practices and norms in which they and their ancestors were raised.\textsuperscript{11} Political Scientist Noenoe Silva notes that histories of nineteenth century Hawai`i of the transition from the exchange of ideas occurring in the early part of the nineteenth century to American colonial impositions at the end, focus almost exclusively on the process of Westernatization within that period.\textsuperscript{12} She shows through her work with Native Hawaiian language sources that these histories silence prominent processes of Kanaka Maoli cultural maintenance that took place alongside and opposed the increasingly belligerent Euro-American demands for rights and political control through the 1800s.\textsuperscript{13}

Evolutionist models served as the ideological foundation for Anglo attitudes towards the Native peoples of Hawaii. These models framed cultural difference between Europeans and Americans and indigenous peoples as “sequential, cumulative, and end driven…Evolutionism did not simply provide that ‘their’ present
was ‘our’ past…It consigned each of them to a particular moment from that past.”

This formulation erased difference between Anglos and indigenous others by uniting all cultures in a singular march towards “civilization,” (following in Anglo footsteps), while simultaneously re-inscribing difference by presuming a temporal boundary which was akin to looking back in time. Merry gives an example:

A British traveler to the islands in 1849 justifies his travel account as a picture of an isolated portion of the “great human family”…He compares the Sandwich Islanders (the European name for the Hawaiian Islanders) when they first met Europeans to the early Britons when the Romans arrived. Now, seventy-five years later, he likens them to the Britons when most of their barbarous customs were changing along the lines of Roman refinement.

Evolutionism not only undergirded a sense of colonial superiority but also led European and American colonizers to formulate their work in terms of replacing what existed when they arrived. This idea of replacement existed at both the material and metaphysical planes, which corresponded with the colonial desires for wealth and moral reform of the indigenous population. Materially, Americans and Europeans sought land and political power, which is to say to they sought to replace Native rule in order to reproduce their societies in Hawaii. Metaphysically, missionaries constructed Native Hawaiians as barbarians and thus in need of reformation. This colonial configuration of Native Hawaiian identity was static: the Kanaka who practiced their traditions would always be a heathen. The goal of the “civilizing process” was to ontologically transform them from Hawaiians into Christians and then capitalists.
Colonial ideology and discourse of the twentieth and twenty-first centuries is built upon refined articulations of this same logic of prehistory. Given contemporary American cultural and political hegemony in Hawai‘i, settlers, such as Dan, take it for granted that this colonial project of transformation is complete. Thus, in the settler worldview, any Kanaka Maoli who opposes a fundamental capitalist endeavor, such as development over a cultural matter, is trying to hamper progress and bring Hawai‘i back to the “stone age of pre-contact times.”

This chapter elucidates how the world changed around Naue, from what is known of pre-contact life to the present and yet how, despite these myriad changes, Kanaka Maoli can reach across time to vitally reconnect with burial places. Without a critical review of the history, the disposition of the Naue case appears to be driven simply by economic justifications for development, which is an over-simplification. The principal contention of this chapter is that Native Hawaiian unmarked burials have been seen as evidence supporting the logic of prehistory by Euro-Americans and held as vital connections to essential identity by Kanaka Maoli. This chapter will connect critical events from the nineteenth through the twenty-first centuries to show how the logic of prehistory developed from missionaries to plantation owners, and then to the twentieth and twenty-first century settler state and at the same time Kanaka Maoli national consciousness and anti-colonial resistance. This chapter is not intended to be a comprehensive history but rather seeks to ground contemporary state instrumentalities and Kanaka Maoli cultural nationalist practices.
in their histories to reveal the active ongoing nature of the colonial struggle in Hawai`i.

I. Exchange with the West

Naue is located in the Ahupua`a of Wainiha. An Ahupua`a is a unit in the pre-Mahele land division system in Hawaii. The `aina (land) was divided at different scales. The entire island was called the mokupuni, which was divided into several wedge shaped sections called moku which in turn were made up of ahupua`a, each of which contained several family plots called `ili. The ahupua`a was unique among these levels because it was generally self-sufficient. The makai (seaward) `ilis would fish and gather food from the sea while the mauka (inland) areas would farm such products as taro and sweet potato. Then the `ilis would exchange goods with one another. The ahupua`a division extended into the sea and so the residents of each ahupua`a were expected to care for the `aina and resources of their own ahupua`a because they couldn't take resources from neighboring ahupua`a. For this reason, there were strictly enforced rules around fresh water streams. One could only bathe in the very makai (seaward) part of the stream because it would not pollute the entire stream. The land was considered communally owned and since the people were dependant on it for their sustenance each person was responsible for caring for it. Hawaiian culture and society developed in this context. The ethic of malama `aina (care for the land), burial customs, and the cosmological system are all based on a
dignified connection to the land typified by balance and a spiritual connection to the ʻaina (land).

Each ahupua‘a were governed by a local Ali`i (chief) and administered by a konohiki (resource manager). Each ahupua‘a were governed by a local Ali`i (chief) and administered by a konohiki (resource manager).[23]

Generations of families were born and died in the same ahupua‘a. The word kula'iwi is translated by Mary Pukui and Samuel Elbert as, “native land, homeland.”[24] Yet the word is made up of the word kula (plain, open field) and iwi (bones).[25] Thus in Hawaiian cosmology, homeland is where one’s kupuna (ancestors) are interred. This etymological analysis reveals the critical role that burials served as both spiritual and material connections to place. One can only imagine that in a time without written history or records, iwi kupuna must have represented an incomparably tangible marker of history and solidified the link between the living, the dead, and the
land. Edward Halealoha Ayau and Ty Kawika Tengan explain that in the Hawaiian worldview the burial of iwi, “results in the physical growth of plants and the spiritual growth of mana (spiritual power). The living descendants feed off the foods of the land and are nourished spiritually by the knowledge that the iwi kupuna [bones of the ancestors] are well cared for, and in their rightful place.”26 The dead were an active part of everyday Hawaiian life.

After Cook arrived in 1778, Hawai‘i became increasingly involved in the world mercantile economy with ships from the Northwest Pacific fur trade, Pacific whaling ventures, guano seekers, and sandalwood merchants using it as a port of call.27 Contact with Westerners in Hawaii was devastating for Kanaka Maoli. Great numbers of Hawaiians died due to illness. Hawaii’s population in 1778, when Captain Cook first arrived, is estimated to be between 1,000,000 and 800,000; in 1818, just forty years later, the population was 135,000.28 Numerous diseases reached epidemic levels because Hawaiians had no immunity to Europeans and existing medical practices were unable to provide the necessary treatment. In the early 1800s, a census was taken by the konohiki of Wainiha for the ahupua’a from Naue by the ocean to La’au, a tiny hamlet seven miles mauka (inland). The census listed 2000 residents. By 1847, the population declined to only 147 residents.29 In 1909, Reverend John Lydgate described the drastic depopulation and consequential transformation of Wainiha by writing, “The haoles had come, bringing many wonderful things, but bringing also in the train of these wonderful things certain contagious diseases which ran like wildfire through the secluded valley and left broad areas silent and
desolate.’ This massive depopulation occurring in a very short time frame, radically disrupted nearly all parts of Hawaiian life and led to changes in their cultural practices. It was also part of the (pre)condition that enabled twentieth century settler colonial population transfer.

In October 1819, King Kamehameha II, the heir of the first mo`i (monarch), Kamehameha I, of the Kingdom of Hawai`i established in 1810, assented to calls for the ‘aikapu system (system of separate eating for men and women) to be overthrown and replaced with ʻainoa (eating without the observance of the ʻaikapu restrictions). The ʻaikapu was one of the central tenets of Native Hawaiian religious practice for honoring the gods and the abandonment of the system by the Mo`i threw the entire religious order into question. The calls for this dramatic change were made by his mother Keopuolani and co-ruler Ka`ahumanu. Though the exact reasons for this decision are not known, historian Lilikala Kame`eleihiwa provides compelling analysis that the decision reflected a sincere loss of faith in the akua (gods) to protect Kanaka Maoli from death due to disease. Hawaiians saw that white people broke the sacred taboos of the ‘aikapu religion, yet did not become ill. “Thus, they chose ‘to live as the white people do.’ At least, it seemed to be pono behavior, and since the ‘aikapu seemed to no longer preserve the people, perhaps the ʻainoa would.” The mo`i ruled by divine right and so by breaking the ʻaikapu, Liholiho sent a signal to the entire nation that worshipping the akua, which for so long had served as a central organizing principal for Hawaiian society, was no longer necessary.
The first company of missionaries from the American Board of Commissions for Foreign Missions, led by Rev. Hiram Bingham, arrived in 1820. American Calvinist missionaries used this liminal period in Hawaiian religious belief to aggressively convert Kanaka Maoli. In addition to many other areas of Kanaka Maoli life, Reverend Bingham set about reforming burial practices.\(^{37}\) In 1823, he wrote about a Native Hawaiian funeral he attended on Kauai:

At the decease of the wife of Cox, at Kauai, towards the close of the year, her friends for seven days performed their heathen rites, using incantations, offering sacrifices of hogs, dogs, and fowls, so sickening to the Missionaries, so offensive to God, and so degrading and ruinous to the people. Heathen burials were suited to the hours of darkness and the Hawaiians chose that time to put their departed out of sight, without coffins into a cave or under the surface of the ground just where the spirit left its clay. This they did, it is said, to escape the coarse and unkind remarks which they feared. In the place of the gloomy scenes of heathen burial, Divine Providence, by a tender bereavement in the mission family called us to set the example of a Christian burial, which while it awakened sympathy in the breasts of stout-hearted rulers, became the means of introducing a custom long to exert a humanizing and salutary influence.\(^{38}\)

Bingham here sees Native Hawaiian burial practices as not only a manifestation of the state of Native heathenism, but actually constitutive of it. His mission, as he understood it, was to convince the Ali`i (chiefs) initially and then eventually the maka`ainana (commoners) of the backwardness of this practice and to replace it with Christian burial practices. To this end, he was highly effective. Kamehameha I, who died in 1819, was buried in the traditional Hawaiian manner with his remains hidden to protect his mana (divine power).\(^{39}\) Conversely, Kamehameha II and his wife
Victoria Kamamalu, who died six days apart in 1824, were buried in ornate coffins with a minister reciting a Christian prayer.\(^{40}\)

Kamehameha II’s death left Ka`ahumanu in charge as Regent of the Kingdom of Hawaii. By this time, the missionaries had established themselves as advisors to the Ali`i Nui (high chiefs).\(^{41}\) Scholar Lilikala Kame`elehiwa has theorized that in 1825 Ali`i Nui Ka`ahumanu officially adopted Christian rules for pono (righteous) behavior as a means of solidifying her political power.\(^{42}\) Silva adds to this analysis that Kanaka, particularly the wahine (women), converted to be taught the palapala (reading and writing) since they recognized the power of the written word.\(^{43}\) Ka`ahumanu’s decision to adopt Christianity marked a major turning point in Hawaiian history. As a consequence of this decision, missionaries became Kahuna Nui (High Priests)\(^{44}\) and for the first time in Hawaiian history, foreign influences had power in the decision-making process for the newly formed Kingdom of Hawaii. Missionaries used their newfound influence to found schools, churches, and push the establishment of a legal code around Christian ideals.\(^{45}\)

The missionaries, rooted in social evolutionist theory, constructed Native Hawaiian history and culture as a teleological stepping-stone towards civilization. Missionary teachings and the laws they helped enact placed a heavy emphasis on capitalist modes of labor. Silva shows how missionaries aggressively preached labor as an end unto itself, as a means to “civilize” them.\(^{46}\) In her Ph.D. dissertation, From Resistance to Affirmation, We are who we were: Reclaiming National Identity in the Sovereignty Movement 1990-2003, Lynette Cruz notes that in contrast to
industrialize labor, Hawaiian subsistence labor was sacred. She writes, “subsistence methods were farming and fishing, emphasizing a strong connection to earth, sky and sea, coupled with the continued practice of protocols between man [sic] and nature.” These labor practices had no profit motive and were cosmologically and practically structured to ensure a balance between the Kanaka Maoli and the environment around them. These foreign interests denied that the land possessed the agency and ontology granted to it by Native Hawaiians. Missionaries read this connection to the earth as “savage” and branded Native labor practices “lazy and indolent.” Missionaries applied this perspective to all parts of life. Randy Wichman, the Director of the Kaua‘i Historical Society explained to me that missionaries criticized the Kanaka practice of burying the dead in sand beaches, such as at Naue, as lazy. Wichman noted that missionaries believed Hawaiians did this because sand required little effort to dig and the perceived lack of effort denoted a lack of respect for the burials. He continued that missionaries did not understand or care that those locations were chosen by Hawaiians specifically to aid the dead in their journey to Po (realm of the ancestors who have passed on).

The tacit belief in the superiority of Western labor practices drove, in part, the increasingly aggressive calls by missionaries and business interests for the repurposing of land. Hawaiian land, as viewed through the eyes of Westerners, was the stage of history upon which to carry out God’s civilizing mandate (and make a profit). Politically, the Kingdom would not allow foreigners to own land outright. But recognizing the need for tax revenue, the kingdom did issue leases.
The first sugar plantation in Hawaii was established in Koloa on the South shore of Kauai in 1835. William Hooper, the man behind the plantation, had arrived in Hawaii just two years prior and quickly worked to obtain a lease from King Kamehaha III to open the Koloa Mill. At this time, Kauai was rarely visited by whites making Hooper’s presence a source of curiosity among the Kanaka Maoli.\textsuperscript{52} One year after opening the mill, Hooper remarked on his accomplishments by writing in his diary that,

\begin{quote}
Just one year to day since I commenced work on this plantation, during which I have had more annoyances from the chiefs and difficulty with the natives (from the fact of this land being the first that has ever been cultivated, on the plan of \textit{free} labour, at these islands) than I ever tho’\textsuperscript{sic} it possible for one white man to bear, nevertheless I have succeeded in bringing about a place, which if followed up by other foreign residents, will eventually emancipate the natives from the miserable system of \textquoteleft chief labor\textquoteright\textsuperscript{sic}…The tract of land in Koloa was [developed] \textsuperscript{sic} after much pain…for the purpose of breaking up the system aforesaid or in other words to serve as an entering wedge…[to] \textsuperscript{sic} upset the whole system.\textsuperscript{53}
\end{quote}

Hooper here is referencing the system of taxation in the ahupua`a where the Ali`i exacted labor from residents.\textsuperscript{54} Hooper’s stated desire to \textquoteleft upset the system\textquoteright would prove prophetic, as the introduction of the plantation system would dramatically change the course of history in Hawaii.

By the mid-nineteenth century, Kamehameha III, Mo`i (monarch) of Hawaii was under immense pressure from foreign interests as well as his haole (white) advisors to privatize land. After their funding was cut, missionaries and their descendents acquired land through favorable leases with the Kingdom to start their
own plantations and pushed for more land. In addition to this domestic pressure, Kamehameha III was eminently aware of the threat that colonialism posed to Hawaii.\(^{55}\)

In 1843, a British Lord named David Paulet, militarily occupied Hawaii for six months following land disputes involving the denial of special privileges for British subjects. After review, the Queen of England demanded that sovereignty be returned to the Kingdom, but the incident left Kamehameha III with a looming and critical question. How could he protect his nation from these foreign threats while still acting pono? The now powerful missionaries fiercely argued that “only the private ownership of ‘aina would save the Hawaiian race from extinction.”\(^{56}\) Kanaka advisors to the Mo’i warned of the potential for Native Hawaiians to lose their land as a result of the Mahele (portion, division, section),\(^ {57}\) but, in the end, they could not stop Mahele.

In 1848, Kamehameha III consented and ordered the mahele (separation) and subsequent privatization of communal land holdings in Hawaii. The Mahele of 1848 happened because of the missionary influence and conscious will of the Kamehameha III to prevent Hawaii from being colonized.\(^ {58}\) The mahele ushered in a fee simple land tenure system, in which land could be bought and sold for the first time in Hawaii’s history.\(^ {59}\) The immediate benefactors were foreign merchants and the missionaries, themselves, as they quickly acquired large tracts of land and established plantations.
Maka`ainana did not immediately adopt the cultural adaptations required by the change in land tenure systems. Owning `aina was unthinkable for some due to the spiritual connection between Kanaka Maoli and `aina so deeply embedded in Native Hawaiian culture and the antipathy towards profit as a disingenuous form of exchange. The Native Hawaiian scholar Samuel Kamakau, writing in 1866, described the Kanaka Maoli attitude:

Because of the foreign ways of the race, they have abandoned the works of the ancestors and have become lazy and make a living by peddling, a practice despised by the ancestors, who used to say, ‘Child of a peddler! Wife of a peddler! Food of a peddler! Fish of a peddler!’

The implication of this passage is that profiteering is not pono (good, righteous). Thus the dealer and everything associated with that person are devalued. Native Hawaiians were reluctant to engage in buying and selling to accumulate wealth; so much so that some neglected to register their own land claims. This opposition to profiteering did not evenly apply to all Kanaka Maoli.

After the Mahele, the ali`i of Wainiha, Mikahela Kekauonohi received title to the land. Kekahuonohi allowed the 147 remaining residents to possess their kulenana lands. As with some other Ali`i he sought to make money from the Sandalwood trade and purchased a schooner called the Manu-o-ka-wai (the bird of the sea) with a $9,000 loan. The Manu-o-ka-wai, loaded with sandalwood, departed for Shanghai and never returned, leaving Kekauonohi with debt that he could not repay and interest on that debt accruing. In response, Kekauonohi proposed selling her land holdings in Wainiha to those that owned kuleana lands. She had the option of selling to haoles
(whites) for more but chose to sell to her fellow Kanaka instead. The residents organized and, in 1877, 71 people paid $100 each to buy shares. A deal was arranged with Kekauonohi and the loan grantor for the land and the remaining debt to be transferred to the shareholders for $7,100. The Hui Wainiha (Wainiha group) was born. Ha`ena, the ahupua‘a neighboring to the West also formed Hui around this time. The Wainiha Hui allowed the residents to maintain their life ways and subsistence lifestyle.62

The first half of the nineteenth century was a time of great upheaval and change away from the practices and lifestyles to which Kanaka Maoli had been accustomed for generations. While the process of change was uneven, as evidenced by the ability of the Wainiha community to maintain their subsistence practices, the trajectory of this change was towards the West. Merry argues that while the adoption of anglo law and land tenure should be understood as expressions of Kanaka Maoli agency in the struggle for sovereignty rather than passive capitulations to the militarily dominant foreigners. She writes that Hawaiian elites attempted, “to purchase independence with the coin of civilization. Constructing a society that appeared “civilized” to the Europeans in nineteenth century terms clearly helped to win acceptance from those European powers whose recognition conferred sovereignty.”63 The cost of these changes was to bring Euro-Americans into the heart of the expanding government as bureaucrats and judges. Silva notes that that, “although ali‘i were firmly in charge of the throne a colonial two-tiered structure was developing across the main institutions of the land, with the Europeans and American
the tip tier and the Kanaka Maoli at the bottom." Yet in the midst of all of this change, Kanaka Maoli were innovatively finding ways to maintain knowledge systems and formulate them into the core of a national identity.

Rather than entirely adopt Euro-American ethnocentric views of progress, Kanaka Maoli anchored themselves during this period of immense change by looking to their past. Noenoe Silva’s compelling research reveals that Native language sources, and newspapers in particular, played a critical role in preserving and spreading Native Hawaiian beliefs and practices. Silva focuses on the Hawaiian Language newspaper Ka Hoku o ka Pakipika (The Star of the Pacific) to elucidate Kanaka Maoli efforts to maintain their culture in the face of Euro-American attempts to eliminate it. In the newspaper, authors wrote traditional mele (song, chant, poetry), mo`olelo (history, legend, story), and mo`okoauhau (genealogy). Silva writes

Through Ka Hoku o ka Pakipika, the Kanaka Maoli were able to create a new kind of sacred space in which the ancient gods and traditions lived again. One reason the resistance took place in a sacred space rather than a political one is that it could. While the economic system was driven by ali`i colluding with colonial capitalist power, and while political sovereignty existed at the mercy of great states with warships, rifles, and cannons, the Kanaka Maoli were a people small in number and unable to raise up a great navy. They could, nevertheless, retain a sovereign identity as a lahui (nation), through preservation of their language, stories, songs, dance, and cosmologies. They did and do have themselves, a collective identity, rooted in an ancient, sacred past.

Here Silva brilliantly delves into Native Hawaiians’ fundamental response to Euro-American impositions into their lives. They responded by rooting themselves in an ancient, sacred past. Within a Western materialist or capitalist epistemology, the
past is dead and gone forever as a necessary condition of its continuation. As Karl Marx said of this knowledge-system, “All that is solid melts into air, all that is holy is profaned.” As explained in the introduction to this thesis, Kanaka Maoli epistemology is predicated upon a relationship to the past as one of life, not death. When Silva says in the passage above that, “Kanaka Maoli were able to create a new kind of sacred space in which the ancient gods and traditions lived again,” she is not saying that they were preserved as relics. She is trying express that by reading Ka Hoku o ka Pakipika, Kanaka Maoli were able to vitally connect with the knowledge of their ancestors, and thus themselves. Through the newspaper, these traditions lived and gave Kanaka Maoli a sense of self, nation, and place amid the violent and rapid change they were experiencing.

In the mid-nineteenth century, this vital process was unrecognizable and severely misunderstood by Euro-Americans. Missionaries and scholars interpreted the continued practice of Kanaka Maoli tradition as a vestigial relic of a people nearing their extinction due both to the purifying discourse of modernity and to the massive Kanaka Maoli death rates. Mark Twain was foremost among the commentators who situated Kanaka Maoli within a trajectory of doom.

Mark Twain arrived in Hawaii in 1866 and, through several letters he wrote during his experience to promote sugar interests for the Sacramento Union, he gives voice to American thinking at the time. He invokes themes like Native exoticism and eroticism while treading over cultural difference with a semi-self-conscious air of American superiority. Scholar Amy Kaplan notes that Twain was obsessed with death
in particular. She writes that Twain, “attributed to Hawaiians a special intimacy with death, repeating often that they would just decide to die and do so, as though the people as a whole had willed their own demise.” One can see here the burgeoning settler colonial ideology of modernity writ large, where what was Native was associated with death and as a natural consequence what was Western was associated with life. Looked at another way, Twain’s perspective posited that, both historically and evolutionarily, Native Hawaiians were the past, while Euro-Americans were the future. Twain found expression for his near obsession with Hawaiians and death in Native bones and burial places. While in Hawaii his interest led him to, “collect bones scattered through the landscape, explore ancient burial sites where he imagined human sacrifices, and search for the exact location where Captain Cook was eaten.”

In one particular letter, he documents his journey with a group of American tourists outside of Honolulu. This passage is important because it reveals American material and symbolic practices specifically with Native Hawaiian remains. In March, 1866 Twain wrote,

Gaily laughing and talking, the party galloped on, and with set teeth and bouncing body I clung to the pommel and cantered after. Presently we came to a place where no grass grew - a wide expanse of deep sand. They said it was an old battle-ground. All around everywhere, not three feet apart, the bleached bones of men gleamed white in the moonlight. We picked up a lot of them for mementoes. I got quite a number of arm bones and leg bones - of great chiefs, maybe, who had fought savagely in that fearful battle in the old days, when blood flowed like wine where we now stood - and wore the choicest of them out on Oahu afterward, trying to make him go. All sorts of bones could be found except skulls; but a citizen said, irreverently, that there had been an unusual number of "skull hunters" there lately - a species of sportsmen
I had never heard of before. The conversation at this point took a unique and ghastly turn. A gentleman said:

"Give me some of your bones, Miss Blank; I'll carry them for you."

Another said:

"You haven't got bones enough, Mrs. Blank; here's a good shin-bone, if you want it."

Such observations as these fell from the lips of ladies with reference to their queer newly-acquired property:

"Mr. Brown, will you please hold some of my bones for me a minute?" And,

"Mr. Smith, you have got some of my bones; and you have got one, too, Mr. Jones, and you have got my spine, Mr. Twain. Now don't any of you gentlemen get my bones all mixed up with yours so that you can't tell them apart."

These remarks look very irreverent on paper, but they did not sound so, being used merely in a business way and with no intention of making sport of the remains. I did not think it was just right to carry off any of these bones, but we did it, anyhow. We considered that it was at least as right as it is for the Hawaiian Government and the city of Honolulu (which is the most excessively moral and religious town that can be found on the map of the world), to permit those remains to lie decade after decade, to bleach and rot in sun and wind and suffer desecration by careless strangers and by the beasts of the field, unprotected by even a worm-fence. Call us hard names if you will, you statesmen and missionaries! but I say shame upon you, that after raising a nation from idolatry to Christianity, and from barbarism to civilization, you have not taught it the comment [sic] of respect for the dead. Your work is incomplete.

This letter captures the arrogance with which Americans treated Hawaiians in the 19th century. Twain’s words also bring to light the perception of Hawaiian passiveness,
stemming from his sense of their inferiority, in the face of colonization. Twain speaks to statesman and missionaries when he chastises them for failing to teach the Hawaiians “respect for the dead.” In Twain’s view, Hawaiian culture was merely a site of reform, possessing no inherent validity other than, perhaps, the amusement he derived from it. Twain’s gaze on burial practices again links deviance from recognized Christian burial practices with barbarianism. These suppositions coalesce to Twain’s core argument, which is that it is morally acceptable to desecrate Native Hawaiians burials that do not conform to those recognizable to him.

Kaplan remarks that the act of collecting bones, “manufacture[s] [its] own reference as a way of making tourists at home by both representing and disavowing the colonial violence that links the history of conquest to the present journey.” The bones become relics, symbols, validating the existence of temporal boundary marking the arrival of whites and on the other side of which lies the “dead past.” In Kaplan’s analysis, the symbolism of the bones for Twain renders, “authentic native culture as necessarily dead or dying,” a natural consequence of the transition to civilization.

In *Firsting and Lasting: Writing Indians out of Existence in New England*, Jean O’Brien notes that local New England histories, written around the same time Twain was in Hawai‘i, invoked the notion of Indian extinction to discursively justify and nativize their settlements. These narratives not only masked the colonial violence by which land was acquired by also the fact that the tribes they claimed were extinct still had living members. As a result of these histories, Native extinction became “fact,” and provided a reality for settlers to believe in their native authority over the
land. In Hawai`i, this narrative of native extinction similarly went hand in hand with
Euro-American demands for increased political power.

Historian Jon Osorio states in his book, *Dismembering Lahui: A History of
the Hawaiian Nation to 1887*, that the downfall of the Kingdom of Hawaii began with
passage of the 1887 constitution.\(^76\) The 1887 constitution, which is also called the
Bayonet constitution because King Kalakaua was forced to sign it at gunpoint,
essentially stripped the Monarch’s power and gave it to the plantation owner
controlled legislature. Under the Kingdom of Hawaii prior to the 1887 constitution,
missionaries, business interests, and other colonizing agents had to negotiate with
Native Hawaiian government officials to achieve their ends. After the constitution,
Native Hawaiians utilized their political agency in innovative and effective ways but
were no longer in control.

In 1892, Queen Lili`uokalani, Kalakaua’s successor (and sister), traveled
around Hawai`i and talked to her people to understand their needs. Using this
information she drafted a new constitution that would restore power to the monarchy
and voting rights to those who did not own land. This action threatened the power
held by white plantation owners. Rather than lose their power the plantation owners
took drastic action. In January 1893, a group of white plantation owners, the same
group that had written and forced the passage of the 1887 constitution, conspired with
the U.S. foreign minister to Hawaii and forcefully overthrew the Kingdom of Hawaii
with the help of U.S. Marines.\(^77\) Native Hawaiians immediately began working both
inside and outside of law to recoup their sovereignty.
In 1893, Cleveland commissioned a report on the overthrow of the Kingdom that found it to be an illegal ‘act of war.’ In response, he attempted to negotiate the return of sovereignty to the Kingdom but negotiations broke down around Liliu`kalani’s legal inability to accept Cleveland’s demand that those responsible for overthrowing the Kingdom be pardoned of treason. The interests who planned the overthrow had done so with the intention of Hawaii being annexed to the U.S., but with the threat that President Grover Cleveland would force them to restore Queen Lili`uokalani, the last sovereign of the Kingdom, to the throne, they started their own government, the Republic of Hawaii. President Grover Cleveland agreed to recognize the Republic of Hawaii as a sovereign nation, seeing no viable political alternative.78

In many ways the process of colonization reached its culmination in 1894 with the inauguration of the Republic of Hawaii. July 4, 1894, was a celebration for those in attendance not just because it was the second time in 18 months that the same group of plantation owners had created their own government, but because this time they had guarantees that it would not be returned to Queen Lili`uokalani and the Kingdom of Hawaii. Thomas Thrum wrote in the Hawaiian Almanac of 1985:

July 4th, 1894 [witnessed] the culmination of patriotic enthusiasm at the fruition on Hawaiian soil of American principles and ideas which were engrafted here with the dawn of Christian civilization and nurtured by the commercial and social rather than by political ties; for upon that day was born the new Republic of Hawaii.79

This event marked an endpoint for the process of importing American Christianity, capitalism, and government to Hawaii in order to promulgate and then increasingly control a bureaucratized state. Hawaii as a body of land had been liberated from the
Native Hawaiians who were racially inscribed as perpetually less civilized and thus temporally behind. The land could now be politically incorporated into a “civilized” society. For Native Hawaiians, this event marked the culmination of over a century of depopulation, and political and territorial dispossession. Even Sanford B. Dole, the President of the Republic of Hawaii, acknowledged the event’s climactic nature in his inauguration speech:

> The Land Commission and the great Mahele, by which the lands of the kingdom were divided between the people, the chiefs, and Government and the king, the Constitutions of 1853, 1864, 1887 and the proclamation of January 17, 1893 are the milestones along the way. Today as we pass through the “gate beautiful” [sic] into a new realm full of promise, of hope and of boundless opportunity, we set up another mile-stone, greater and grander than all that stand behind us. The end is not yet.

In the quoted portion of the speech, Dole lays out a brief history of American colonial efforts in the archipelago. Each constitution shifted increasing amounts of power away from the Hawaiian monarchy and to the same business interests that now filled the cabinet of the Republic. The proclamation refers to the overthrow of the Kingdom of Hawaii and the establishment of what Sanford B. Dole and Lorrin Thurston and his colleagues named the Provisional Government. In 1895, Robert Wilcox led a short-lived rebellion that attempted to restore power to Queen Lili`uokalani. Expansionist William McKinley succeeded Cleveland as President in 1897. Spurred by the perceived need for U.S. military position in the Pacific, McKinley proposed a treaty of annexation for the Hawaiian Islands.
Scholar Noenoe K. Silva’s work, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism*, documents the significant and successful Native Hawaiians strategies of resistance to American colonialism and particularly annexation, challenging the previously accepted narrative that Hawaiians either supported or at least passively accepted annexation. In 1897, three groups, the Hui Aloha Aina for Men, the Hui Aloha Aina for Women, and the Hui Kalai`aina, set out across Hawaii to collect signatures for petition drives to oppose annexation. These petitions succeeded in defeating a treaty of annexation in the U.S. congress. But, expansionists used the outbreak of the Spanish American War to pass the Newlands Resolution in 1898, illegally annexing Hawaii to the United States by Congressional resolution rather than by a treaty.

II. **20th Century Colonialism**

The establishment of the Republic of Hawaii marked the transition from the colonizing period to the settler colonial period that is still ongoing. The roots of this transition lay in the profitability of the sugar industry and the political and legal efforts by the plantation owners to secure their business interests. Through the Twentieth century, Hawaii experienced broad economic and governmental transitions formed by settler colonial practices and logic. Economically, Hawaii went from an agricultural based economy producing mainly sugar and pineapple to one reliant upon development, the military and tourism. Hawaii was organized as a territory in 1900 through the Hawaii Organic Act and eventually a state in 1959. Accordingly, colonial
practices also shifted from reform and conquest to settlement and disciplinary enforcement. This shift towards settler colonialism is born out in the demographics.

The 1896 Census, the only census taken by the Republic of Hawaii, shows the Native Hawaiian population at 39,504, the lowest total in documentarily recorded history. In the 118 years since Captain Cook landed in Waimea, on the East side of Kauai, the Native Hawaiian population decreased by roughly ninety-five percent. Depopulation in conjunction with post-Mahele land dispossession, and the change in governments, left Hawaiian people and land vulnerable to American settler colonialism. Patrick Wolfe posits that the settler colonial impulse to destroy native communities in multiple senses of the word, coalesce into a “logic of elimination.”

Outcomes of the logic of elimination are not simply limited to gaining possession of territory and are broad. Wolfe gives a sense of the breadth of these outcomes which he says, “can include officially encouraged miscegenation, the breaking-down of native title into alienable individuals freeholds, native citizenship, child abduction, religious conversion, [and] resocialization.” The logic of elimination organized attitudes and policies toward Native Hawaiian epistemology, identity, land claims, and culture. One of the first acts of the Republic of Hawaii, was to make the teaching of Hawaiian language in schools illegal. Over the course of the twentieth century Native Hawaiians were redefined by settler society as an assimilated racial minority that no longer possessed an authentic culture.
The information in the table and graphically represented on the following page is culled from censuses taken by the Kingdom of Hawaii, the Republic of Hawaii, and the United States. It clearly represents the drastic shift from a Native Hawaiian majority in the early 19th century and before to a small minority in the 20th century. It also reveals the degree to which settler migration fueled the overall population growth. It is no mere coincidence that settler migration rates significantly increased during periods of governmental transition, from the Kingdom of Hawaii to the Territory of Hawaii at the turn of the century and from the Territory of Hawaii to the state of Hawaii in the mid-20th century. These demographic and political shifts also correlate with economic shifts as the plantation economy grew at the turn of the century and the development industry grew in the mid-twentieth century.
Fig. 4

Population Trends in Hawaii 1853-2000

Number of People

0 200,000 400,000 600,000 800,000 1,000,000 1,200,000 1,400,000

Year


Total Population
Population not born in Hawaii
Native Hawaiian Population

Fig. 487
These transitions aggregated to treat land in Hawaii intensively as a purely ahistorical commodity. This desire for land fueled discrimination within Hawaii against Native Hawaiians. Kanaka Maoli struggled through intense racism, cultural and economic hardship. As Haunani Kay Trask stated, “Hawaiians suffered a unilateral redefinition of our homeland and our people, a displacement and dispossession of our country.”

From 1890 to 1900, a decade that encompasses the overthrow of the Kingdom of Hawaii and annexation to the United States, the general population of Hawaii, excluding settlers, grew at a rate of 1,081 people per year while the settler population grew at a rate of 5,319 people per year. The settler population in Hawaii increased by a total of 53,197 from 1890 to 1900. This increase drastically outpaced the relatively meager increase of 10,814 people for the rest of the population in Hawaii. Meanwhile the Native Hawaiian population shrank by 966 people during that same decade. Of this influx of immigrant settlers, 50,314 of the 53,197 people were born in either China or Japan meaning that they came as laborers to work on the plantations. Many of these Asian immigrants settled in Hawaii. Some moved off of the plantations and on to land once used by Kanaka Maoli that lay untenanted due to population loss. In Wainiha, Chinese planted rice in abandoned taro patches.

The Big Five agricultural cartel, which was made up of five plantation-based corporations, rose to become the most powerful force in the archipelago. Together, Castle & Cooke, Ltd., Alexander & Baldwin, Ltd., C. Brewer and Company, Ltd., Theo H. Davies & Company, Ltd., and American Factors, Ltd., controlled 90% of the highly lucrative sugar industry in the early 20th century, which gave them substantial
political power within the Territory of Hawaii. The power of these companies has led political scientist Noel Kent to describe pre-World War II Hawaii simply as "Big Five Territory." The McBryde Sugar Company, founded in 1899 and located in Koloa and Hanapepe near the Koloa Sugar Mill on the island’s South shore quickly became the dominant sugar plantation on Kauai.

In 1903, McBryde Sugar Co., a subsidiary of Theo H. Davies and Company and then Alexander and Baldwin, Ltd., leased 15,000 acres of the mountainous inland section of Wainiha from the Hui Wainiha. The hui shareholders were monetarily impoverished and struggled yearly to pay taxes on the land. The lease of the land and water rights suddenly provided a large influx of cash so that instead of collecting taxes, the hui distributed dividends. The company used the Wainiha stream to build a hydroelectric plant and opened The Kauai Electric Company in 1905. This event closely correlated with rapid land acquisition by plantations across the Hawaiian Islands. As Lawrence Fuchs notes, “By 1909, half of the privately owned land of Hawaii was controlled by haole (white owned) corporations, one sixth by individual haoles, another sixth by the haole directors of the Bishop estate, and the remaining sixth by individual part-Hawaiians and Asians.”

Not all of this land was acquired by legal means, however. Where it wasn’t, Native Hawaiians often had no recourse. In 1909 the Supreme Court of the Territory of Hawaii decided the case, Kaanapu [sic] Sylva and Hannah Jackson v. Wailuku Sugar Co. (Sylva v. Wailuku Sugar Co., 19 Haw. 602. (1909)). The case dealt with a piece of land called Loaloa at Waikapu, Maui. When the original title-holder died in
1870, he left half of the land to his wife Kaaua [sic] and half to his relative Kaauwai [sic]. The wife’s portion of the land was subsequently sold by her heir and then resold multiple times until a white man named Henry Cornwall obtained it in 1872. Then in 1875, Kaauwai sold his land to Cornwall, who in turn conveyed a section of it back to Kaauwai. Cornwall recorded his deed to the land while Kaauwai did not. Kaauwai’s family continued to live on the land while Cornwell sold his share to the Wailuku Sugar Co. in 1879. In 1908, the sugar company plowed the land that had belonged to Kaauwai and planted cane on it, disturbing and damaging several graves on the land. Kaauwai’s heir Kaanapu Sylva sued the sugar company for trespassing. The sugar company claimed that Sylva was in adverse possession of the land because he did not have a recorded deed or paper title to the land. A key part of Sylva’s claim however was that the graves proved that he possessed the land outright. Sylva’s lawyer argued that, “You must consider the nature and use of the ground in order to judge who was in possession of it and cultivation might not be expected of burial places where it would be of other arable land, and that to use land for burial places is to be in possession of it.”

In the majority decision, the Supreme Court found in favor of the plaintiff on the basis that the court could establish Kaauwai’s claim to the land but also rejected the argument that the existence of graves constituted possession. In his decision, Justice C.J. Wilder Hartwell wrote that the desecration of graves is a matter of punitive damages, not the foundation of a claim for title.

This argument is a rearticulation of the traditional Native Hawaiian relationship between burials and land. As Greg Johnson states, “one underlying
assumption about historic Native Hawaiian burial practices is that one’s “rights to land were symbolized by the right to bury upon it.” Thus, for Sylva to use this conception of land rights to support his title claim nine years after Hawai‘i was annexed by the United States, shows that traditional knowledge systems were still in practice and being adapted and redeployed within the colonial legal system. Sylva’s articulation was careful in that his claim was predicated on land-use, which is a concept comprehensible to Western law. This example builds upon Noenoe Silva’s analysis to show that rather than eschewing traditional knowledge practices and belief systems within colonial Hawai‘i, Kanaka Maoli forged new ways of connecting to them. Rooted in the endowed meanings of burial practices from his ancestors, Kaanapu Sylva was able to redirect the logic to have meaning within the legal context. That the court rejected his argument shows that the Territorial government thought little of these traditional knowledge practices. This case outlines the debate over pre-Contact burials that exists to this day; Natives argue that burials imply land-rights while settlers assert that title is the only determining factor.

While Sylva was able to regain his land after settlers stole it, many Kanaka Maoli were not. As a result of this concentration of land ownership by non-Natives, many Native Hawaiians were no longer able to farm or gain access to traditional gathering areas in the mountains and the ocean. “They abandoned traditional subsistence living, which had supported the Hawaiian culture for centuries….By 1921, devastated by poverty, disease, and political powerlessness, Hawaiians were clearly in danger of losing the battle to survive as a race.” Gavan Daws explains in
The Shoal of Time, from perspective the haole political and economic elite, “The Hawaiian had all but ceased to be a person; he was defined as a problem.” Elite Hawaiians rallied around the cause of “rehabilitation” for Native Hawaiians that resulted in the Hawaiian Homes Commission Act (HHCA) of 1922. As J. Kehaulani Kauanui documents in her book, Hawaiian Blood, the inclusion of the 50% blood quantum rule as a legal threshold for qualifying as “native Hawaiian” resulted in the racialization of Kanaka Maoli identity. In the early 20th century this racialization molded Kanaka Maoli identity to more easily fit within colonial technologies of control, positioning them as a racially defined population. Racialization in the HHCA was tied to limiting the number of Hawaiians eligible for homesteads, thus allowing sugar plantations to continue using the unused land. Racialization as a longer-term project involving census categories and public discourse also had the effect of obscuring Native Hawaiian history and outstanding legal claims stemming from the unlawful overthrow of the Kingdom of Hawaii. As Kauanui states, “[blood quantum] reduces Hawaiians to a racial minority rather than an indigenous people with sovereignty claims.”

Survival for Native Hawaiians required significant sacrifice. All over Hawaii, Kanaka Maoli could not afford to pay the increasingly expensive taxes on their land. Things were no different in Wainiha. In 1947, the McBryde Sugar Company and a rich haole family combined to purchase 64 shares of Wainiha, leaving only seven remaining shareholders in the Hui. Families had lived on this land for generations but economic realities intervened and forced the living shareholders to sell.
In addition to losing land, many Native Hawaiians were forced to practice their culture and language underground. Val Ako, a kupuna (elder) on Kauai whose advice is sought from across Hawaii due to his knowledge of traditional burial practices, explained his situation growing up. He said,

Learning Hawaiian culture, you see when I was brought up my mom and dad were fluent in English and fluent in Hawaiian. I wanted my mom to teach me Hawaiian and she said, ‘No. If you learn Hawaiian you goin’ to be stupid…English is the mother tongue today. If you learn Hawaiian you will never get ahead.’ I was angry about it but whatever language I picked up was from my grandparents. I wanted to learn so when I was young I spent a lot of time with the elderly people and they would teach me. My grandparents didn’t want to be Americans. They wanted to be true Natives of the islands. My parents were brainwashed to think that the American way was the right way. But as time went on we realized that the American way was to suppress the Natives to take the land. That is why we are still bitter, Grandpa and Grandma, they didn’t want to be American, they had their own lives to live. In my case, I didn’t become an American citizen by choice, I was forced to.  

Mr. Ako’s statement strikes at the anguish and confusion felt by many Hawaiians who lived in the Territory of Hawaii. The settler colonial institutions during this period insidiously interpolated, or brainwashed, to use Mr. Ako’s term, Native Hawaiians to turn against their own heritage. Mr. Ako’s story is a common one among the older generation of Native Hawaiians today. Jimmy Chu, a member of the Kauai/Ni’ihau Island Burial Council, repeatedly testified in meetings, that when he was growing up, he was not taught the traditions of his culture. “It is like a dragon being disconnected from its tail,” he said. Puanani Rogers, a kupuna and independence activist, told me many times that she, “had to do her homework and
learn Hawaiian culture herself.” These stories reveal the ongoing nature of colonialism in Hawaii. The pressure upon Hawaiians to abandon cultural change was constant and intense. It started in primary school and continued to be strictly enforced in the workplace. This regime of discipline, sought to produce a particular kind of Native Hawaiian subject, one that subscribed to ethics of capitalist production. Opposing the removal of Native burials on a plantation was unthinkable because such an action would not only result in losing one’s job but also likely result in incarceration as well. Cultural transmission, like what Val Ako experienced as a child was an important form of resistance in the face of American cultural imperialism.

In post-World War II Hawaii, the descendants of immigrants of Asian ancestry, who were U.S. citizens by virtue of being born in the territory, used their voting rights to organize around economic diversification. Asians in Hawaii, particularly the Japanese, had long been discriminated against, even under Kingdom law. Initially, they sought to break up the massive plantation landholdings to benefit a greater number of citizens in Hawaii. As George Cooper and Gavan Daws argue in *Land and Power in Hawaii*, “After only a few years in office most Democratic politicians pretty much abandoned forced land redistribution as a social goal, and…opted instead for land development as an essential part of the way to broad social and economic reform.” This course united the landed rich and the Democrats, who for decades had been avowed enemies, in profitable land deals. The statehood movement of the 1950s was facilitated by a discourse of multiracialism. The University of Hawaii contributed to the construction and
dissemination of this discourse with its studies on racial mixing. A central component of these studies was the idea that, “Kanaka `Oiwi (Native Hawaiians) had become too racially mixed, too acculturated and assimilated…[and] were no longer culturally distinct.” The pointed goal of this is to further disguise the densely layered colonial regimes of control within an image of multi-cultural economic prosperity.

Hawaii attained statehood in 1959. In his inauguration speech on August, 29, 1959, William Quinn, the first governor of the state of Hawaii as well as the last governor of the Territory of Hawaii, stated, “For the first time our America has enfolded its people of Polynesian and Asian ancestry in its warm embrace…We of Hawaii, of whatever ancestry, should drink deep of the cultural heritage that is ours from all of the many races that make up our people.” This quote references the anxieties and previous ardent and open opposition to statehood by Congress due to the fact that Hawaii had a non-white majority, with a significant Japanese population, dating back before World War II. Though not consecutive, the two quoted sentences of Quinn’s speech point to a fundamental contradiction in representation and management of cultural difference in Hawaii. Namely, that cultural difference between ethnicities could be acknowledged and celebrated in Hawaii only so long as it fit neatly within American colonial paradigms. The discourse of multi-racialism symbolically erased the historical differences that existed between ethnicities, and with them, the asymmetrical power relationships embedded by American colonialism. This is an extension of the logic behind the HHCA where the questions about Native Hawaiian claims to land were resolved through racialization.
Statehood catalyzed the second, and more prolonged wave of settlement in Hawaii. From 1950-1990, the settler population grew at a rate of 8,550 people per year while the population of those born in Hawaii (including the children of settlers) only grew at a rate of 6,661 people per year. This meant that over those 40 years, of the total population increase of 608,460 people, 342,017 people moved to and settled in Hawaii. Settlers accounted for 56% of the total population growth. In contrast to the 1st wave of settlement, American settlers largely drove the 2nd wave. Of the 342,017 people who settled in Hawaii from 1950 to 1990, 66% or 226,392 people were born elsewhere in the United States.\textsuperscript{110}

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number of Housing Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>90,830</td>
</tr>
<tr>
<td>1950</td>
<td>120,606</td>
</tr>
<tr>
<td>1960</td>
<td>165,506</td>
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<tr>
<td>1970</td>
<td>216,283</td>
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<tr>
<td>1980</td>
<td>334,235</td>
</tr>
<tr>
<td>1990</td>
<td>389,810</td>
</tr>
<tr>
<td>2000</td>
<td>460,452</td>
</tr>
<tr>
<td>2009</td>
<td>515,538</td>
</tr>
</tbody>
</table>

Out of this shift, real estate grew to be by far the largest sector in the Hawaii state economy. According to the U.S. Bureau of Economic Analysis, in 1963, real estate\textsuperscript{112} accounted for just twelve percent of the Gross State Product (GSP) of Hawaii. By 1997, real estate accounted for nineteen percent of the total GSP, almost doubling the second largest industry retail trade,\textsuperscript{113} which only accounted for about
11% of the GSP. Comparatively, from 1963 to 1997 real estate consistently accounted for 11% of the U.S. Gross Domestic Product (GDP).114 This means that through the 2nd half of the 20th century, Hawaii’s economy is bound to nearly continuous development. The capitalist focus on profit through development in the present becomes the priority and relegates historic preservation, particularly of Native Hawaiian cultural heritage, wahi pana (sacred places), and burial grounds to a minor logistical concern. This impulse intertwines with the settler colonial logic of elimination to produce indifference toward Native Hawaiian culture that results in the wanton destruction and desecration of such places.

III. Modern Hawai’i and Emerging Cultural Nationalism

Archaeologists play a critical role in the maintenance of settler colonialism in Hawaii. Archaeology is the epistemological framework through which Hawaii’s pre-colonial past is narrativized and explained. The Anthropology Department at the University of Hawaii at Manoa, itself a product of settler societal production,115 devoted a substantial portion of its archaeological program to the exhumation of Native Hawaiian burials in order to better understand Hawaii’s pre-historical past.116

In his 1961 graduate archaeology thesis entitled Hawaiian Disposal of the Dead, Robert N. Bowen unintentionally shows the intricate connection of colonial processes at work in his description of a salvage field study in Mokapu and Heleloa, Oahu. The Marine Corps of Engineers were clearing burial dunes on the beach there to build a naval air station,
When I arrived at the site on March 15, three military bulldozers were removing sand from the entire lee side of the Heleloa Dunes and spreading it out upon the adjacent level ground. The disarticulated skeletons of approximately twenty people, uncovered the preceding day, filled three large cardboard boxes and a tarpaulin...At the time of my arrival the following Monday, bulldozers were again working in the burial area and had uncovered one cranium and miscellaneous skeletal fragments. Work continued throughout the day and ten to fifteen burials were exposed. Burials directly in the path of bulldozer blades were completely disarticulated and the bones scattered along a considerable distance under the vehicles. When the entire burial not taken up with the blade, but severed, damage to the skeleton was severe. As crania were frequently slightly higher than the trunks of the skeletons, many were decapitated.117

The violence depicted in this scene acts as a stark and difficult history of the treatment of Native Hawaiian bones and symbolically of a Hawaiian past. Bowen offers no analysis about the scenes that he witnessed. Instead he spends pages analyzing the bone fragments that he collected. In all, archaeologists collected 1,600 sets of remains starting in 1915 that, despite ardent attempts to repatriate them, are currently stored in the Bishop Museum. The mindset of Bowen and the other archaeologists is best explained by the anthropologists Geoffrey White and Ty Kawika Tengan: “The implicit (and at times explicit) statement was that there were no Kanaka `Oiwi (Native Hawaiians) left to study; the only place to find a Hawaiian was in the ground.”118 This academic perspective further legitimized burial desecration.

Whereas missionaries invoked theories of social evolutionism to justify their project, archaeologists in Hawaii relied on the concept of pre-history to effect the same temporal boundary. The idea of pre-history is that societies without a system of writing had no history. In analyzing the idea, archaeologists Ian McNiven and Lynette
Russell state that, “The terms ‘prehistoric’ and ‘prehistory’ are the colonial products of social evolutionism and a hierarchical structuring of cultures.” This internal logic of the idea of pre-history has largely been unexplored in its application in Hawaii. However, its effects are as profound as they are pernicious. The idea of pre-history, of an ontological separation between pre- and post-contact Hawaii justified the violence depicted in Bowen’s description. The critical point here is that Bowen and the archaeologists of his time, such as Kenneth Emory, constructed their distance from their subjects by casting pre-1778 Hawaii into the purgatory of pre-history, thus producing them as material objects to be studied.

Archaeology assuming the domain of pre-history as its own, necessarily positioned its written products and more importantly, its practitioners as arbiters and narrators of Hawaii’s past. In court cases and Land Use Commission hearings, archaeologists were called as experts to determine the history of an object or place. For instance, they were asked to provide their opinion whether a particular heiau was important enough to preserve from development.

Cheryl Lovell-Obatake, a Native Hawaiian and longtime protector of Native burial grounds on Kauai, told me that in the late 1970’s there was a lawyer who bought a piece of land in Kalapaki Bay on the South Shore, just up the hill from where she and her family have lived for several generations. The Hawaiian community knew that the land contained a burial ground. As the cultural monitor for that area, she informed the man who bought the land, but he said he did not care. She then went to the Kauai Planning Commission to argue that it was a graveyard and
argued that building could not be permitted there. They said there was nothing they could do. All she could do was watch as they took a backhoe and dug into the ground. She said that in the first trench they encountered the remains of two babies. They kept going. After they unearthed tens of burials, the contractor hired high school students to collect the bones, put them into plastic garbage bags, and leave them by the side of the road. Descendants of those buried were then called and told to take the remains of their ancestors away. Cheryl paused, looked down, and said, “too much data, too much data,” with tears in her eyes.120

Stories like the one that Cheryl shared with me abound throughout Hawaii. Yet because such burial desecration was legal, cases were not recorded and thus only exist as anecdotes remembered and shared by those who suffered through them. The indifference expressed by the planning commission in the face of Obatake’s call for help is ingrained in bureaucratic culture of Hawaii when it comes to Native burial grounds. This mentality is deeply informed by a settler colonial logic of elimination and represents a fundamental belief functioning in nearly all cases of desecration of Native Hawaiian burial grounds: the burials’ rights to remain where they were interred were far outweighed by the settler’s right to build. The belief is enacted through the developers’ actions and upheld by state and county agencies.

Meanwhile, at about the same time on the North shore of Kauai, a developer named Alex Fereirra laid the groundwork for the Wainiha Subdivision II. In the late 1970s, Wainiha was still mostly undeveloped. John, a man who moved to the Northshore of Kauai in the 1970s to surf said that he could bike from Ke’e, the beach
at the end of the road in Ha`ena, to Hanalei the closest town in 15 minutes. To give a
sense of contrast, today, it is extremely treacherous to bike from along what is now a
narrow two lane road as residents and visitors drive very fast along its bends and
curves.

Alex Ferreira submitted plans for the Wainiha Subdivision II at Naue in 1978.
The land at the time was “undeveloped.” The Kauai Planning Commission (KPC)
approved Ferreira’s proposal for a 22-lot condominium complex. The Mahuikis, one
of the original shareholder families in the Hui Wainiha, organized with other local
residents and a community organization called North Shore `Ohana (family) to sue
the KPC over the environmental impact of its approval. Though they knew Naue was
a burial ground, the Mahuikis had to articulate their legal claim in terms of
environmental impact because as Cheryll Lovell-Obatake’s story shows, Native burial
sites were given absolutely no legal protection at the time. The case *Mahuki v.
Planning Commission*, 65 Haw. 506 (Haw. 1982), went all the way to the Supreme
Court of Hawaii which ruled that the residents’ aesthetic and environmental interests
would be injured by the development and the Court vacated the permit. In 1984, the
KPC approved Mr. Ferriera’s proposal for a less dense 15-lot subdivision with a 40
foot setback from the shoreline.121

In the early 1970s, Native Hawaiians brought cultural practices and political
claims into the public arena in a movement that has since been termed the, “Hawaiian
Renaissance.” Scholar George Kanahele wrote in 1979,

The Renaissance can best be understood in terms of before and
after, comparing the level of activity on or prior to 1970 and
now. Take Hawaiian music as an example. In January, 1971, I wrote in the Honolulu Advertiser that "Hawaiian music was in its death throes...Today, the resurgence of Hawaiian music is one of the strongest evidences for the Renaissance. Young people are now turned on to Hawaiian music as they had once been turned on to rock earlier. The Cazimero Brothers, Gabby Pahinui, Olomana, and the Sons of Hawaii are as familiar to them as The Village People and Peter Frampton.\textsuperscript{122}

The renaissance also led to increased activism by Native Hawaiians as the cultural dignity fostered by the revitalization gave strength to Kanaka Maoli legal and political claims. Groups formed to fight corruption and mismanagement of Hawaiian Homelands and to demand reparations from the United States. Similarly, the pain and grief caused by the numerous destructions of burial grounds, coupled with the energy of the renaissance, culminated in 1988 in a watershed event on the West side of Maui at a place called Honokahua.

The Maui Land and Pineapple Company began excavating a site in Honokahua, Maui in 1986 to build a Ritz-Carlton hotel. The construction uncovered remains but the developer continued digging. In all, somewhere between 900 and 1,100 sets of Native Hawaiian remains were exhumed. In the face of a 24-hour protest at the site and substantial negative public reaction, then governor John Waiheʻe, the first Native Hawaiian elected as governor, publicly halted the construction.\textsuperscript{123} After negotiations with the developer, Colin Cameron, the state paid the Maui Land and Pineapple Company $6 million to alter the building plan for the hotel to be moved away from the burial site. Colin Cameron’s comments about the situation afterwards reveal that at some point in the process, he realized that the remains his company had been unearthing also possessed the inherent sacredness of all human remains. As part
of the agreement, Cameron, whose family has lived on Maui for five generations, and his company voluntarily granted the state an easement on the land containing the burial ground, meaning the state would not have to acquire the land to protect the burials. “That would give us the right and obligation to maintain the area,” stated Cameron. “Why do we want that? Because Kapalua will be around a lot longer than the state legislators and other officials who might forget its importance. It must be done properly.”

Honokahua was a major victory for Native Hawaiians. The situation established important precedents, including legal protections put in place to protect burial sites and the formation of groups such as Hui Malama I Na Kupuna ‘O Hawai’i Nei, which focuses on the protection of Native Hawaiian burial grounds, re-interring remains, and repatriating remains and sacred objects. In addition to these tangible changes, Honokahua signified for the first time in post-overthrow Hawaii that Native Hawaiian burial grounds have inherent value and should be appropriately protected.

Edward Halealoha Ayau, one of the leaders of “Hui Malama” and a lawyer by trade wrote, “One lesson learned from Honokahua was that, even though it was our sacred responsibility as descendants of these ancestors, we did not have the legal authority to determine the proper treatment of their burial sites. Nor were many of us trained in the protocols related to the handling of ancestral burial objects. Much had to change.” Working with the state government to rectify the lack of legal protection for Native Hawaiian burials, Ayau and others developed Hawaii Revised Statutes (HRS) chapter 6E. This statute radically altered the legal landscape for treatment of
Native burials and burial sites as well as historical preservation for all of Hawaii. Most prominently the statute established the Island Burial Council system as well as the State Historic Preservation Division (SHPD).

Under this law, if burials were discovered construction must stop and the burials cannot be handled. If the burials are determined to be over 50 years old, then one of the five Island Burial Councils, Hawai`i Island, Maui/Lana`i, O`ahu, Moloka`i, or Kaua`i/Ni`ihau, would make a legally binding determination about whether the burials could be removed and reinterred elsewhere or whether they must be preserved in place. The SHPD would oversee archaeological testing and then work with the developer to construct a Burial Treatment Plan (BTP). The BTP specifies the method of disinterment and re-interment as well the place and short and long term protective measures for ensuring the bones are not damaged.

The burial protection system was developed within the context of a settler colonial society and thus has embedded within it, a confrontation between settler colonial instrumentalities and Kanaka Maoli knowledge systems and axiology. It is telling that the same law that established legal protection for unmarked Native Hawaiian burial grounds did so within the discourse of historic preservation. This designation distinguished unmarked Native Hawaiian burial grounds from cemeteries legally as well as conceptually. As the Chapter 6E’s preamble states, “The legislature declares that the historic and cultural heritage of the State is among its important assets and that the rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage.” Even in this
pronouncement of the legislature’s intentions to preserve, we can see the logic of elimination at work by framing Native Hawaiian burial sites as vestiges of a historic past, implying a temporal separation that typifies settler colonial ideology. The staff of the SHPD is made up of archaeologists, again reifying archaeology’s role within the field of law as narrators of Hawaiian history. So in giving up some power to determine the disposition of burial sites, the legislature did so in a way that still marginalized Native Hawaiian epistemologies by giving ultimate authority to archaeological modes of knowledge. This hierarchy serves as a structuring force as the Burial Councils are legally situated in an advisory role to the SHPD. HRS 6E-43.5(f)(3) states that the Burial Councils shall: “Make recommendations regarding appropriate management, treatment, and protection of native Hawaiian burial sites, and on any other matters relating to native Hawaiian burial sites.” Thus the SHPD has ultimate authority over the treatment and protection of Native Hawaiian burial sites. This set up a natural conflict as archaeological knowledge systems and practices clash with Native Hawaiian ones. Additionally, HRS 6E-43.5 (b) states that each burial council must be made up of “Regional representatives” as well as “developers and land landowner interests.” Regional representatives are Hawaiians selected from the, “community on the basis of their understanding of the culture, history, burial beliefs, customs, and practices of native Hawaiians.”

Against this bureaucratic framework, the protections gave important weight to the voice and made space for Native knowledge systems through the burial council. Structurally, the burial council is the only space where Native Hawaiians can have
input about the treatment of the burials by either serving on the council, coming forward as a genealogical descendent, or testifying as part of the public. This space is used by Native Hawaiians to perform powerful speech acts and assert their political and cultural rights.

The SHPD assumed the responsibility of carrying out the mandates of the Historic Preservation Act as well as HRS 6E. Don Hibbard, who had been the administrator for the SHPD’s predecessor since 1981, was named the newly formed division’s first administrator. At the inception of the law in 1990, this relationship was meaningful in protecting burials. The SHPD used recommendations by the Island Burial Councils in order to make determinations. Dana Naone Hall, one of the foremost Kanaka Maoli leaders of burial protection, a leading figure at Honokahua, and a member of the Maui Island Burial Council and told me that Don Hibbard, who was the SHPD administrator, “gave his full support to the Burial council. Under his administration the burial council was not only allowed to be the decision makers over previously identified burials (those that are found as part of the historical review process) but also in our consultation capacity to be the decision makers over unidentified burials (those that are found during construction after the historical review process) as well.” Each of the five Island Burial Councils has developed its own distinct evaluative precedents. The Kauai/Ni’ihau Island Burial Council set a strong precedent for determining remove and reinter when burials were threatened by construction while preferring to preserve in place whenever they felt they could.
Greg Johnson, a scholar of Hawaiian religion and contemporary law, said that for a while after HRS 6E was passed, Hawaiians had the upper hand as they became increasingly sophisticated in using Burial Council system to protect burials, but then the developers started pushing back and the pendulum swung the other way. In 1995, under democratic Governor Benjamin Cayetano’s administration, the SHPD’s budget was slashed and nearly a quarter of the employees were laid off. This created a situation where the SHPD was charged with reviewing all historic sites on tight deadlines without an adequate staff or funding. As the 1990s gave way to the 2000s, developers increasingly pushed the boundaries of the law designed to protect burial grounds. Each burial case is unique and requires a determination and BTP specific to that site. As developers pushed harder to diminish the protections that were obstacles to their projects, Native Hawaiians pushed harder to uphold them.

Native Hawaiians and community members could not rely on the SHPD to effectively protect sites so they took their claims to the court system. In 1991, in the Native Hawaiian Rights Handbook, Edward Halealoha Ayau, lawyer by trade, commented that, “there is no case law with respect to Native Hawaiian burial rights.” The shift to use the courts to protect ancestral remains is itself important because it shows a growing willingness amongst Native Hawaiians to make cultural claims and expect them to be upheld.

Governor Benjamin Cayetano’s term ended in 2002. During the election, Republican Linda Lingle campaigned promising, “she'd hang a sign on the state that says: ‘Open for Business.’” Based on such promises of economic revitalization,
Lingle was elected becoming the first Republican governor of Hawaii since William Quinn in 1959. Not coincidentally, development has boomed since she took over in 2002.

![Value of Building Permits Issued In Hawaii](image)

Figure 6

This graph shows the major spike in the value of building permits issued, which begins almost at the exact same time as Lingle came into office. The sharp downward drop is due to the economic downturn, which hit Hawaii hard. This emphasis on development put even more pressure on the SHPD, which was already nearing a state of dysfunction, and numerous high-profile burial desecration cases.

Shortly after Lingle took office in 2002, the results of an audit of the SHPD were released. The audit severely chastised the SHPD for mismanaging resources and for generally being ineffective in fulfilling their mandates. Amongst the laundry list of
issues, the audit specifically notes that, “A burial program staff member, who was also a Minister, accepted $1,000 donation to his church from a developer whose project unearthed 200 burials, one-third of its employees took vacation or sick leave without recording it, and staff members worked for other employers during state hours for which the division compensated them.”136 Don Hibbard abruptly resigned his post as Administrator, leaving the SHPD without leadership.

Once in office, Lingle appointed Peter Young to head the Department of Land and Natural Resources (DLNR). Young, who was a real-estate appraiser before becoming head of the DLNR, repeatedly intervened on behalf of the Hokuli‘a development. The development on the West side of Hawai‘i Island was planned as a luxury housing development around a Jack Nicklaus designed golf course. Initial construction for the project uncovered over a hundred sets of remains, many of which were destroyed in the process.137 During his confirmation process he stated that Hokuli‘a was, “one of the most environmentally sensitive golf courses in Hawai‘i,” despite a ruling by the 3rd Circuit Court that the developer had spoiled nearby marine waters by allowing massive runoff into the ocean.138 Upon assuming the chair in early 2003, Young immediately vacated an agreement between the Hawaii Island Burial Council and the developers in order to give the burial ground less protection. This decision is indicative of the Lingle administration’s priorities and willingness to intervene in administrative matters to push development.

One prominent example is the construction of a Wal-Mart on O‘ahu in 2003. The SHPD allowed the developers to skip conducting an archaeological survey
because the SHPD assumed that, “cultural remains were already disturbed or
destroyed by previous land development.” The remains of 25 individuals were
unearthed and designated as inadvertent discoveries. The SHPD determination of
remove and re-inter. Paulette Kaleikini, who claims to be a lineal descendent of the
burials filed a lawsuit seeking preliminary injunction. The temporary injunction was
denied and the Wal-mart was constructed and opened for business, without the case

Later in 2004, Melanie Chinen, a member of the team that audited the SHPD
in 2002, was hired to be its administrator. But many of the old problems intensified
during her tenure and new ones arose. The turnover rate has been staggering. By
2009, 22 people have left the division, which has only 24 positions, six of whom
Chinen hired. One of those people was David Lawrence Brown whom Chinen hired
as the Branch Archaeology Chief, meaning he was responsible for overseeing and
managing all of the SHPD archaeologists. Brown did not resign but left because his
contract was not renewed.

In 2007, Brown sued for false termination due to his unwillingness to engage
in what he refers to as unethical practices in Brown v. Chinen, et al. (2007). The
defendants in the case are Melanie Chinen, Laura Thielen (the Chairperson for the
DLNR who replaced Peter Young), Bob Awana (Lingle’s chief of staff), Peter
Young, Robert Masuda (Director of the Department of Parks and Recreation), Nancy
McMahon (SHPD archaeologist for Kaua`i), Melissa Kirkendall (SHPD archaeologist
for Maui), Ashley Chinen, and twenty doe defendants. As of this writing, the case has
not been fully adjudicated. Presiding Judge Alan Kay, however, has dismissed motions for dismissal by the defendants meaning the case has merit. The complaints made by Brown provide deep insight into how the SHPD functioned during the Lingle administration. Brown alleges gross negligence occurred during his time at the SHPD. However, the most startling allegation is that the governor’s office conspired with Melanie Chinen to violate state laws. In the complaint Brown states, “Defendant AWANA regularly would make phone calls to Defendant MELANIE CHINEN to tell Defendant MELANIE CHINEN what projects to fast track and what projects to hinder.”141 As a result of these calls, Brown claims he was asked to approve reports he had not reviewed for construction in archaeologically sensitive areas.142 If true, this allegation shows the complete perversion of the SHPD. Rather than protect burial sites, the SHPD became a tool of exploitation.

IV. Conclusion

After dropping Dan off in Princeville,143 we arrived at the Wainiha general store, and I said goodbye to the Celtic troupe. I walked up the dark unpaved road just East of Wainiha Powerplant Road.144 While walking I noticed that walls of tall vines and vegetation visually separated each house lot on the street so that you generally couldn’t see one house from the next. The only marker to distinguish the house I was
to live in was the address painted on a surfboard. The house, a dark green two-story on stilts, was visually secluded from the road.

I rented a room in a house from a nice white couple. The man was a surf instructor, snorkel and hiking guide, and the woman worked as a personal chef for celebrities who owned houses or visited the island. He was born and raised in San Diego, California and she in Fort Lauderdale, Florida. I told them that I came to Kaua‘i to study Naue. “People will really respect you for what you are studying,” said the woman. “You should talk to Sausen tomorrow, she did our house blessing and she lives right by Naue.” I telephoned her and she told to stop by any time.

The next day I hitchhiked further West until I reached Naue. I walked along the beach and visited the Brescia house built on Naue. Then I walked across the street to find Louise Sausen’s house. I saw Sausen on the mailbox of a house on the corner of the mauka side of the street. Sausen’s house was small and humble next to the large houses on stilts that surrounded it.

I knocked on the door, introduced myself, and asked if she would be willing to talk to me. She agreed and we sat down in her yard. Looking at the row of similar looking houses on the beach side of the street, Dan’s question interested me. So I asked Sausen why the building of the Brescia house elicited a greater response than the others?

She responded:

This is the point, the piko [naval or energetic center]... When I moved to Wainiha in the ’70s. Jeff Chandler’s grandmother took me for a walk along the beach over there (pointing to the beach across the street). She told me about the history of the
place. It is a burial ground, a cemetery, and the piko is a leina-a-ke-akua (place where spirits leapt into the nether world).\textsuperscript{146} I fought every single one of these houses. Thirteen years ago there was only two houses. They found bones on almost all of the plots but the burial council approved remove and reinter for all of them. There was a woman on the council who pushed for that because she was concerned about the bones, she died. People just really wanted to stand up for this property because this is the last one and it is the leina [the jumping off place].\textsuperscript{147}

The difference between Dan’s perspective and Sausen’s shows the range in perspective about Naue. Sausen experienced Naue as a sacred place while Dan saw it as a piece of property. Not all people who settle in Kauai share Dan’s viewpoint. My landlord, who worked as a lifeguard with Sausen’s son, participated in protests against building Brescia’s house. However, they do share similar anxieties about property.

In May, two months after I arrived, I asked my landlord if he supported giving land to Hawaiians as reparations for the overthrow and annexation. He replied, “I think that the overthrow and annexation were a real injustice and they definitely deserve reparations.” I responded by asking, “Well what if Hawaii became an independent sovereign nation?” He replied, “I don't know about that. What would happen with my land?”

My landlord’s was knowledgeable about Hawaiian culture and Kauai’s past. He viewed himself as sympathetic to Native Hawaiian causes. Yet, once he bought property, he became imbricated in the settler colonial system. He subverted the system in important ways, such as protesting against Brescia’s house, but his
investment in his house and land tied him into the system of property rights that has displaced Natives since the Mahele.

Property rights serve as the most powerful justification of legitimate residence for settlers. A lesser but still significant justification is whether you are a part of “local culture.” This is an attempt by settlers to nativize themselves. These two justifications form a powerful combination in the house blessing ceremony. This is a local tradition where the homeowner pays a Native Hawaiian, sometimes a priest, but not necessarily so, to come to their house after construction is finished and bless it so the owner can move in. Sausen did this at my landlord’s house. She was also invited to do it at another house that Bresica owned three houses away from his new one at Naue. Sausen refused to do the blessing because Brescia had removed the set of remains on the property and had it reinterred under the bedroom. This ceremonial practice is so normative in Hawaii that Brescia also attempted to have another house blessing before beginning construction on his new house at Naue, in spite of public opposition to his house by Native Hawaiians across the archipelago.

The point of this history can be simply stated: land is important in Hawaii and interested agents have gone to great lengths to control it. In the 19th century, missionaries and business interests built favor with the Ali`i to gain use of it and then to privatize it. Acquiring significant tracks of land after the Mahele wasn’t enough for some plantation owners who then overthrew an internationally recognized government to maintain control of it. In the 20th century, the colonial interests managed Native Hawaiians through schooling, economics, and racialization.
Throughout this entire history though, Native Hawaiians consistently resisted colonial impositions but continually had to sacrifice their land and public performance of their culture in order to survive. In the 1970s, Native Hawaiians began publicly revitalizing their culture and challenging the settler colonial order. An important part of this revitalization is protecting burial grounds. Native Hawaiians successfully worked to establish a legal system to ensure protection but that was unfortunately riddled with problematic aspects. The desire for land is so strong and so profitable that the SHPD was marginalized and subverted to enable further development.

This is the background to Naue. A man from California intent on building his house on Kauai was enabled to do so by a pro-development Governor and a broken burial site protection system. Brescia felt entitled to build due to the amount he paid for the property and, when challenged by Native Hawaiians who claimed the site was a cemetery, he saw it as merely another bureaucratic hurdle in the building process.
Chapter Two

Burial Preservation and Naue: How a House was Built on the Bones of Ancestors

On March 8, 2010, Pua Aiu, the Administrator of the State Historic Preservation Division (SHPD), sent a letter to Mike Dega, the contract archaeologist hired by Joseph Brescia. The letter granted Brescia the SPHD’s approval of the 16th draft of the Burial Treatment Plan (BTP) for Brescia’s house at Naue. The SPHD decision was shocking and unprecedented. Just one month earlier, on February 11, 2010, the KNIBC had unanimously rejected that very same plan. In its twenty-year history, the SHPD had never overruled a burial council’s unanimous rejection of a BTP. This reversal of the KNIBC decision was the culmination of eight years of decisions that served to gut the legal protections for unmarked burial sites under the Lingle Administration. The letter ended three years of intense struggle over the treatment of the burials at Naue, undermining Native Hawaiians’ efforts at Naue to make the legal protections for burial sites a reality.

Aiu’s approval of the 16th draft of the BTP was more than a simple setback, it constituted a destructive precedent on multiple levels. It obliterated the distinction between “preserve in place” and “remove and reinter” by recognizing concrete caps and vertical buffers as forms of appropriate protection. Prior to Naue, a determination of “preserve in place” by a burial council generally required a horizontal buffer. This meant that the area containing the remains would be a dedicated burial site and no construction could occur within a certain distance of the site. A vertical buffer sets the
minimum distance that a structure must be above a burial. Approving the concept of a vertical buffer eliminates any land rights for unmarked burials and renders their presence inconsequential for land-use decisions.

Beyond setting the precedent that a vertical buffer is an acceptable method of preservation, the Naue case provides a roadmap for developers to avoid the legal protections for unmarked burial sites. Brescia got the Kaua‘i Planning Commission (KPC) to approve the house design prior to archaeologically testing the site. Archaeological testing for unmarked burials is a catch-22 because Native Hawaiians consider unearthing ancestral remains to constitute serious desecration. However, burials must be physically observed during testing to qualify for legal protections. Approving the house design prior to testing allowed Scientific Consultant Services (SCS) Hawaii, the contract archaeology firm hired by Brescia, to manipulate the ethical ambiguity in their favor by restricting testing to just the places where the foundational footings would go. On its face, this may seem culturally sensitive, but it intentionally conceals the full extent of the burial site. Though the distinction is repugnant, it is more difficult to justify building a home on a site containing 100 burials than 30 burials. Brescia, with the complicity of the state, cleared a path through HRS-6E allowing the property owner’s desired development to determine protections for burials that are preserved in place, inverting the intent of the law.

This chapter follows the path of the Naue case through the burial preservation process. It seeks to make sense of the process that led to the house being built on top of the burials and of the personalities and motivations driving it as well as the
structural forces embedded in state practices. Naue is very much a contemporary
*contact zone*, to adapt Mary Louise Pratt’s concept. Pratt explains that a contact zone
is a, “space of colonial encounters, the space in which peoples geographically and
historically separated come into contact with each other and establish ongoing
relations, usually involving conditions of coercion, radical inequality, and intractable
conflict.”¹ Pratt uses the term to analyze colonial encounters in the eighteenth and
nineteenth century in order to elucidate the co-production of history and discourse by
both colonizer and colonized. Sally Engle-Merry adopts Pratt’s contact zone
perspective in her history of colonialism in Hawai‘i throughout the 19th century, while
bringing forth the idea that, “the term *contact zone* focuses on intersections among
equally centered entities.”² This conceptual framework views the interactions
between settlers and Natives as occurring through independent but connected
epistemologies and axiologies, meaning that actors can respond to each other without
being reactionary. It acknowledges and gives weight to the third space in that Kanaka
Maoli navigate the colonial legal sphere from a position of cultural rootedness.

Naue is a multilayered site and symbol that was produced through various
encounters between the law and ontology filtered through the circumstances and
individuals involved in a process where meanings and expectations were anything but
stable. Through different arenas Kanaka Maoli practiced the kuleana (right,
responsibility) of malama na iwi kupuna (caring for the bones of the ancestors) by
representing Naue as sacred and demanding legal protection for it concomitant with
other burial sites protected from desecration. Native Hawaiians operated out of the
third space to demand dignity for their ancestors’ burial ground. In doing so they challenged the colonial logic of prehistory that lay at the core of the legal and archaeological paradigms justifying the house. Despite effective action, Native Hawaiians were not able to overcome the structural limitations of the law and the dubious practices of the State Historic Preservation Division (SHPD) to stop the house. This is emblematic of the settler colonialism as practices of place and history construct and signify the transition of Native to settler, justifying at times violent state impositions that seek the same end.

I. Initial Issues with Brescia’s House

Brescia, who has been buying and selling land in Kauai for many years, purchased plot 6 in the Wainiha Subdivision II from actor Sylvester Stallone in February 2000. The plot measured 18,106 square feet. In 2001 Brescia started the building process by submitting a building plan to the Kauai Planning Commission (KPC) that called for his house to be built within thirty-one feet of the shoreline to increase the property size. The KPC had approved a forty-foot setback when the Wainiha Subdivision II was planned in 1984. Brescia unilaterally decreased the shoreline setback, the minimum distance from the beach that one is allowed to build, from forty feet to thirty-one feet to increase the size and, therefore, the value of his property. In Hawai‘i all beaches are public. So, in essence, Brescia sought to take public land as his own, ignoring when it was to his benefit the fact that he had not purchased the additional land and had no right to occupy it.
In 2003, the KPC rejected Brescia’s request for a special variance to give him a thirty-one foot setback. The owner of the adjacent plot, rock star Anthony Keidis, lead singer of the Red Hot Chili Peppers, also proposed building within thirty-one feet of the shoreline. They both claimed they could not build the houses they wanted within the space allotted for them. Mr. Brescia through his lawyer Walton Hong sued the Kauai Planning Department claiming the Department had unduly denied him his property rights. The 5th Circuit Court ruled in favor of Mr. Brescia in 2005. The Planning Department declined to appeal the decision and issued a use permit. A community organization—the North Shore ‘Ohana—independently appealed the decision in Brescia v. North Shore Ohana (2007) along with local residents Caren Diamond and attorney Harold Bronstein to protect the public beach and the environment from Mr. Brescia’s land grab. The Hawai`i State Supreme Court accepted the case for review.

In July, 2007, the Hawai`i State Supreme Court overturned the lower court decision in Brescia v. North Shore Ohana (2007). The State Supreme Court accepted the Kauai Planning Commission’s (KPC) reasoning that the size of the original lot was sufficient to build and that Brescia knew the setback when he bought the lot.

II. The Normal Historic Review Process for Burial Preservation

The historic review process for determining the disposition of previously unidentified, unmarked burial sites is contained in Hawai`i Revised Statutes chapter 6E (HRS 6E) and Hawai`i Revised Statutes Section 13, Chapter 300 (HAR 13-300).
HRS 6E-43 defines two categories of burials: previously identified burials and inadvertent discoveries. In cases where a construction project is likely to affect a known or probable historic property or burial site, the SHPD will require an inventory of the site. All burials found during the inventory are classified as “previously identified” and the case is sent to the appropriate burial council to determine appropriate treatment. If burials are discovered after a project has begun construction then they are classified as “inadvertent discoveries” and HRS 6E-43.6(a) mandates that any construction must stop immediately and a medical examiner or coroner and a “qualified archaeologist” shall determine if the burials are over 50 years old. If they are, the SHPD must be notified and the SHPD, not the burial council, shall make a determination of whether to preserve in place or remove.

For “previously identified” burial sites, an Archaeological Inventory Survey (AIS) must be conducted. HAR 13-300-1 defines an AIS as,

> the process of identifying and documenting historic properties and burial sites in a delineated area, gathering sufficient information to evaluate significance of the historic properties and burial sites, and compiling the information into a written report for review and acceptance by the department.\(^8\)

The archaeological testing done as part of this process is designed and conducted by an SHPD approved contract archaeologist with the explicit approval of the SHPD. If testing occurs without prior SHPD approval, it constitutes a criminal act of desecration under HRS 711-1107. Once the archaeological testing methods are approved by the SHPD and the testing is conducted, the ethnicity of the remains must be determined. HAR 13-300-32(a) explicitly states that in order to preserve and
protect burial sites, “especially Native Hawaiian skeletal remains from unnecessary
disturbance, physical examination of human skeletal remains over fifty years old is
prohibited,” unless expressly permitted by the SHPD.9

Once the ethnicity of the remains has been determined, the contract
archaeologist must develop a Burial Treatment Plan (BTP) in conjunction with the
SHPD. Section 13-300-33(b) of the HAR states that the BTP must include fourteen
separate components, the most important of which are: (1) Evidence of a good faith
search for lineal and cultural descendants including: (1)(C) notice to potential lineal or
cultural descendants published in a county and a statewide newspaper for a minimum
of three days, and (3) A description of proposed treatment of all burial sites including
a statement of “preservation in place” or relocation.10

Determining lineal and cultural descendancy is important for determining
appropriate treatment for the burials because, within Native Hawaiian culture, it is a
kuleana (responsibility, duty, privilege) of the family to care for their ancestor’s
burials.11 There are two categories for descendants – lineal and cultural. A lineal
descendant is defined in HAR 13-300-2 as, “a claimant who has established to the
satisfaction of the council, direct or collateral genealogical connections to certain
Native Hawaiian skeletal remains” and a cultural descendant as “a claimant recognized
by the council after establishing genealogical connections to Native Hawaiian
ancestors who once resided or are buried or both, in the same ahupua`a or district in
which certain Native Hawaiian skeletal remains are located or originated from.\footnote{12}

In addition to the two categories of descendants, there are two levels of recognition. The burial council has the ability to recognize somebody as a lineal or cultural descendant through oral testimony. This recognition gives the claimant’s testimony greater weight by the burial council in making their determination. The SHPD has its own process of recognition that requires material documentation to be submitted and reviewed by an SHPD genealogist. This level of recognition gives greater weight to the claimant’s preference for whether to preserve in place or remove and re-inter, if the burials are removed, where and under what protocol will they be reburied, the elements of the BTP and whether or not the AIS will be released publicly.

Once the BTP is submitted to the SHPD, the appropriate Island Burial Council has 45 days to determine whether preservation in place or relocation is the most appropriate treatment and the SHPD has 90 days to approve the BTP. The burial protection framework established by HRS 6E and HAR 13-300 is designed around the “preservation in place” determination.\footnote{13} For most Kanaka Maoli, unearthing and moving na iwi o kupuna is itself a form of desecration. Wilma Holi, a kupuna (elder), Kauai representative for Hui Malama I Na Kupuna O Hawai`i Nei, librarian, and a member of the KNIBC at its inception said, “whenever we made the determination of remove and rebury, we did so with a heavy heart.”\footnote{14}

Following the burial council determination, HAR 13-300-38(e) states that the
SHPD can only approve a BTP, “following consultation with the applicant, any known lineal descendants, the appropriate [burial] council, and any appropriate Hawaiian organizations.”\(^{15}\) It is only after a BTP has been approved by the SHPD after consultation with the appropriate parties that the project is submitted to the County Planning Department for consideration. HRS 6E-42 requires that,

> Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites.\(^{16}\)

The order of this process is critical to the proper functioning of the law because appropriate treatment must be determined first in order for the County Planning Department to ensure that the project design can make the necessary accommodations to protect the burial site.

### III. The Historic Review Process for Naue

In the Naue case, the process was inverted and critical steps such as consultation were left out. Melanie Chinen resigned from her post as Administrator of SHPD in mid-2007. This led to the promotion of then head state archaeologist Nancy McMahon to interim-Administrator, placing her effectively in charge of SHPD. McMahon is not a Native Hawaiian. In the Naue case, McMahon’s actions radically reinterpreted the meaning of “preserve in place.” The implicit idea behind the law is
that it could prevent construction through a determination of preserve in place, if the
burial ground was too substantial to relocate and the property could not accommodate
a development set an appropriate distance from the burial ground. This is the
principle that was followed by the KNIBC at Naue. The KNIBC had determined that
a “preserve in place” solution would not work for the lot, which was less than a half-
acre in size. The KNIBC determined that there was not room on the lot for a house to
be sited at an appropriate distance from the burial ground. McMahon, however—
with support from the SHPD, the DLNR, the KPC, the 5th Circuit Court, and the State
Attorney General’s office—plowed through this dilemma and created a new
precedent by approving Brescia’s plan to build on top of the burial ground. To her,
“preserve in place,” meant that the bones would remain in place but did not limit or
constrain above surface construction.

North Shore residents, the SHPD, and Native Hawaiians on Kauai knew that
Brescia’s lot likely contained burials. Nearly every property in the fifteen lot Wainiha
Subdivision II contained burials. “In 1991, the [State Historic Preservation Division
(SHPD)] warned the Kaua‘i Planning Department that it should demand
archaeological studies before granting any building approvals because of the high
likelihood of burials being present in this historic area [Naue].” In order to comply
with this mandate, Brescia hired the contract archaeological firm Scientific
Consultants Services (SCS) to do the inventory. Michael Dega, a Ph.D. archaeologist
who works for SCS, conducted the testing in four phases. Phase one, conducted in
March 2007, uncovered one burial. SCS published a notice, per HAR 13-300
requirements, in “The Garden Island,” Kauai’s local newspaper. Phase two in June/July uncovered 27 sets of human remains and phase three in September/October revealed two burials. These discoveries were not announced publicly through any channel. This did not explicitly violate HAR 13-300 because it does not require a published notice for each discovery, but the failure to publish a notice that subsequent testing revealed such a substantial number of burials effectively concealed the information. Because they were uncovered during the AIS, all thirty burials qualified as previously identified. Every burial that the testing encountered was a woman or a child and some dated back to the 13th century. Given the date, and the findings of other burials in the immediate vicinity, Dega and SCS determined the remains to be of “Polynesian” ancestry. The other lots in the subdivision had no more than one to two sets of remains. The significant concentration of burials at Naue was unexpected. Had the number of burials been made public, the outcry would have been immediate.

The July 2007 Hawai’i State Supreme Court decision that overturned the lower court decision in Brescia v. North Shore Ohana (2007) had the effect of nullifying the KPC’s approval of the design in February. The Supreme Court’s decision was released during this testing period. The decision required the house to be redesigned to fit within the original setback line. Using this opportunity, Dega consulted with McMahon and the architects who designed the home to make the foundational footings shallower. Originally the stilts upon which the house would sit had foundational footings that went two meters in the ground. Over fifty percent of
the burials that were found on the plot were two meters or deeper. In light of this, the footings were redesigned to a depth of only one meter.22

IV. December 11, 2007 KPC meeting

Brescia’s redesigned house was put on the agenda for the December 11, 2007, Kauai Planning Council meeting for the design review before the Kauai/Ni`ihau Island Burial Council (KNIBC) even heard the case. This inversion contradicted the established historic review process. Typically, the KNIBC would hear cases before consideration by the KPC. Nancy McMahon even testified at the KPC meeting, that normally the “historical review process” is completed before the Planning Commission completes its design review.23

Nevertheless, McMahon strongly advocated that the KPC approve the design review as the first step. Ms. McMahon explained to the Planning Commission that for this house, testing for burials should be determined by the design of the house, and that the likelihood of as yet uncovered burials should have no bearing on phase four of the testing or the design of the house. Under the proposed house design, six of the known burials would lie under the house. This situation put the Kauai Planning Commission (KPC) in a difficult position. The house’s design called for it to be elevated by stilts to protect it from flooding. McMahon testified that only testing around the foundation footings for the stilts was necessary because that, combined with Dega’s previous testing, would be sufficient to qualify as an AIS.
In response to this recommended inversion of the process, one commission member, Sandi Kato-Klutke expressed reservations that if the Kauai Planning Commission adopted Ms. McMahon’s suggested course of action, the burial council would have very limited data upon which to base its decision and might decide the burials must be kept in place leaving the distinct possibility that building would occur on top of as yet unknown burial sites. To this McMahon replied:

I’m not Hawaiian and I can't answer for how Hawaiians feel about that. Culturally, if they knew there was a burial there they might not like something on top of it. That has been the previous decision of the burial council…Now the Attorney General, and I asked this question, again the burial council can say leave in place or remove, leave in place or remove, that’s it. That is their purview under the law. If we leave in place, what we do outside here is all recommendations to our department and we do listen to them…If in working with the owner, he cannot build his house, we have never done a taking for burials now, we work with them to try to figure out how to do this, If the owner comes back and says I cannot save this one, legally, by law we could try to come up with some kind of proposal and it might have to be that he would build on top of it.

McMahon essentially told Commissioner Kato-Klutke that while Native Hawaiians may not consider the outcome of this process to be appropriate, they have no legal remedy by which to have their preferences enforced. The only variable is whether the burial council makes a determination of preserve in place or remove and re-inter, and even then that decision will have no legal impact on the house being built. Even more troubling is that McMahon’s interpretation of the law—which is the same as State Attorney General Mark Bennett’s interpretation—is that the SHPD is supposed to work with the homeowner to ensure that they can build their house regardless of what
protective measures the burial council, lineal and cultural descendents, or community members suggest. McMahon’s testimony essentially states that building the house is inevitable, if the homeowner wants to pursue it. Given the complicated nature of the case, the KPC voted to table the measure until later in the meeting.

When his request for design review came up again in the 12-hour KPC meeting, Brescia testified to assuage the lingering concerns by commissioners about protecting the burials. Brescia testified that, “We are going to have people there [testing] next week if we get approval today and we are just going to work our way through this. I am very concerned. I really understand. I am touched actually by the thoughts I heard here tonight and at our last meeting. I am really concerned.”

Commissioner Cavel Raco asked, “And just to say on the record that you are open to having the burials stay on site?”

Brescia: “Yes sir.” The Kauai Planning Commission (KPC) then on the strength of McMahon’s assurances, proceeded to grant conditional approval of the design for Brescia’s house. The approval came with the stipulation that Brescia could not receive a building permit until he met the conditions of the SHPD and the KNIBC, and that both groups had to approve a BTP for the site. After the approval, Walton Hong, Brescia’s lawyer said to the KPC, “Thank you very much. I think Mr. Brescia appreciates this early Christmas gift.”

The callousness displayed by both Brescia and his attorney is founded upon a destructive coalescence of desire and entitlement deeply entrenched in the settler colonial mindset. From Brescia and Hong’s perspective, building the house was of
paramount importance and the protection of the environment, public property, and burial sites were merely externalities that had to be negotiated. From the time he purchased lot 6 in 2000, Brescia was determined to build the house he wanted and would not let anyone stop him. Brescia’s actions from the time he arrived in Hawai`i have been based on the settler colonial presupposition, “that ‘we’ could use the land better than they could.”

This notion is expressed as the quintessential settler belief that Brescia has more right to the land than the Natives or the remains. Naue and the building of the Brescia house on top of a site containing so many burials is a case study in how the settler state supports Native territorial dispossession through a framework of private property rights.

McMahon also displayed a callousness towards Native Hawaiian culture, but the dynamics of her attitudes towards Native Hawaiian culture are structured in different and important ways. McMahon’s perspective is in part the product of her training at the University of Hawaii at Manoa Anthropology Department (BA 1981, MA 1990) and the bureaucratized system of historic preservation in Hawai`i (she has worked for the state of Hawai`i in historic preservation since 1988). As discussed in the previous chapter, these institutions were both formed by colonial ideologies and they continued to refine those practices and theories. As Geoffrey White and Ty Kawika Tengan point out in their article “Disappearing Worlds,” and is even more powerfully evinced through the aforementioned scholarly debate on Kanaka Maoli tradition (which occurred during the precise period that McMahon was working on her MA), the anthropology department at Manoa did not view Kanaka
Maoli ontology as legitimate. At most they were empirical practices and beliefs. The mere fact that protection of burial sites falls under the prevue of “historic preservation” is contrary to the goal of the Kanaki Maoli that burial sites must be preserved as sacred places. The legal sphere ignores the constellations of the Kanaka Maoli ontological universe such as `uhane (the spirit), ola na iwi (the bones are alive) and mana (spiritual energy). When McMahon said in her testimony to the KPC, “I’m not Hawaiian and I can't answer for how Hawaiians feel about that,” she not only admitted her positionality, she also affirmatively stated that she is not responsible for understanding Kanaka Maoli culture and ontology let alone enacting preservation measures based on its axiology. For McMahon, her preservation is purely materialist: if the bones are not harmed, then they have been “preserved.” This stance is utterly incommensurable with the views of Native Hawaiians that sought to protect Naue because for the Kanaka Maoli, the iwi and the land in which they are buried is indistinguishable in terms of sacredness as both share in the interred kupuna’s mana (spiritual power).

I once asked Puanani Rogers what she considered to be appropriate protection. She replied, “Leave Naue alone!” In exclaiming her inability to speak for Native Hawaiians, McMahon is implicitly stating that she does not have to understand. Despite the fact she is bureaucratically responsible for preserving Native Hawaiian burial sites, McMahon represents the position that Native Hawaiian cultural views and beliefs are not relevant so long as the letter of the law is followed. This is the
fundamental problem with cultural resource management (CRM) regimes applied to indigenous sites.

V. The Archaeological Inventory Survey

Dega quickly conducted testing phase four within days of the December 11, 2007 meeting. The testing did not uncover any additional burials. This was not a surprise as it was the sought-after result. Since the foundational footings were shallower, the test trenches were also shallower and the result was no new discoveries of burials.32 In his analysis of the results, Dega determined that the thirty discovered burials were unassociated. This determination meant that based on the archaeological evidence, Dega and McMahon believe that Kanaka Maoli interred people at this site randomly and therefore Naue did not need to be treated holistically as a burial ground. In preparing a Burial Treatment Plan (BTP) for the KNIBC, Dega marked each burial as an independent burial site. Under this classification instead of one burial site with 30 burials, Mr. Brescia’s property contained 30 burial sites with one burial each. This is the equivalent of defining each grave plot in a registered cemetery as its own cemetery. The “scientific” knowledge that this classification conveys is that Native Hawaiians wantonly buried the remains of their ancestors and that the site was utterly insignificant. This contradicts established knowledge that Native Hawaiians chose burial places with the utmost care. It disregards Naue’s representation in oli (chants) and mele (songs) as a place revered for its hala (pandanus) grove, a tree strongly associated with death.33 Moreover it ignores the archaeological evidence from Naue in which no burial was found to be touching
another. Given the density of burials, it shows that the placement of the burials was known and used to ensure that no burials were disturbed when interring remains. This purportedly factual premise for classifying the burials as “unassociated” shows the low standard of proof required for outsiders to produce “fact” about Natives. It also shows much like the narrative of extinction, settlers configure truths about Natives around their desire for land.

NHLC attorneys Alan Murakami and Camille Kalama explained to me that this classification made it easier to build the house. Under Dega and McMahon’s determination of multiple burial sites, Brescia was only responsible for protecting the area of each of the 30 burial sites. However, if they had concluded that there was one burial site, which included 30 known burials, Brescia would have had to protect the entire site, and that would have covered almost the entire lot. But since each burial was an independent burial site, the space in between the sites was not protected allowing for its use in the construction of the house.

According to HAR 13-300 Title 13, “‘Burial site’ means any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods if any, are interred, and its immediate surrounding archaeological context” [emphasis added]. Dega and McMahon ignored the surrounding context in order to serve the interest of development. Thomas Dye, a former State Historic Preservation Division archaeologist told me that from, “an archaeological point of view, that determination was ludicrous.” He went on to say that the practice of classifying burial concentrations as individual sites started during
Linda Lingle’s administration. “It is a perverse application that makes no archaeological sense. Private archaeologists classifying individual burials as sites allow their clients to get around the burial council. It is unethical.”

In January 2008, McMahon acknowledged that there were likely more burials on the lot than the testing revealed. But rather than require additional testing, she approved the AIS submitted by Dega as sufficient under the SHPD requirements. The approved AIS did not define the perimeter to the burial ground on the lot because he defined each burial as its own site. The KNIBC would thus be asked to make a determination about how best to protect the burials at Naue without having a singular site to protect. To put this situation in perspective, it is equivalent to asking a planning department to zone a cemetery without telling them the number of burials or the area that constituted the cemetery. In other words, it put the KNIBC in an untenable position. In addition to this, the approved AIS did not recognize any lineal or cultural descendants. HAR 13-300 mandates that AIS must include research to determine any lineal or cultural descendents of the remains. This is important information as their preferences for the disposition of the burials and any protective measures are given significant weight. Not listing any recognized lineal or cultural descendants meant that Brescia did not need to contend with their preferences for preservation, which were likely to be more substantial than his own. On January 29th, Dega submitted the second draft of the BTP. This draft included the updated AIS. In the BTP the house was located over six of the burials. It requested that the burial council make a determination of “remove and re-inter” for the six burials and
“preserve in place” for the other twenty-four burials. This was possible because McMahon approved Dega’s finding that the burials were unassociated. This meant that the KNIBC had to make a determination of preserve in place or remove and re-inter for each individual burial rather than collectively.38

VI. February 7, 2008 KNIBC meeting

The Naue case was brought before the KNIBC for the first time at the February 7, 2008 meeting.39 The chair of the council was a white man named Mark Hubbard who filled one of the at-large landowner positions on the council. At the meeting, Dega gave a presentation to the council about the project. He explained that due to shoreline setback issues,40 the house had already been redesigned fifteen times. Both Native and non-Native people testified against the house being built. Jeff Chandler stated that he believed it was a cemetery and thus sacred. Puanani Rogers, Ka`iulani Edens-Huff, Lia Sausen and her mother, Louise Sausen, all testified against construction. Ken Taylor and Sandra Herndon who are Kauai residents both opposed the construction of a house on top of a burial ground. Barbara Say, a Native Hawaiian who has served on the council since its inception also testified that because of the finding of 30 iwis on the property, she considered it to be a cemetery and that this house should not be built there.41 According to the minutes from that meeting, Chandler testified again that he, “is a direct lineal descendent to the iwi kupuna. Chandler said he comes from Hawai`i and his ties are to Hawai`i which makes him a lineal descendent. Instead of showing that he is a lineal descendent, he demands that
the system disprove him of his connection.”¹⁴² Neither the KNIBC nor SHPD recognized him or anyone else as a lineal or cultural descendant that day.

In addition to opposing the house, each person that has been mentioned also pushed for the burial council to make the Burial Treatment Plan (BTP) public. The number of burials on the land was public information but the BTP (because it gave the burials’ exact placement) was withheld to protect against malicious desecration. However, in withholding the BTP, the KNIBC and the SHPD were also withholding information about the protection measures for the burials. After the portion of the meeting for public testimony, Dega, “commented that Council knows that is not within their purview to object to building the house but to determine approval or rejection of the BTP itself and the preservation or relocation of the iwi.”¹⁴³

Immediately following Dega’s comments,

McMahon informed the Council that their role is not to determine that [Brescia] could not build his house because that is the County’s job. McMahon stated that the owner is asking for relocation of six burials and preservation in place for the remaining 24. If the Council decided to leave all the burials in place, it still does not mean that he cannot build his house.⁴⁴

After going into executive session to discuss their legal options with deputy state Attorney General Vince Kanemoto, the KNIBC voted to publicly release the BTP due to the substantial number of burials discovered. The council also voted to defer making a determination until the next burial council meeting after the community had a chance to read the BTP. Dega revised the BTP again and submitted the third draft to the SHPD on February 21, 2008.
VII. April 3, 2008 KNIBC Meeting

The Brescia case was taken up for the second time by the KNIBC at its meeting of April 3, 2008. By this time, the BTP had been made public and the issue had spread through “the coconut wireless,” the name that Kauaians use to describe how information flows through the dense web of interpersonal connections on the island. As one observer at the meeting said afterwards, “The room was overflowing.” The observer continued that the meeting “began with a Pule (prayer)… ending with all joining hands and singing. People were sobbing, chanting, impassioned and determined to protect the iwi (bones).” Wilma Holi, a kupuna (elder) and member of the repatriation group Hui Malama I na Kupuna o Hawai`i Nei (Group Caring For the Ancestors of Hawai`i), described the meeting to me as tense. Many expressed outrage that a man from California was trying to build on a burial ground and a leina-ake-akua (place where spirits leapt into the nether world). The tension was so high that two of the burial council members walked out of the meeting and did not return.

McMahon impressed upon the Council however that they could only decide whether to relocate na iwi or preserve them in place. She advised that even if they voted to preserve the bones in place, they could not stop the house from being built. This statement echoed what McMahon told the KPC in their December 2007 meeting. McMahon did not give her reasoning at this KNIBC meeting but in the KPC meeting she explained that, based on her conversations with state Attorney General Mark Bennett, the burial council cannot stop construction.
In spite of McMahon’s insistence on their limited power, the KNIBC voted 4-2 to preserve all 30 burials in place as well as any as yet undiscovered burials. At the end of the meeting, Chair Mark Hubbard asked the council members if they had any comments or recommendations on the BTP. Each of the members stated that due to the intensity of the meeting, they were not prepared to offer their comments.\footnote{49}

VIII. The Vigil at Naue

Edens-Huff, who in addition to attending this meeting had also attended the February, 2008 KNIBC meeting, was deeply disturbed by McMahon’s comments. So after the meeting, she went home “grabbed a tent and headed to the [property]” with her husband Jim Huff to “to keep an eye on the iwis.”\footnote{50} Edens-Huff is a passionate Native Hawaiian sovereignty activist, radio DJ, surf instructor, and caregiver to her paralyzed son. Her distrust of the SHPD was born through years of struggle to protect burials and other sacred sites. Edens-Huff received support from many in the community and others set up tents alongside hers, “making like one little village,” as a supporter described it.\footnote{51}

Meanwhile Dega quickly revised the BTP and produced a fourth draft to comply with the KNIBC’s decision of preserve in place. He then submitted it directly to the SHPD on April 17, 2008. Under the revised plan, the house would be built over six of the known burials. Cement “jackets” would be placed over the seven burials that would lie beneath the foundation of the house.\footnote{52} The BTP listed “vertical buffers” as an additional mitigation measure. Vertical buffers are the space between the
ground where the burial is located and bottom of the house above it.\textsuperscript{53} This proposal was deeply problematic because Native Hawaiians generally consider placing a heavy object harmful to the `uhane (spirit) of the kupuna (ancestor)\textsuperscript{54} because it inhibits their journey to Po. Rogers explained to me that, “heavy objects weigh on the kupuna. They are a burden and make it so they can’t move.”\textsuperscript{55} It is common for a horizontal buffer to be placed around burials that are preserved in place; conversely vertical buffers were unheard of as a mitigation measure. The justification for calling “vertical buffers” a mitigation measure is that if the house were a certain height above the burial, it would protect it. However for Native Hawaiians, the house was the source of the harm. Despite all of this, McMahon approved the BTP submitted on April 24\textsuperscript{th}, 2008 without notifying or consulting with the KNIBC or the public.\textsuperscript{56} There were no lineal or cultural descendants recognized by the SHPD so no one made any comments or recommendations on BTP#4. The approved BTP fulfilled the conditions on the conditional approval. Brescia received his building permits in May.

Edens-Huff was still primarily living on the beach at Naue and by May she had been joined in vigil by several others and received support from many. Her then husband Jim Huff a helicopter pilot and construction worker stayed at Naue when he was not working. Hale Mawae, a Native Hawaiian artist and activist from Kaua`i, camped in vigil on the beach. Andrew Cabebe a Native Hawaiian and Christian radio show host, says he was led to Naue by a dream and discovered that Edens-Huff was a distant cousin. He also discovered that his family was listed on the Mahele records as a caretaker of a tract of land on the North Shore including Naue. Hanalei “Hank”
Fergerstrom, priest with the Temple of Lono,\textsuperscript{57} from Puna on Hawai`i Island, found out about the situation at Naue while on an unrelated trip to Kaua`i. He subsequently visited Naue numerous times and became involved with the forthcoming lawsuit and activities on the site. Rogers stayed with them on weekends. Dayne Aipoalani, the Ali`i nui of the Polynesian Kingdom of Atooi, also visited and contributed supplies.

During the vigil at Naue in May 2008, Mawae wrote a piece that was posted on the locally run blog called Island Breath. The piece entitled “Ola Na Iwi: The Bones Live” eloquently and poetically lifts the veil on the depth and pervasiveness of colonialism in contemporary Hawai`i while placing particular focus on the systemic nature of the rampant phenomena of burial desecration. In discussing the events at Naue Hale Mawae writes,

I’ve sat on the point at Naue for many nights and often wondered what my ancestor’s [sic] saw when they stared from the sea, to the mountains, to the night sky above. What did they see past the point of Makana as it was enraptured in the blazing setting sun. What images would they invoke from within them as their thoughts gazed into the future? What ho`ailona would they read as the wind and clouds shifted before them? The ocean currents changing with the season as warmer waters flow from the south. Our ever dignified kohola migrating into the cold Northern distance.

What did they see?

Naue’s true character stands prominent with many hula, mele, oli, and mo`olelo that have survived in the face of a thousand indigenous extinctions since the time the Western foreigner’s [sic] arrived, and decided not to leave. Oral traditions that have kept the true character of our sacred places alive. Places that have been historically captured with kanaka maoli’s [sic] superb poetic language, creative thought, and dignified expression.
Na Hala o Naue. The many hala trees of Naue. Naue, which was told to me by a kupuna that it is like the swaying of the ocean, when you look far out to see and watch it go back and forth like the hips of a graceful hula dancer. “How the Hala trees would once bend and sway to the rhythm of the wind and rise of the tides.” She says to me with the biggest smile upon her face. I close my eyes, take a deep breath, and imagine I can hear the sound of the wind in their broad green leaves.

As her smile fades, I open my eyes and look around at the million dollar homes being crowded on to the beach and the image is gone. I begin to comprehend, and not “wonder” what happened to Na Hala o Naue and the Hala trees so famed at this particular wahi pana. This special, sacred place.

There is no place for them in a world full of multi-million dollar, pimped out vacation rental homes with 5 bedrooms and 4 baths. All built to perfection with their ocean front view, and well groomed landscaping. A place in a world full of greedy land squabblers and lawyers all trying to strike a deal and make some fast illegal cash.

Or do they have a place?

....The tempest rises. Where is it that we finally draw the line? My line’s in the sand, and I’m ready. Or at least my tent’s set up so you’ll know where to find me down at Naue when you feel the time is right. The truth is here, and even if it’s only a whisper in the wind today, the sail is caught, and it turns toward a new horizon tomorrow.

Ola na iwi! The bones live!58

Mawae here delves into his own ontological experience to strike at the heart of the conflict over Naue. For settler colonialists and those that adopt their logics, pre-contact Hawaiian history and traditional Native Hawaiian culture are dead and gone. The heritage of those times merits nothing more than selected physical conservation and the importance of the objects, places, and practices associated with pre-colonial time pales in comparison to present economic concerns. For Mawae and other Kanaka Maoli, their past and heritage are alive and constantly interacting with the
present. Naue is a sacred place where they can connect with their ancestors and be with them if only for the briefest of moments. This is what is at stake at Naue for Native Hawaiians.

During the vigil, Sausen purchased tiki torches and oil to mark each of the burials. Every night, they lit the torches and chant for na iwi o kupuna. Together they all also built an ahu (altar) to mark the ground as sacred.

Jim Huff (furthest on the right) told me his experience of the vigil. Huff said that they would:

almost take turns getting possessed. Not anything like Hollywood style stuff. Just a change in a person, almost momentarily where a person would always get aggressive. It happened to myself. I wasn’t aware that I was being possessed. Then when everyone told me what I did, I was like wow, I didn’t even remember. I got in my truck and just driving
around erratically and just driving around all anger and I don’t remember anything. Just short outbursts maybe minimum ten minutes maybe tops a half an hour…I was visited by kupuna twice in dreams. In one it was a beach area and a kupuna came out of the sand wearing a white kihei [garment worn over one shoulder and tied in a knot] and had a hakulei [a braided lei]. It was just a short dream but it happened a couple of months after I had been staying out there…I had one strange thing happen to me. Each one of us would walk through the graveyard and talk to the graves and try to feel them. Everyone of us was attracted to one certain grave and not any of us was attracted to the same grave and they were far distances apart. Before I walked through, I would stop at the ahu (altar) do my prayers and ask permission to walk through. I would walk through and as I walked through, I would honor and aloha all the kupuna that were buried here, all the keikis (children) that were buried here. I would always stop at grave 27 because I felt a connection so maybe this is who came to me in my dream, I don’t know.60

Nana I Ke Kumu, a source of 20th century expressions of traditional Native Hawaiian beliefs, customs, and psychology, documents that noho (possession by a spirit)61 is well established in Native Hawaiian culture. These experiences stand in direct contrast to the construction of the site as property. The book, which was co-written by Mary Kawena Pukui, an eminent scholar of Native Hawaiian culture and tradition, and E.W. Haertig a practicing psychologist, contextualizes the experience of possession by saying, “Certainly, for a Park Avenue sophisticate who is suddenly ‘possessed,’ the diagnostic balance might waver from ‘eccentric’ towards ‘psychotic.’ For the Hawaiian still very close to the mystical, noho episodes by themselves do not necessarily point to the abnormal or psychotic.”62 This statement makes sense of a phenomenon foreign to traditional Western psychology by placing it within its cultural context rather than dismissing it as false or illegitimate. The treatment of Native Hawaiian experience in Nana I Ke Kumu stands in sharp contrast to the
treatment of that experience by the SHPD and the KPC. Such mystical experience is excluded and delegitimized in their routinized bureaucratic logic. For Huff, Mawae and the others in vigil at Naue, these experiences are real and transcend any legal definitions or labels imprinted onto Naue. Yet those labels and definitions are imposed through the superior force of the state, relegating these experiences to personal anecdotes. This is the very essence of colonial suppression of indigenous ontology.

IX. June 3, 2008 Ku`e

At the end of May, Brescia’s contractor Ted Burkhardt told Edens-Huff that they would break ground in the next few days. On June 2nd, Edens-Huff, Sausen, Rogers and others sent out a kahea (call) informing the community that construction was set to begin the next day and asking them to come to the property to ku`e (oppose, resist). On June 3rd people of different backgrounds arrived to pay respects to na iwi o kupuna and oppose the house. Kaua`i freelance journalist Joan Conrow published her experience of the day on her blog KauaiEclectic:

I slipped into the circle on the beach just as the pule was beginning, and joined hands with Andrew Cabebe, who cried softly during the blessing, and Hale Mawae, whose hand was still cold from his dawn hiuawai (cleansing) in a small tidepool exposed in the reef by the shrinking tide.

After Hale's pule and chant, Louise Sausen told the group how to respond if the police attempted to make arrests: everyone who chose to should pick a gravesite and sit with their knees up to their chest, in the same way that the women and children were buried in that sandy soil hundreds of years ago.
Over the next couple of hours, more people joined in, including some of the lua guys, who stood guard at both entrances to the burial grounds. In all, about 50 people were there.

As we waited, I talked with Andrew, who along with Ka`iulani Huff and Hale, among others, have been keeping watch, camping on the beach adjacent to the graves for about 10 weeks now.

He said being at the burial site had “really changed my life. When you spend nights praying to them, talking to them, listening to the wind, the surf, listening to the birds, then all the people who come malama, knowing it’s the thing to do, it keeps you going.”

Even visitors were surprised to discover that “our burial rights are not in place,” Andrew said, and that the state regularly allows iwi to be dug up and reburied elsewhere, or structures placed right over them.

“So here we are, pockets everywhere in Hawaii trying to do their little thing to improve what needs to be done for the Hawaiian people,” Andrew said. "We even have kanakas who are against what we’re doing. They want to be Americans and they have that choice.”

At about 9 a.m., the contractor, Ted Burkhart, showed up with a rather frail looking security guard and several members of his crew. They were followed by some of Esaki’s surveyors and an archaeologist.

“This is not a political thing, it’s a spiritual thing and you must know the consequences of what you do,” Nani told Ted.

Added Louise: “That’s why the sky is crying. It’s our kupuna.”

Then Ka`iulani, who says she has a royal patent giving her ownership of the land in question, came up from the beach and said: “I have title to this land. I’ve called the police, and everyone who is not invited has to leave. You’re on my property. Get off.”
I talked with Ted for a little while then, and he said he had signed the contract a year ago, before more than 30 burials had been uncovered by a backhoe during excavation for the foundation. Some were broken up in the process.

“It’s affecting me very deeply,” he said. “The last thing in the world I wanted to do was have a conflict with anybody, especially the Hawaiian people, who have treated me very well.”

As Conrow was leaving Naue, Lady Ipo, a Native Hawaiian musician and Christian minister whom Mr. Brescia had retained to do the house blessing, arrived. Sausen, Rogers and Cabebe refused to let her step onto the graveyard. They met Lady Ipo at the gate to the driveway. She explained to Sausen, Rogers, and Cabebe why she had come to the site. They told her that she could not come in. Sausen raised her voice and forcefully explained that this site was kapu (sacred) and that only those who honored na iwi o kupuna were allowed to enter. Lady Ipo protested, but Sausen, Rogers and Cabebe remained steadfast. Lady Ipo walked away with tears as she understood why they did not let her perform the blessing. The contractor, Ted Burkhardt, agreed to postpone work at the site. The ku`e ended around 11:00 AM with Hawaiian chanting led by the cultural practitioners.

X. Legal Cases

Brescia and his lawyers wasted little time in responding. Reached for comment by The Garden Island the next day, Walton Hong called the action “stall tactics.” On June 12th, Brescia filed an amended lawsuit against Edens-Huff and four others as well as nearly a dozen “doe defendants” for damages due to
trespassing, private nuisance and harassment, tortious interference with contract, civil conspiracy described as “terroristic threatening,” intentional interference, ejectment and slander of title. Fifth District Court Judge Kathleen Watanabe accepted the suit which included a restraining order for the lot against those named on the suit.

Jeffrey Chandler and Rogers filed a countersuit against Brescia and the SHPD, seeking an injunction to stop construction. The Native Hawaiian Legal Corporation (NHLC), which represents Chandler, claims that: “(1) both Brescia and the SHPD failed to determine the extent of the burial site, which is a cemetery, over which the KNIBC had jurisdiction to protect and (2) the SHPD failed to follow various important procedures in approving of a plan that effectively reversed the KNIBC determination.”

XI. June 24, 2008 Ku`e

On June 22nd, the Kauai Police Department visited Naue to tell those camping in vigil that that they were going to return in two days and that they had to leave then, or the police implied that any protesters present would be arrested. In response, Edens-Huff immediately sent out another kahea via phone calls and the internet for those supporting her to come to Naue on June 24th.

On the 24th, many again showed up to try to protect the burials. The contractor called the police to remove the “trespassers.” The police arrived but Kaua`i police chief Darryl Perry determined that the contractors were doing something illegal, not the protesters. “Unless we have a directive or some kind of documentation or some
kind of decision that is made at a higher level, as far as we’re concerned, if
coloration begins on this burial site, they’ll be in violation of Hawai‘i Revised
Statutes,“71 he announced. Perry suspended any construction on the house. According
to Jim Huff, the head contractor shouted, “Fuck!” loud into the air and hurled his
building plans to the ground.72 Cheers and mahalos (thank yous) erupted from the
group. Soon after, Andrew Cabebe stood in the driveway and sounded a kahea (call,
or ceremonial invitation).73 Everyone, Native Hawaiians walking side by side with
the police, slowly processed onto the property, which had been marked off as a kapu
(sacred, taboo)74 area. The entire group circled around the burials, held hands and
prayed together as the torches marking each burial burned.75

On July 7th, the Hawai‘i state attorney general Mark Bennett gave the opinion
that the development would be in violation of HRS 711-1107 only if “intentional
damages”76 occur to the burials.”77 This interpretation, which was never publicly
issued by the State Attorney General, makes the legal separation between protections
for traditional Hawaiian burials and all other burials explicit. HRS 711-1107 is
applied to all places of worship or burials and defines desecration as, “defacing,
damaging, polluting, or otherwise physically mistreating in a way that the defendant
knows will outrage the sensibilities of persons likely to observe or discover the
defendant's action.”78 To state as Bennett did, that Brescia’s construction project does
not constitute desecration is a clear imposition of state power to facilitate
development. Chief Perry responded to Bennett’s opinion by writing an article for the
“Hawaii Legal Reporter.”
Basically, the wording of Penal Code HRS 711-1107 does not clearly make the connection to Hawaii Administrative Rules 13 (HAR). From a strict law enforcement perspective it is obvious that damaging or otherwise mistreating a place of worship or burial site in a manner that outrage the sensibilities of a person of reasonable caution constitutes a violation. And exactly who is a person of reasonable caution? A person of reasonable caution is the member of our community, like you and I [sic].

Given that Bennett’s interpretation of HRS 711-1107 denies community members a position from which to legally claim desecration, Perry poignantly asks, “Who defines the meaning of desecration?” Perry, deftly citing Brescia’s own words, responded to his own question:

Mr. Brescia stated it matter-of-factly, ‘The law was obviously designed to punish those persons who desecrate burials without authorization.’ The optimal word in his sentence states it perfectly: ‘authorization.’ The owner did follow all proper protocols and now has authorization to build a home on top of burial sites that many would consider a cemetery.

Perry’s explanation of Bennett’s logic reveals state power at work. The process for building on a site containing burials requires review by the appropriate planning commission, burial council, and State Historic Preservation Division in order to determine what kind of building is appropriate to authorize. Once she did that, every institutional body upheld the decision, overwhelming any opposition to the house. Perry’s analysis points to the fundamental injustice of Naue: those in the best position to determine what constitutes desecration for the burial ground at Naue, due to their genealogical connections, are stripped of their right to do so.

Bennett’s decision gave Brescia and his contractors clearance to build. A dust fence was promptly erected around the site. Hastily,
footings were dug and laid and the six burials located under the footprint of the house were covered by concrete jackets.  

XII. August 7, 2008 Ku‘e  

On August 7th, 2008, in order to prevent further construction before the injunction hearing scheduled for August 14th, a group of eight individuals, including one non-Native Hawaiian man, chained themselves together using Polyvinyl Chloride (PVC) pipes while more than twenty others stood in solidarity. ‘Our goal is to make them forcefully remove us,’ stated Andre Perez, one of the Kanaka Maoli protesters. “This is not just about Kaua‘i. We’re serious about protecting our iwi kupuna, our ‘āina (land) and our lahui (nation).” As evening set in, the protesters received assurance from the contractor that there would be no construction between then and the court date, August 12th. The standoff with Kaua‘i police lasted eight hours but no arrests were made at the scene. The police later arrested three of the men on trespassing charges and warrants were issued for three others.
The court denied the injunction sought by Chandler and Rogers to halt construction on the basis that once all the digging is done, the desecration has been committed(!) and there is nothing left to enjoin. This logic assumes that the remains are static objects and that the concern is only over their physical maintenance. Kahu Hank Fegerstrom explained to me that the bones are alive meaning that every single day they are covered in concrete with a house on top of them, is a new act of desecration. A court date was set for September 15th, 2008 to review the claims more fully.
XIII. Order Granting in Part and Denying in Part

On September 15th, 2008, Fifth District Court Judge Kathleen Watanabe ruled in the case of Jeffery Chandler, et al. v. Joseph A. Brescia; Pua Aiu, et al. Watanabe found that the SHPD had violated Hawai’i Administrative Regulation (HAR) 13-300-38(e) as a consequence of its failure to consult with the KNIBC before approving the revised BTP on April 24, 2008. The regulation mandates that the SHPD shall only approve the BPT “following consultation with the applicant, any known lineal descendants, the appropriate council, and any appropriate Hawaiian organizations.” She issued an injunction requiring the SHPD to consult with the KNIBC on the revised BTP. However, she refused to issue an injunction halting construction, during the consultation process. The only restriction imposed by the court on Brescia was that the construction “does not in any way further demolish, alter or prevent access…to the seven (7) burials that fall within the footprint of the house plans.”

The findings and order of the court, simultaneously finding that there had been “irreparable harm caused by the desecration of the iwi [and]… the inability of Chandler to follow ancient traditions to protect the iwi,” while still allowing construction to proceed, are internally inconsistent. Judge Watanabe rationalized her decision on the grounds that, even though the concrete footings had been poured, Chandler still might be entitled to unspecified “other relief,” depending on the final outcome of the BTP process. The court “cautioned” Brescia that “he should not take any action that might foreclose implementing potential options for burial treatment plans that may result from the consultation between the SHPD and the KNIBC.”
Brescia was allowed to continue construction, but with at least the potential for risk that it might have to be undone due to preservation measures in the final BTP. The KPC then sent a letter to Walton Hong to inform him they had approved his “proposal to construct a single-family residence on the subject property.”

XIV. November 4, 2008 KNIBC Meeting

On November 4th, 2008, the Kaua’i -Ni’ihau Burial Council voted to unanimously reject the BTP, 6-0. The SHPD subsequently sent a letter to Dega informing him that “at this time we cannot accept the Burial Treatment Plan without some revisions which are to be addressed below’ and then outlining several concerns for him to deal with.” The letter asked him to submit a revised plan for their consideration. Notably, the letter makes no mention of consultation with Native Hawaiians or with the KNIBC. This is important because a previous BTP that the SHPD unilaterally approved had already been struck down by Judge Watanabe for failing to consult with the appropriate parties. Thus, the SHPD’s recommendations would not satisfy the legal requirements that they had already failed. More importantly, without input from Native Hawaiians the BTP could not become more culturally appropriate.

After this meeting, the terms of two burial council members ended. The KNIBC had only four serving members, which is below the number necessary (five) for the council to meet and conduct business. The governor’s office is responsible for nominating candidates, which the state legislature then confirms. There would not
be a sufficient number of council members for another KNIBC meeting to discuss the still unapproved BTP until June 2009. Throughout this period, Brescia continued to build the house.

XV. Trespassing Rulings

The criminal trespassing charges against the August protesters were dropped after a hearing in Kaua’i district court on January 15th, 2009. Based on Judge Watanabe’s ruling that the SHPD failed to follow its own procedures, prosecutors and defense attorneys agreed in the stipulation of facts that the protesters were acting to “prevent an imminent harm to the iwi kupuna at the property.” They “acted reasonably to prevent further harm by peacefully placing themselves between construction” and the bones. Judge Senda reasoned that since any construction on the day of the protest would have been illegal due to the McMahon’s violation of the process, the actions of the protestors prevented an illegal act from occurring. Her decision goes farther though to say that they were preventing, “imminent harm to the iwi kupuna.” The decision was based on the case State v. Marley 509 P. 2d 1095 (1973) in which the Hawai’i state Supreme Court held that, “Reasonable action, even if technically a violation of criminal statutes, if taken to prevent or terminate the commission of a crime by another, is, in certain circumstances, completely defensible. Such action is immune from criminal punishment as one of the "justification" defenses for otherwise criminal conduct.” The findings of fact, in Senda’s decision stated that the defendants had pursued all the administrative
remedies available to them to protect the burials on the property, but the administrative process had failed them.¹⁰³

In March 2009, Judge Watanabe issued a default judgment in the civil lawsuit *Joseph A. Brescia v. Ka`iulani Edens-Huff, et al.* The judgment stated that the original defendants: Ka`iulani Edens-Huff, Puanani Rogers, Dayne Gonsalves, Louise Listman, Jeffrey Chandler, Hale Mawae; and later Hanalei Colleado, Andrew Cabebe, Andre Perez, Ehu Cardell, Keali`i Collier, Palikapu Dedman, Skippy Ioane, Hanalei Fergerstrom, and Hanaloa Helela were liable for up to $362,000 plus additional unspecified damages. Brescia asked for the money to cover estimated losses from delays in construction and increased security due to alleged trespassing and obstruction. The ruling also negated the title claims to the property by Edens-Huff and the other defendants.¹⁰⁴

The contrast between the rationales in the two decisions, which occurred within two months of each other, is significant. Whereas Senda ruled that occupying the site to prevent construction was necessitated due to the complete failure of the administrative process, Watanabe ruled that those occupying the site were fully liable for all of the damages Brescia claimed. The suppressive force of settler colonial law in Hawai`i is fully revealed when we consider Watanabe’s role in the case. Watanabe repeatedly refused to grant any injunctions halting construction on Brescia’s house in order to address the administrative failures of which she herself had found the SHPD guilty. Thus Watanabe’s handling of the Naue case was one of the administrative failures that necessitated the August 7, 2008 Ku`e. Yet Watanabe went further to
issue a default judgment against some of those involved in the August 7 Ku`e, the same individuals Senda had just acquitted of any criminal wrongdoing.

For those found in default, the lawsuit caused significant hardship. The amount was far more than they could afford. Brescia’s lawyers threatened to put a lien on Roger’s house, a house she had inherited from her father and the current home of her daughter’s family. This burden only added to the trauma of being punished for trying to prevent what Rogers believed was the desecration of a sacred burial ground.

For Kanaka Maoli, Naue is a place with a history that lives on in the present. The proverb: ola na iwi (the bones live)\textsuperscript{105} expresses this view of history best. The Hawaiian word for bury is kanu which also means, to plant. When a person is buried, the mana (spiritual power) in their bones spreads into the land. In this perspective, Naue’s past must dictate its future. Preservation means that the place as a whole must be protected in both the material and spiritual realms. The material realm of the bones and the site must remain undisturbed and the spiritual realm must be tended through paying homage and giving offerings, making access to the site critical.

Conversely, every Burial Treatment Plan (BTP) submitted by Dega on Brescia’s behalf treats Naue as an empty ahistorical space, rather than a spiritual space connecting the ancient to the present. The burials and the past that they evoke are immaterial in the present. The bones are thereby objectified as relics of an ancient past and literally sealed in that past realm with concrete. In this perspective of Naue, preservation is at once a simple straightforward concept and a nebulous one. It means that the material substance of the bones must not be harmed. The broader significance
of the burials and Naue’s history are rendered immaterial in order to justify building a house on top of them. In other words, as long as the bones are not destroyed, the job of preservation is complete, there is nothing else to preserve. It is just space to be filled. In the BTP, Dega’s definition of “preservation” appropriately embodies this twisted logic.

“Preservation”, according to HAR 13-300-2, is defined as “the form of mitigation that sets forth appropriate treatment of historic properties, burial sites, or human skeletal remains which are to be preserved in place.” Under this definition, the current Plan fulfills “Preservation” through the stated goal of preserving the burials in place in perpetuity. The main thrust is that all thirty burials lie in their original context, within their original soil matrices, within the original location of their interment hundreds of years ago.106

The legal definition Dega provides is for “Preservation Plan,” not “Preservation.”

Dega essentially invents a legal definition for preservation in order to claim that the plan satisfies the legal requirements. A preservation plan is merely the written object explaining the preservation measures that will be undertaken, not the measures themselves. The quote bears repeating because, upon close inspection, the subtle wordplay used to hold this empty logic together becomes painfully apparent and the logic naturally falls apart. “‘Preservation [Plan]’ is defined as ‘the form of mitigation that sets forth appropriate treatment of historic properties, burial sites, or human skeletal remains which are to be preserved in place.’ Under this definition, the current Plan fulfills ‘Preservation’ through the stated goal of preserving the burials in place.”

This definition literally states that the preservation plan is the preservation plan because it preserves the burials. This circuitous reasoning is intended to legally and ideologically shield the BTP from Kanaka Maoli claims that the Plan does not
constitute appropriate treatment because it refuses to define what appropriate
treatment is or is not.

XVI. February 11, 2010 KNIBC Meeting

With the Brescia house all but completed, the KNIBC met on February 11,
2010 to address the 16th draft of the BTP. Again under intensely heavy pressure, the
KNIBC voted unanimously 7-0 to reject the plan. It was the first formal KNIBC
recommendation on any draft of the Brescia burial treatment plan. Vice Chair Keith
Yap testified after the vote that the KNIBC rejected the plan. He explained:

There were many folks who testified against the concrete caps
and the KNIBC took that into consideration…The vertical
buffers with the house complicate the case with the high
concentration of burials. The KNIBC questioned the house
being in the space of the vertical buffers and the BTP does not
specify what is appropriate for vertical buffers…the access
issue is neither adequate nor defined, [and] the landscaping
looks like there will be coconut trees and the concern is that the
root system will impact the burials.

The unanimous KNIBC vote to recommend rejecting the BTP was a cause for
optimism among those who were fighting to protect the burials. After so many
setbacks, they finally had some support from a body inside the government. This
glimmer of hope was quickly snuffed out when on March 10, 2010, Pua Aiu, the
recently appointed Administrator of the SHPD, shockingly approved the Burial
Treatment Plan. She claimed that her hand was forced in the matter because the
SHPD could not stop the owner from constructing his house. The NHLC made strong
arguments in front of the KNIBC and in Judge Watanabe’s courtroom that this legal
interpretation is normative and not representative. They argued that methods were
available to prevent Brescia from constructing his house. However, Aiu’s interpretation was supported at every level from the Deputy District Attorney advising the planning commission to the State Attorney General.

**XVII. April 5, 2010 KNIBC Meeting**

The next KNIBC meeting on April 5th, 2010 was the first that I attended during my fieldwork. The meeting was held in a narrow rectangular room in the Veterans of Foreign Wars (VFW) post in Hanapepe, on the South shore. Three contract archaeologists including Dega and two State Historic Preservation Division (SHPD) employees including McMahon sat against the far side of the narrow rectangular room. The burial council members were at a long table with the windows to their back. Kanaka Maoli filled the entire side near the door. This was the first burial council meeting, since the SHPD had overruled the Burial Council and officially approved the building of a house on top of an ancient burial ground at Naue. Naue was not on the agenda for that day’s meeting but it was the reason that everyone came. Sausen sat in front of the Council and testified that the problem of burial desecration would continue until the Council did something about it. Rogers got up and said, “preserve in place, what does that mean? Not concrete caps!” Edens-Huff then testified, “Preservation in place means go away.” Person after person got up in front of the Council and decried the decision as culturally, morally, and legally wrong. They implored the council to take action, to “get up right now and walk out of the meeting in protest.”*108 Through it all the Chairman of the Council politely stated
that Naue was not on the agenda and that if the speaker had anything to add about the agenda item for that day they were welcome to say it.

I sat in the middle of the room in the Kauai VFW, the white archaeologists to my left, the Council in front of me, and the Kanaka Maoli to my right. Sitting directly to my right was Dega. The Kanaka saw him and passionately pointed out to the Council how the system could not work if a man who they claimed was in part responsible for the desecration of burials at Naue was now being hired to do work for the state. The members of the Council were silent for most of the four hours the meeting lasted, breaking their silence only to try and make the speaker talk about what was on the agenda or to try and stop them if they exceeded their allotted time of three minutes.

The SHPD employees, McMahon, the head archaeologist and Coochie Cayan, the burial program administrator, also did not say very much while so many people were there talking about Naue. At the end though, after almost everybody had left, McMahon stood up to give the announcements and casually mentioned that the septic tank had been installed at the house in Naue and they did not find any more bones.¹⁰⁹

XVIII. Legal (un)Resolutions

On October 5, 2010, Judge Watanabe issued a summary judgment against the NHLC’s appeal of Brescia v. Edens-Huff, et al. The NHLC’s goal in the appeal was to invalidate the process by which Brescia obtained approval to build the house so that other developers could not repeat it in the future. Alan Murakami and Camille
Kalama specifically argued that the court should provide a broader definition of “preserve in place” than the state’s interpretation in the Naue case. Kalama argued that by allowing Brescia’s house to be built atop burials, “the state’s interpretation of that (burial preservation) law eviscerates the Legislature’s intent. If ‘preserve in place’ means only that burials are left in place, then the decision to preserve in place has very little meaning.” Watanabe’s decision of summary judgment in effect rejected NHLC’s request. Before issuing her judgment, Watanabe told those in attendance that she could not base her decision “on personal feelings or emotions or respect for cultural positions taken by the parties. I believe there is a need for some finality in this matter…it is the court’s hope that this is final and we can all move on and do better in our respective cases.”

Watanabe appears to treat the NHLC’s arguments as being based on feelings, emotions and what she calls “cultural positions.” These, she notes cannot form the basis for a legal judgment. “Cultural positions,” however, are an appropriate consideration under HRS 6E and are, thus, distinct both practically and legally from “feelings” and “emotions.” Her failure to recognize this distinction is based on a false dichotomy between the cultural positions taken by Native Hawaiians and the requirements of the law. While Watanabe appears to respect Native Hawaiian “cultural positions,” her earlier decision in which she allowed construction of the Brescia house to continue despite her findings of “irreparable harm caused by the desecration of iwi,” relegates the importance of burial protection to a lesser status than Brescia’s interest in uninterrupted construction. Using “finality” as a guiding
principle in her later decision is further evidence of this lower priority accorded burial protection. It is also particularly questionable since her earlier order, allowing construction to continue, is what set the stage for her later ruling, that since the construction is done, it is time to move on to other matters. Her rulings and comments fit within the settler colonial hierarchy which subjugates Native Hawaiian cultural concerns to those of settler concerns.

Watanabe’s decision ended the last challenge to the legality of Brescia’s house. Within a week of the summary judgment, Brescia through his lawyer offered to settle the civil suit with the defendants for a combined one dollar.\textsuperscript{112}

I asked Alan Murakami via e-mail if he would provide a comment about the legal precedent set by the Naue case. He replied:

\begin{quote}
The Brescia case represents the absolute worst example of administrative disregard of crucial and special protection the state legislature intended to give iwi kūpuna faced with threats from developers. The lingering precedent set by the SHPD’s reversal of the KNIBC preservation in place determination stands a looming threat to the future protection this law can provide to any other iwi kūpuna in the State. Any other developer could always point to this case and seek to overturn any island burial council preservation in place determination by using inadequate information, abbreviated archaeological testing, and vertical buffers to build over iwi kūpuna, which island burial councils wish to preserve. That is the danger of this case.

The short shrift given to consultations with the KNIBC and other Hawaiian groups is also troublesome. The SHPD never explained clearly how unanimous opinion \textit{against} allowing the building on top of a burial site can be reconciled with what the SHPD ultimately allowed – a house over 5 iwi kūpuna occupied by strangers to them. Without clear articulation of the reasons for this culturally inappropriate decision, the SHPD
\end{quote}
decision stands as a monument of disrespect for Hawaiian cultural traditions and a callous indifference to traditional beliefs, making a mockery of what “consultation” means.

The Lingle Administration will forever live in shame for allowing such a ludicrous result, in the name of supposedly preserving property rights of a landowner who should have known better, given his multiple ownership of scores of Kaua`i properties and prior encounters with issues dealing with the identification of iwi kūpuna on his other properties. State officials never forthrightly acknowledged that they were giving priority to a mistaken and premature perception that Mr. Brescia had vested rights to build his house. Nonetheless, hiding behind attorney-client privileged communications, SHPD officials and their legal advisers distorted the entire legislative scheme designed to protect iwi kūpuna in order to accommodate a larger political priority favoring property development, leaving an established societal policy in shreds in their wake. Governor Lingle’s disservice to Hawaiian customary rights will be her political legacy, one that has left the SHPD in shambles, fraught with inefficiency, federal threats to defund it, and a demoralized and decimated staff. ¹¹³

[Emphasis in original]

Murakami’s statement explains the substance of the precedent and also reflects the level of frustration and disgust shared by all of those who sought to protect Naue from construction. Throughout the three years of the struggle over treatment, there was a sense that the law would protect the burials. This injustice is a reality of 21st century colonialism, where Brescia was allowed to bypass state law while those trying to prevent desecration are subjected to its full force in the form of arrest warrants and massive lawsuits.

As Naue shows, colonial logics, attitudes, and enactments of violence are applied unevenly and sometimes subverted by agents, such as the Police Chief, Darryl Perry, who are charged with upholding them. The field of law is a particular contact
zone where, in the Naue case, Native Hawaiians sought to have their ontology and axiology legitimated and given legal force. This did happen at particular moments with Perry’s action to stop construction and Senda’s decision as examples. Brescia’s application of his vast resources to build the house carried the day and the house was built. However Naue, as both a physical site and a symbol, represents its co-production. The Hawai`i Bureau of Conveyances has registered lot six in the Wainiha Subdivision II as Brescia’s house and as a burial ground. The ahu (altar) built during the vigil still stands and as part of Brescia’s separate settlement with Chandler, Rogers and Sausen, they may perform ceremonies on the site with prior notification. Chandler said to me, “I am going to take my sons to Naue and use it to show them how to take care of the iwi. I will use it to teach them. That is victory. It is the kupuna having their way.”
Chapter Three
The Politics of Burial Protection

Independent Kanaka Maoli filmmaker Keoni Alvarez, who lives on Hawai`i Island, made a video about Naue. The film opens with Ka`iulani Edens-Huff draping shell leis around a spray-painted wooden stake marking a burial. She looks into the camera and says:

Archaeologists say that the last graves were put here in the 1900s so this has actively been used as a cemetery for six, seven hundred years that they know of. The stake has a number on them as well as a body identification tag which lists the body number and the depth it is at. So this is body number twenty-eight at a depth of fifty inches so this is one of the older burials. And as you can see they spared no expense for materials. Someday we will mark you better than with a piece of wood and some spray paint.¹

This quote dramatizes the CRM archaeological methods of marking site sacred to indigenous people with stakes as if they were unimportant features. Scientific Cultural Services (SCS) – the contract archaeological firm Brescia hired to carry out the Archaeological Inventory Survey (AIS) – inserted the stakes to mark the “burial sites.” The stakes not only mark the placement of burials but also code them as archaeological subjects. Edens-Huff’s remarks about the stakes in the video reveal the ideological and cultural divide that the stakes represent. Her point is that these are humans and should be treated with due respect. Louise Sausen, who is featured later in the video, makes Edens-Huff’s point much more forcefully. Sausen is featured confronting the contractor, Ted Burkhardt, in front of the site:
You tell me why can’t you walk away from this. Joe Brescia is trying to control our culture and in the way of controlling our culture, he is ruining our graveyards, cemetery just like in your culture. Burial sites is the same thing! Walk away from it, why you cannot walk away? You tell me, you tell kupuna why you cannot walk away. Where are you from? Shall I go and try to build on your kupuna? If this was haole kupuna here, I would still be here fighting. I would still be here, I don’t care what race. A grave is a grave and they should have our respect. Well guess what, I can’t walk away either. I’m sorry, I am here to protect. My job is from Ke Akua (God). I don’t get paid. When I fought for all these properties, thirteen years, nobody paid me. To light these torches, I’m the one pay for the oil so kupuna can be seen. But all of you is making money off of our lands. You are just stewards, I don’t care how much you pay for your lands. You are only here to caretake, not disturb, not disrupt, not ruin.

Sausen speaks from a spiritual perspective where colonial power inequities do not dictate interpersonal relations. In this domain, humans are all beholden to a set of responsibilities that are directed by, in this particular instance, an ethic of stewardship and respect for the dead. Thus, a burial ground is a burial ground. It does not matter when, where, or who is interred, “burial sites is the same thing.” Therein though lies the cultural fault line at the bottom of this conflict. Unmarked Native Hawaiian burial sites are denied legal protection given to other sites that are associated with death and burial. Kanaka Maoli with whom I spoke during my fieldwork repeatedly asked me, “How would they like it if I built a house on top of Punchbowl or Arlington National Cemetery?” They chose these two cemeteries because they recognized that military cemeteries are culturally constitutive of American national identity and given the utmost legal protection. They see military cemeteries as analogous because, for those Native Hawaiians involved, their connection to Naue has actively formed their
understanding of their identity as Kanaka Maoli. This was a deeply personal process and accordingly played out differently for each Kanaka involved. Sausen took on herself significant responsibility as she lived across the street from the house.

In an essay entitled, “Social Lives of the Dead,” religion scholar Greg Johnson looks to Hawaiian repatriation struggles to argue that Western law has, “in potent respects, stimulated ‘traditional’ cultural activities, even when these activities take the form of contestation and outright intracultural conflict.” It is similarly possible to read the vigil and the three Ku`e at Naue as a means to resist the discriminatory imposition of Western law. However, I would like to suggest in this chapter that it was a connection to the sacred at Naue, not Western law, which stimulated the cultural activities performed at the site. As Sausen told the contractor Burkhardt in the passage above, “I am here to protect. My job is from Ke Akua (God). I don’t get paid. When I fought for all these properties, thirteen years, nobody paid me. To light these torches, I’m the one pay for the oil so kupuna can be seen.” Sausen clearly states that her motivation is sacred duty, not political strategy. Puanani Rogers also told Ted Burkhardt during the June 3, 2008 Ku`e, “This is not a political thing, it’s a spiritual thing and you must know the consequences of what you do.” The sacred was more than a motivation for those protecting Naue, it was the critical component of the legal battle for both sides.

In American law, cemeteries are accorded legal protection due to their “sacred nature.” The decision in A.F. Hutchinson Land Co. v. Whitehead Bros., 127 Misc. 558, 217 N.Y.S. 413. (N.Y.Supp. 1926), a prominent case on the consideration of
cemeteries in property law, states, “Every humane instinct urges that the last resting place of the dead should be preserved from profanation, and the desecration of such place should make a strong appeal to the conscience of the court.”

Allowing the house to be built excluded Naue from the realm of the sacred and banished it to the realm of the profane in both a legal and practical sense. As the word “humane” in the Hutchinson decision indicates, to desecrate a burial site is to deny and disrespect the humanity of those interred.

The legal treatment of Naue reveals that the implicit disdain for pre-contact (pre-1778, pre-white, pre-Christian) Hawaiians and the belief of their lesser humanity, first justified through social evolutionism, not only continues through the present, but has been inscribed into the very laws that were supposed to protect the burial sites. In the law review article, “Treading on Hollowed Ground,” legal scholar Mary Clark affirms this point by stating that, “Hierarchies of race and ethnicity segregate people in death, with the land on which they died and/or were buried treated differently.”

Thus, the conflict over Naue reveals key political and ideological strategies employed by settlers and the settler colonial state, which ultimately coalesce into denying Kanaka Maoli equality within the law based on their lesser state of humanity. The efforts to protect Naue from desecration are then aimed at asserting the humanity of those interred and those practicing Kanaka Maoli culture. The efforts of Ka‘iulani Edens-Huff, Louise Sausen, Puanani Rogers and their many allies show some of the inner domain of Native Hawaiian culture and national
consciousness through their engagement with the settler colonial state of Hawai‘i as they worked to legitimize themselves and the burials at Naue.

This chapter seeks to read the conflict over Naue through the politics of the sacred. Section one probes the justifications for denying legal protection to Naue and their logics, such as the use of “pre-history,” to reveal the neatly delineated racial and cultural hierarchy in Hawai‘i. This section reveals and analyzes the evaluative frameworks and practices of CRM archaeology as applied to Naue. Section two examines Native Hawaiian understandings of the sacred as it relates to Naue and how the sacred was strategically employed in the political battle over the treatment of the burials. Through a close analysis of the vigil, the cultural dynamics of the third space become apparent. Section three locates and analyzes the settler colonial strategy to regulate the sacred through the use of “tradition” and presents a Native critique of the logics justifying the exclusionary understanding of “tradition.” It shows how the same eliminatory logic of authenticity that was applied to Native claims to Kaho`olawe were also at play in the Naue case. The chapter concludes by situating the eliminatory practices and logics utilized in the Naue case as means to maintain the present settler colonial order in Hawai‘i.

I. The Realm of Pre-History

Reading the logics by which Naue is excluded under modern legal structures from protections as a sacred place, offers an opportunity to see the ideological foundation upon which settler colonialism in Hawai‘i sits and continually justifies its
actions. The narratives that were once explicit during nineteenth and twentieth
colonialism in Hawai`i, have since become largely. Though, if they are not plainly
stated, they are still very prevalent through their embeddedness in practices and legal
logics. Thus to look at the justifications for allowing Brescia to build his house is an
opportunity to see the skeleton of settler colonial logic in Hawai`i and the practices
which give that logic meaning, laid bare.

Settler colonial eliminatory legal practices engage in both active and passive
forms of destruction. Scholar J. Kehaulani Kauanui writes that blood quantum in the
Hawaiian Homes Commission Act (HHCA), “is a manifestation of settler colonialism
that works to de-racinate—to pull out by the roots—and displace indigenous
peoples.” The exclusionary racial taxonomy imposed by the HHCA is an example
of an active form of legal elimination by legislative action. Legally legitimiz

desecration of Native Hawaiian burial sites is similarly a settler colonial phenomenon
that works to “de-racinate” Native Hawaiian heritage—to pull it out by the roots. In
Kanaka Maoli beliefs, to kanu (bury) na iwi o kupuna (the bones of the ancestors)
within the ground is to kanu (plant) them and endow that place with their mana
(spiritual energy). Desecrating na iwi o kupuna materially and symbolically attacks
the very roots of Native Hawaiian culture, identity, and personhood. Kanaka Maoli
efforts to protect the burials at Naue must be viewed within the context of preserving
not just the site but, the dignity and spiritual livelihood of their people.

The phenomenon of the post-overthrow 50th state allowing Native Hawaiian
burial grounds to be desecrated is in some ways more insidious and difficult to
address holistically because it has historically been a passive form of destruction.
That is, the state does not make an explicit policy to destroy Native burial grounds but they grant tacit approval. Before the burial council system, the state and the law refused to regulate the desecration of unmarked Native Hawaiian burial grounds for settler use. Patrick Wolfe shows that this practice of governmental inaction is fundamental to settler colonialism. In a Native American context, Wolfe writes, “the agency which reduced Indian peoples to this abjection was not some state instrumentality but irregular, greed-crazed invaders who had no intention of allowing the formalities of federal law to impede their access to the riches available in, under, and on Indian soil.”

In Hawaii, the burial council system was supposed to resolve this situation by inserting Native Hawaiian opinion through governmental regulation into the process for determining treatment of burial grounds. However, as Chapter One shows, the process has been overwhelmed by settler interests and at its worst serves as a mechanism for legally legitimizing burial desecration.

Before the burial council system, unmarked Native Hawaiian burial grounds were legally treated as profane and thus unfit for legal protection. Shortly after the burial council system was established, they were protected through law due to their historical importance not their sacredness. The precedent set by Naue amounts to an established exclusion from legal protection and recognition as sacred sites within the law. The trajectory of protection or lack thereof has a cyclical nature where the protections for the burial sites were overwhelmed by the same “greed-crazed invaders,” like Joseph Brescia, who sought to gain wealth or to own a piece of
paradise\textsuperscript{13} that necessitated the protections in the first place. While admittedly there are important differences between the recognition and treatment of unmarked burial grounds before and after the burial council, it must also be acknowledged that the practice of denying full legal protection for Native Hawaiian burial sites, along with the standard justifications, has been reconstituted within the burial council system. That is the reason that instead of finding means to actively protect Naue, District Court Judge Watanabe and SHPD Administrator Pua Aiu both fatalistically stated that, “the law does not go far enough.”\textsuperscript{14} The settler evaluative framework dictates that the threshold for protecting burial sites is much higher than the threshold for destroying them.

The failure of the state historic preservation laws to provide protection for Kanaka Maoli sacred sites was codified into the statutes when HRS 6E was amended in 2005. Comparing the original version of HRS 6E with the 2005 revision shows the law being relegated to protections for the historical but not the sacred. In contrast, HRS 711-1107, which regulates and defines desecration, enshrines certain sites as sacred because, while any kind of property can be vandalized, only sacred sites or objects can be desecrated. The statute states,

\begin{quote}
A person commits the offense of desecration if the person intentionally desecrates:
(a) Any public monument or structure; or,
(b) A place of worship or burial; or,
(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.
\end{quote}

"Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will
outrage the sensibilities of persons likely to observe or discover the defendant's action.\textsuperscript{15}

HRS 711-1107 does not define nor restrict the type of burial place within its text. However, HRS chapter 6E does not use the word desecration once. HRS 6E-11(c) states that, “It shall be unlawful for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or burial site during the course of land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval.”\textsuperscript{16} The stark difference between 6E-11 and 711-1107 is that HRS 6E contains language allowing the destruction of burial sites if proper approval is granted whereas 711-1107 contains no loopholes that would allow for the destruction of the sites it protects. This is the difference between sites legally recognized as sacred and those that are not. In the original version of HRS 6E, if a person was guilty of violating 6E-11, they could also be prosecuted under HRS 711-1107. This in essence recognized unmarked burial sites as semi-sacred sites. In 2005, the legislature amended HRS chapter 6E-11, the section on penalties, repealing any mention of HRS 711-1107, thereby excluding unmarked burial grounds from the legal protections granted to sacred sites.

Former Attorney General Mark Bennett solidified the categorical exclusion of unmarked Native Hawaiian burial grounds from the realm of sacred sites. As discussed in Chapter Two, Kauai Police Chief Darryl Perry halted construction at Naue on the basis that he believed it could be in violation of HRS 711-1107. Perry then sought Bennett’s opinion on the matter, which was, if the property owner has received the necessary permits for construction, then they cannot be charged with
desecration. This opinion sets the precedent that burial sites, cannot be legally desecrated if the actions taken are approved by the SHPD and the appropriate planning agencies.

In his testimony in Fifth District Court, Michael Dega further stated that, he would not define the site as a cemetery because for "pre-contact" burials, he has no standards by which he can say a burial ground is a cemetery. Dega’s testimony, given legal weight by his designation as an expert witness, relegates the burials at Naue to pre-history. Under his logic the fact that some of the burials were interred prior to Captain Cook’s arrival necessarily means that it cannot be a cemetery. This is not only Dega’s opinion, this is the common practice for the state of Hawaii. Nancy McMahon explained that “either it's a cemetery and department of health gets it or it’s a burial ground and we get it.” If a burial ground goes before the burial council, it is already bureaucratically prevented from being labeled and protected as a cemetery. Ninety-eight percent of the cases that go before the burial council are for Native Hawaiian remains. So unmarked Native Hawaiian burial grounds are legally defined as burial sites, not cemeteries. McMahon attempted to clarify the distinction in an article in the Kaua`i daily newspaper, The Garden Island, by saying, “there’s a distinct difference between a cemetery and a burial ground. A cemetery is a Western term, very modern, very clear, and easily distinguished, with holes and headstones. They’re saying a concentration of burials is a cemetery. In Hawaiian terms it was called a burial ground.” McMahon’s purposeful non-recognition of Naue as a cemetery is based on it failing to meet two intertwining thresholds, both of which are
portrayed as fact but are really fallacious narratives perpetrated to justify settler political domination.

The first is a temporal threshold, which Dega also invokes. McMahon and Dega both state that cemeteries are “modern,” and since Naue is “pre-historical” it categorically cannot be considered a cemetery. In fact, cemeteries are not modern, but rather “ancient.” The first mercantilist transaction where land was acquired for the specific purpose of interring bodies was recorded in the Book of Genesis, and the Roman Empire (27 B.C.–476 A.D.) introduced the legal concept of the cemetery. Thus cemeteries existed in law at least 800 years before people were interred at Naue. Pre-history flattens all human activity occurring before the temporal boundary into a singular “past.” Thus the fact that humans were interred at Naue before 1778 means that they are ineligible to be reconsidered under contemporary understandings. Under the ideology of pre-history, the burials are empty vessels devoid of value except as a source of archaeological knowledge. McMahon’s idea of the “modern” is based on the history of missionaries such as Hiram Bingham introducing cemeteries as replacements to Native burial practices. Thus “modern” becomes synonymous with Christian. Anything before Christianity thus cannot be protected under “modern” law.

The second is a cultural threshold. McMahon stated that cemeteries are “Western,” which means that burial grounds must be recognizable to settlers in order to qualify as a cemetery. Burial grounds with “holes and headstones” are recognizable to settlers whereas unmarked burial grounds are not, meaning that Native Hawaiian
burial grounds cannot be defined or protected as cemeteries. McMahon also stated that Native Hawaiians used the term “burial grounds” instead of “cemetery.” This statement is nonsensical and a gross misinterpretation of Native Hawaiian cultural understanding of burial grounds. The statement however reveals the vitality of the belief that Native Hawaiian culture is categorically incompatible with settler culture in Hawai`i. Using this notion of incompatibility as a means to exclude Native Hawaiian cultural heritage from legal protection is racist. This racist notion though has been consistently perpetrated and specifically applied in the Naue case for a purpose: to destroy Native claims to land in order to open it to settler use.

The state of Hawaii statutorily defines a cemetery as, “any property, or part interest therein, dedicated to and used or intended to be used for the permanent interment of human remains.” The critical factor in this definition is that a cemetery must be a specifically dedicated property. This inherently excludes all burial sites in use before 1848. Under American property law, the state would have to designate the property as a cemetery and do a “taking” using eminent domain. As McMahon repeatedly stated throughout the permitting process for Brescia’s house, “we have never done a taking for burials.” Indeed, such an action would contradict the entire trajectory of colonialism in Hawaii, which is the removal or destruction of Native Hawaiian burials in order to exploit the land for economic gain. This particular practice of American settler colonialism in Hawai`i is consistent across the contiguous United States as well.
The treatment of Naue by legal authorities fits firmly within the legal
treatment of burial grounds across the United States. After reviewing American case
law on the treatment of burial grounds and sites associated with death, Mary Clark
concludes that, “basic property law rules, such as adverse possession, dedication, and
eminent domain, have been modified and solicitously applied to sites of death and
burial associated with whites, this has not been the case with death and burial sites
principally associated with non-whites.” Specifically she notes that, “Rather than
eminent domain power being exercised to preserve Native American burial sites, as at
Gettysburg, Native American burial sites have themselves been condemned to make
way for other uses.” The prime legal example of the settler colonial repurposing of
Native American sacred sites is found in the U.S. Supreme Court case Lyng v.

In the mid-1970s, the U.S. Forest Service (USFS) proposed the construction
of a six mile paved road near Chimney Rock in the Chacoan Valley in California.
This small strip of road was intended to connect the two stretches of a 75-mile road
between the towns of Gasquet and Orleans. The intent on the part of the USFS was to
make the area and its $50 billion gross stumpage value more accessible to loggers.
The area in the Siskiyou Mountains where the road would be built had been used for
centuries by the Yurok, Karok, and Tolowa tribes as a burial ground and a sacred site
for religious ceremonies. The tribes sought an injunction against the building of the
road on the grounds that it violated the free exercise clause of the first amendment. In
a 5-3 decision, the U.S. Supreme Court ruled in favor of the USFS. Justice Sandra Day O’Connor wrote the opinion for the majority and justified the decision by stating,

The Constitution does not permit the government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.28

O’Connor forcefully articulates the settler colonial belief that property rights overwhelm Native rights to protect their sacred sites. Patrick Wolfe draws on the work of legal scholar Harvey D. Rosenthal to say that in “the US constitutional environment, ‘The American right to buy always superseded the Indian right not to sell.’”29 The majority opinion in the Lyng case acknowledged that the destruction of Native American sacred sites may render impossible the religious practices for those tribes associated with the sites., O’Connor concluded, nevertheless, that the Native Americans’ inability to practice their religions was merely an “incidental” consequence of the property owner’s exercise its rights and thus did not constitute a violation of the First Amendment.30 The supreme Court’s decision in Lyng effectively makes Native American sacred sites ineligible for legal protection to prevent their destruction, defining the practices associated with sacred Native sites as “nonconstitutional.”

In writing the dissenting opinion, Justice William Brennan offers a powerful critique of O’Connor’s logic by saying that Lyng:

Represents yet another stress point in the longstanding conflict between two disparate cultures—the dominant Western culture,
which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds lands sacred. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests...By defining respondents’ injury as ‘nonconstitutional,’ the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor.31

Brennan strikes at the heart of the majority’s opinion revealing the colonialist objectives served by its decision. He criticizes the idea that Native religious practice is somehow outside of the realm of constitutional protections and contextualizes this opinion within the larger struggle over land between the United States and Native Peoples. The similarities between Lyng and Naue are especially striking considering that between 1988, when Lyng was decided, and 2010, public consciousness supposedly grew with the passage of Act 301 (1990) establishing the burial council system in Hawai`i and the Native American Graves Protection and Repatriation Act (NAGPRA) (1990), to recognize the need to protect and preserve Native burial sites and sacred objects in culturally appropriate ways. The nearly identical logics employed in both cases though show the deeply entrenched ideology of settler racial and cultural superiority that drove the outcomes while paradoxically disavowing any racial bias. Legal scholar Charles Lawrence III seeks to explain such a phenomenon through his analysis of how the American judicial system fails to account for unconscious racism.32

Lawrence offers two explanations for the continuation of racism despite its public rejection. First he draws on Freudian theory to state that, “When an individual
experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.”

Second he looks to cognitive psychology, which posits that, culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world.

These theories powerfully elucidate the myriad ways that settler societies reproduce ideologies of racial and cultural superiority, constantly inculcating them in both society and law as normal. Racially motivated practices such as desecrating Native Hawaiian burial grounds also become normalized through this same process. Using these theories with Naue, we can unlock the paradoxes in the burial council system where mitigation measures that Kanaka Maoli claim are forms of desecration become accepted means of preservation.

The burial council is the legal space constructed in the system of state law to protect unmarked burial grounds from wanton desecration. This legal space, while at first open, has over the now twenty years of its existence become increasingly defined and regulated both by empirical decisions driven by the unconscious reproduction of settler ideology. This is the danger inherent in such a system, writes Intellectual Property scholar, Michael Brown. Brown explains, “From a Foucauldian perspective, as soon as indigenous heritage is folded into comprehensive regimes of protection it becomes another regulated sphere of activity, something to be managed, optimized, and defined...” The SHPD and the burial council system naturally drew on logics
and practices from the settler society around it as it developed its own logics and practices. Unconscious racism is an active force in the burial council system. Naue provides many examples of the active destruction wrought by unconsciously racist practices. The Archaeological Inventory Survey (AIS) however deserves special consideration.

The AIS is necessary to prove the existence of burials. A critical aspect of Kanaka Maoli belief is that exposing burials is a form of desecration but HRS 6E requires burials to be physically exposed and documented for the burial council to have an opportunity to protect them. The use of archaeology as a means of preservation is highly problematic, for as archaeologist Mark Lehner states in archaeology, “you study it, you kill it.” Naue bears this out in vivid detail as witnessed by reviewing the Archaeological Inventory Survey from the testing performed at Naue.

The following is taken from the first draft of the Archaeological Inventory Survey (AIS) prepared by Michael Dega and Rachel Hoerman in January 2008 based on testing conducted by Dega and Scientific Consultant Services (SCS) inc. for Joseph Brescia.

Burial 11 was unearthed in June 2007. The person buried was 3-12 years old when they died. Some of the remains were “disturbed,” by the backhoe used to dig the testing trench. The AIS does not specify the nature of the disturbance or the damage done to the remains. This is a picture taken of the covered remains taken during the test phase.
The child was buried with, “Conus (puka) [sic] and Niihau shell beads…A small sample of the associated artifacts were removed from the burial and photographed for artifact finding purposes.”
Burial 8 was also unearthed in June 2007. The remains are from a child who was 0-12 years old when they died. The AIS states that,

Prior to disturbance from the project backhoe, sub-cranial bones including a scapula, vertebra, ribs, long bones, as well as teeth and a cranium were observed. Most of the burial was disturbed by the project backhoe and erosion…All human remains were collected, placed in a brown paper bag and reburied in excavation unit ST-9 until a final decision regarding the curation of the remains is reached by the KNIBC.\textsuperscript{39}

Burial 7 (0-12 years old when interred), also lies under the footprint and was “placed in a paper bag in situ [sic] pending a KNIBC decision.”\textsuperscript{40} These are just three of the 30 burials uncovered by the archaeological testing. If these burials are thought of as human, then this testing is a sickening inhumane act. However, these burials were all classified as “pre-historical” in the AIS report justifying their treatment. Dega and his team looked at Burial 11 as a specimen, not an infant, uncovered the body, and took some of the shells that were buried with the child. The remains of the child labeled Burial 8 were seen and then they were still “disturbed” by the backhoe. After they were dug up, both Burial 7 and Burial 8 were placed in a “brown paper bag.” The reason the remains were put in a “brown paper bag” is unexplained in the AIS report but we can infer that they were preparing the burial to be moved since Burial 8 lay under the footprint of the house.

This is the raw uncut truth of how unconscious racism functions in a settler colonial society. It finds methods of dehumanizing Natives in order to take their land while coding settlers as morally advanced. The archaeologists put leaves over the exposed parts of the burial in the photo because Kanaka Maoli consider taking photos
of exposed burials to be desecration. The photo is then culturally sensitive at the same time that it desacralizes the remains by recoding them through archaeological signifiers. In this context, protection becomes a legal, cultural, and psychological means to enact violence. Mary Clark concludes her analysis by writing, “non-whites have been largely barred from the realm of the sacred, and their suffering has been largely excluded from the commons of public experience and consciousness through the less, or un-, solicitous treatment of their death and burial sites, thereby undermining their ultimate humanity through relegation to the world of the profane.”41 What Naue reveals is that the early nineteenth century missionary attitude towards Native burials has not been replaced by understanding but rather unconsciously reinscribed in cultural logic and law.

II. The Sacredness of Naue

The first Monday of every month Puanani Rogers hosts a radio show called “Living Sovereign with Auntie Puanani Rogers” on KKCR, Kauai’s community radio station. She asked me to be a guest on her April 5, 2010 show with the idea that we would discuss my research project on Naue. Israel Kamakawiwo’ole’s song “Living in a Sovereign Land,” played over the speakers in the studio.

Our Children Deserve To Know
What Went Down A Hundred Years Ago
You Can Pay The Man, You Can Take The Land
But You Can't Take The Truth Away! E Ola
Living In A Sovereign Land

E Ola, Living In A Sovereign Land...
E Ola, Living In A Sovereign Land42
Edens-Huff sat behind the control panel. On the other side of the panel, Rogers straightened her back and leaned into the microphone. Edens-Huff did the station identification, and asked, “Alright, Auntie Nani, what do you have for our show today?” I include here an extensive transcript from the program to present Roger’s story of Naue in sum:

Well, I want to ask our listeners what does it mean to be living sovereign in a sovereign land, according to our wonderful song by Braddah [brother] Iz? Let me give you an example, we are living sovereign when we know that we have a right to question any laws of the federal, state, and county governments. Through our own experiences we have learned that to get anything done, we cannot wait or depend on any government agency to do their duty to address any problems and concerns. They work too slow and…they get it all wrong.

I hope most of our listeners know about the gross and intentional desecration of more than 30 burials at Naue, Wainiha Ahupua’ a. Where Joseph Brescia, a rich businessman from California and exploiter of Hawai’i real estate is constructing a house on burials and in an ancient graveyard. Long story short, we tried to stop the construction, and we did, twice. We had island-wide support, we made the news, newspapers, TV, pleaded to the planning commissioner to revoke the permits, went before the burial council with our concerns and asking them for our help. We even took our chances in the fake government’s court with their fake government laws.

Naue is famous for its hala grove foretold in ancient oli [chant] and mele. The area is a point of land that protrudes into the ocean. Point is the English word for lae and the one we are talking about is called Lae O Ka’anohi. It is also known to be a Leina, where spirits go leap into the Lipolipo [great depths of the ocean]. The burials date back to the 12th century, over 800 years old. That fact alone should tell us that it is a very sacred cultural and historical site. And common sense will tell that it should not be desecrated.
As Kanaka Maoli we acknowledge the significance of Naue and with that knowledge comes kuleana [responsibility]. Our kupuna told us that the bones and burial places are to be respected and kept sanctified. So knowing full well our kuleana to protect na iwi kupuna at Naue, we went into battle to do whatever we could to stop Joseph Brescia’s house from being built. So that’s my long story short.43

By telling the story of the efforts to stop Brescia’s house from being built, Rogers is powerfully framing the issue around the division of internal truth and external governance. This division is hardly unique but it takes on a critical importance in colonial situations. The external is the domain of settler colonial power, where settler colonial interests define truth. The outer domain includes the racist ideologies, political schemes, and Western epistemological hegemony that typify the settler colonial establishment in Hawai`i.

Since the 1960s, Kanaka Maoli have undertaken a great labor to re-assert traditional cultural epistemologies and practices within the public sphere in order to re-claim control over Kanaka Maoli ontology within societal discourse.44 Thus Rogers stating on the radio that, “common sense will tell that [the graveyard at Naue] should not be desecrated,” is in itself a significant event. Having grown up in the Territory of Hawaii, worked in the tourism industry, and been an independence activist for nearly 30 years, Rogers is well aware of the immense sacrifices that she and others have made so that she can have a platform like “Living Sovereign” from which to speak. But then this is precisely what Rogers means by living sovereign. When she says that, “we are living sovereign when we know that we have a right to question any laws of the federal, state, and county governments,” she means
something deeper than just the right to protest or publicly criticize the laws. She means that living sovereign in Hawai`i means challenging the truth that the laws impose with deeper internal truth.

Rogers has only one hour of air time each month yet she allows “Living in a Sovereign Land” to play in its entirety, five minutes, at the beginning of each show. That is a significant time commitment but the message in the song is so central to the message of the show that she insists on playing it so that listeners can hear it. The song refers specifically to the wrong committed by the overthrow of the Kingdom of Hawai`i in 1893. The chorus of the song states, “You Can Pay The Man, You Can Take The Land/But You Can't Take The Truth Away!” In these two lines, Kamakawiwo`ole provides a critical division, the same as the one Rogers provided, between the everyday realities of colonial rule and the internal truth that the basis for that rule is false. For Rogers, living sovereign is embodying this internal truth as the spiritual basis for her mission to continually expose and fight the violence, injustice, and interested truths imposed by American colonial rule.

Postcolonial studies scholar Partha Chatterjee draws a similar distinction between the inner and outer domains in his analysis of the means as well as the trajectory of Indian resistance to British colonial rule. In The Nation and Its Fragments, he writes:

Anticolonial nationalism creates its own domain of sovereignty within colonial society well before it beings its political battle with the imperial power. It does this by dividing the world of social institutions and practices into two domains—the material and the spiritual. The material domain of the “outside,” of the economy and of state-craft, of science and technology…The
spiritual, on the other hand, is an “inner” domain bearing the “essential” marks of cultural identity…nationalism declares the domain of the spiritual its sovereign territory and refuses to allow the colonial power to intervene in that domain.\textsuperscript{47}

Chatterjee theorizes that creating a spiritual/inner domain sovereign from colonial influence preceded and vitally informed the Indian anti-colonial nationalist movement to gain independence from Britain.

In \textit{Aloha Betrayed}, political scientist Noenoe Silva uses Chatterjee’s theory as a core part of her methodology but, in the case of Hawai`i, disputes the notion that the inner domain was created, it was the anti-colonial intervention that was new. Her history of Kanaka Maoli resistance to American colonialism in nineteenth and twentieth centuries shows that Hawaiian language, “Hula (dance), mo’olelo (history, legend, story), and especially genealogy,” were used to preserve and carefully safeguard the inner domain of cultural identity, “so that Kanaka Maoli of today have a spiritual/cultural identity of their own on which to base their new anticolonial movement.”\textsuperscript{48} It is this sovereign spiritual domain that Rogers delineates and speaks from when she says, “As Kanaka Maoli we acknowledge the significance of Naue and with that knowledge comes kuleana. Our kupuna (ancestors) told us that the bones and burial places are to be respected and kept sanctified. So knowing full well our kuleana to protect na iwi kupuna at Naue, we went into battle.”\textsuperscript{49} It is a rich understanding of the spiritual domain that informs Kanaka Maoli engagement with the material domain of settler colonial statecraft. Chatterjee later points out, however, that in order to contest their material subjugation, Indian nationalists had to walk the delicate line of becoming well versed in the colonial “techniques of organizing
material life,” while still strictly maintaining the boundary between the inner and outer domains.⁵⁰

Resonant with Chatterjee’s theory and Silva’s elaboration in another Hawaiian context, Kanaka Maoli knew within themselves, that Naue was sacred and used this truth to fight the treatment of it as profane in the material domain of government, bureaucracy and law. They were successful in stopping construction twice and raising Naue as a statewide issue through the media. Translating what she said was an old Hawaiian fishing proverb, Rogers described their strategy for engaging in the material domain by saying, “every net has holes and it only takes one small hole for the fish to escape.”⁵¹ As this metaphoric proverb suggests, Kanaka Maoli employed a multivalent strategy to protect Naue that included engaging with the settler colonial establishment through the outer domain of law, but also through public expression of the spiritual domain. While recognizing the boundary between the inner/spiritual and outer/material domains helps elucidate the meanings behind Kanaka Maoli engagement with the law, it is obviously insufficient to understand the Kanaka Maoli spiritual domain itself.

By looking closely at the vigil at Naue, we can gain some insight into what it means that Naue is sacred from a Kanaka Maoli perspective. Indeed, na iwi – the bones – and the sites where they are buried are not just an abstract spiritual concept, but the very corpus of what ‘constitutes Kanaka Maoli.’⁵² In the piece, “Ola Na Iwi: The Bones Live” excerpted in the previous chapter, Hale Mawae writes eloquently of the incalculable depth at which na iwi reside in the Kanaka Maoli spiritual domain:
In caring for my ancestors, I know that it is within the bones of our people, na ʻoʻiwi o Ko Hawaiʻi Pae ʻAina, that our ancestors live. Kuʻu ewe, kuʻu piko, kuʻu iwi, kuʻu koko. My umbilical cord, my navel, my bones, my blood. All the elements of our body that constitute us as kanaka maoli. All cherished pieces of ourselves that connect us to that iwi. Ola na iwi. The bones live.

Here within the iwi is the life of our people. Our deep spiritual resonance and connection to that source with our iwi. That which is most sacred. Our kupuna, who we serve and protect in the highest and at all cost.

That is our kuleana. The bones must live. They must be cherished and held dearly as our brothers and sisters; because as the ʻolelo noʻeau states clearly, they have life, they gave life, the bones live. Generations upon generations, surviving on ʻaina which thrived and was forever giving.

Our kupuna never imagined that our ʻaina would become such a distant place from their descendants. Their lives, which paved the way for us to stumble upon this bare Earth to seal the survival of a hundred generations to follow in our place. E ola mau e na pokiʻi! The ohiʻa lehua tree falls and another bud rises in its place. A resurrection of life. Na ʻoʻiwi o Hawaiʻi!

That is our kuleana.

To live. To breathe. Ha. To give life.53
Mawae powerfully brings forth the vital and dynamic relationship between iwi and contemporary Kanaka Maoli. This vital connection is most succinctly expressed as, “the bones live.

However the meaning of that statement has no true equivalent in Western life (or death). The closest analogue to the interaction with the deceased in Western thought is a ghost. However as Mawae’s passage indicates, the idea of a ghost as a person’s soul returning to the world of the living comes nowhere close to encompassing the range or constancy of interaction that Kanaka Maoli have with their deceased kupuna. It is common for Kanaka Maoli to pray to their ancestors many times throughout the day and good or bad luck is often attributed to actions by kupuna or ke akua. As explained in the introduction, the spirit remains connected to the place where its bones are interred. ‘The bones live,’ refers to the reality that, for
good or bad, the living can affect the deceased ancestor while, at the same time, the
dead ancestor can similarly affect the living. During the vigil at Naue, Jim Huff
explained how the kupuna were an active presence. Edens-Huff took a photo at Naue
which she titled, “Kupuna on film at night” (Fig. 2). The kupuna are visible as the
light spots in the photo.58 For Kanaka Maoli, the iwi are the material embodiment of
forces that actively shape their everyday experience, identities and worldview. As
Mawae said, “Here within the iwi is the life of our people.”59 Rogers asked her
listeners, “what does it mean to be living sovereign in a sovereign land?”60 The
repetition of the word sovereign was intentional because the ‘aina (land) has its own
spiritual domain which is symbiotically connected to and in constant interaction with
Kanaka Maoli. This relationship was reflected by the treatment of the site by those
who participated in the vigil.

For unmarked burial grounds, such as Naue, leaving the individual burials
unmarked is generally considered culturally appropriate as part of preservation. Yet,
in Sausen’s comments to the contractor Ted Burkhardt at the beginning of this
chapter, she said, “To light these torches, I’m the one pay for the oil so kupuna can be
seen.”61 As noted above, Kanaka Maoli have a particular way of way of seeing
kupuna that is not accessible to everyone, so in stating her motivation to mark the
burials with tiki torches, she is explaining that she wants all people to be able to see,
to recognize that this is a sacred burial ground.
This image shows what Naue looked like during the vigil. To the back of the photographer, on the gate at the entrance to the site, another sign hung that said:

These markers are means of making manifest – in the material domain – the spiritual domains of Kanaka Maoli and of Naue. The sign marking it as a cemetery and the marking of each burial with a torch and creating a boundary around them is modeled after a Western style cemetery. To be sure, this was not a Western cemetery but rather
a representation of a cemetery recognizable to those who view Christian cemeteries as
the norm. Edens-Huff, Sausen and the others appropriated and reinterpreted the
concept of the cemetery as an analogue to provide, in the material domain, what they
knew was right in the spiritual domain. Chatterjee states that for Indian nationalism,
“What was necessary was to cultivate the material techniques of modern Western
civilization while retaining and strengthening the distinctive spiritual essence of the
national culture.” Here we can literally see creative engagement with Western
material culture as a means of reclaiming Native place. The sign in the foreground of
Figure 3 reads:

Kapu! Forbidden!
-No Entry-
This property, indeed, this ENTIRE subdivision, is
under the jurisdiction of `Ohana `o M. Kekaunohi,
Kanaka Maoli lineal descendants of Ha`ena, Halele`a,
Koe Nae `o Kamawaelualani (Taua`i) and is a sacred
burial ground of women and children.

Kanaka Maoli entry permitted; Protocol, please! Non-
Kanaka entrance forbidden.

Perfect title #5 – Royal Patent #7194 LCA #9860 11216:5

This sign, which was written by Edens-Huff, marks Naue all at once as kapu (sacred),
under Kanaka Maoli cultural and legal jurisdiction, and as a historically rooted place.
Edens-Huff (who traces her genealogy to Mikahela Kekaunohi) filed a title lien on
the property in court based on the title claim listed on the sign. However, as noted in
Chapter Two, District Court Judge Watanabe threw the claim out when she found
those that Brescia sued for trespassing in default. Also as noted earlier, whenever
those who participated in the vigil entered the site, they would first pule (pray) to ask
the kupuna for permission to enter. Of particular note on the sign is the phrase “Koe Nae ʻo Kamawaelualani.” Kamawaelualani is the mythological name for Kauaʻi, which Edens-Huff re-wrote using the allographic orthography as “Tauaʻi.” Samuel Kamakau states that the name Kamawaelualani, which he translates as, “the middle of the circle of the sky,” predates Kauaʻi. “Koe Nae” is the beginning of the phrase “Koe nae na kuleana o na kanaka,” that was written at the top of each patent granted as part of the 1848 Mahele. The phrase translates to, “reserving however the rights of the people,” with “koe” meaning, “reserving” and “nae” meaning “however.” Thus the sign states that the rights to jurisdiction over Naue have been continuously held and reserved and passed down genealogically since the first inhabitants on the island. This is an incredibly powerful evocation of the Native Hawaiian spiritual domain in which place, ancestry, and the spirit are intricately bound together, carefully crafted to battle settler colonial power in the material domain. Unlike the settler temporal configuration in which anything pre-1778 constitutes pre-history and is unsubstantial in the present, Native Hawaiians trace meaningful history through genealogy to the beginning of time. This is the temporal landscape from which the sovereign Native Hawaiian spiritual domain derives its force and authority. Naue is especially significant because it serves as a portal, as a leina, where the deceased pass from this world into the spirit realm and where the living connect with the vital essence of their culture.

The Kanaka Maoli spiritual domain remains continuous while its expression changes with the times. As Mawae says in “Ola na Iwi:”
Our kupuna never imagined that our ‘aina would become such a distant place from their descendants. Their lives, which paved the way for us to stumble upon this bare Earth to seal the survival of a hundred generations to follow in our place. E ola mau e na pokiʻi! The ohīʻa lehua tree falls and another bud rises in its place.⁷⁰

Naue is culturally important and its threatened destruction necessitated Kanaka Maoli to politically invoke their culture within the material domain of the colonizer in order to protect it.

III. Exclusionary Cultural Logics

Phyllis “Coochie” Cayan, a Native Hawaiian who is the History and Culture Branch Chief at the SHPD and who also responsible for overseeing all five Island Burial Councils for the SHPD, submitted expert testimony on behalf of SHPD Administrator Pua Aiu and DLNR chairperson Laura Thielen in the third-party lawsuit, Chandler v. Brescia, Aiu, et al. (2010). In the disclosure, Cayan portrayed herself as an authority in traditional burial practices and, from this position, directly refuted contentions about the nature of Naue’s sacredness and what constituted appropriate protection made by Jeffrey Chandler and Puanani Rogers in the lawsuit. Cayan made two particularly incendiary claims which were,

30. It is presumptuous to absolutely state that the concrete layers or lids or any protective layer is a spiritual barrier that will stop the bones from completing its spiritual journey. The practice of burial and reburial is to protect the bones from any enemy who may want to use its “mana.” (“Mana” being the life force and what made that individual strong or powerful in his physical life.) [sic]

31. The request by recognized descendants for visitation or access to burial sites is a product of assimilation of traditional native Hawaiian practices with modern western culture and
beliefs. Under the true traditional native Hawaiian protocol, care of one’s kupuna iwi [sic] would require that only the caretaker would know the location of the burial and would be the only one to malama the burial until he [sic] passes that knowledge on. The notion of “visitation” is a modern practice that sometimes verges on being a cultural show. 71

Cayan uses a discourse of inauthenticity to deny Kanaka Maoli legal claims. She forms a narrow construction of Native burial practices wherein there is little room for reinterpretation to make sense of them within a settler colonial context. The charge of inauthenticity against traditional practices is always eliminatory, traditions only have power insofar as they are seen as authentic. Within settler colonial society however, these charges carry an even greater weight for as they seek to eliminate Native traditional and customary rights, they simultaneously justify and entrench settler power. In this case that relationship is explicit as Cayan’s negative analysis of the cultural claims of those who sought to protect Naue was stated with the direct intention of supporting the state’s action in allowing Brescia to build his house. As Cayan stated elsewhere in the testimony, “It is my opinion and conclusion that BTP-16 provides appropriate treatment of the burials at the site given the following factual constraints…(c) the accommodation of the landowner’s right to develop.” 72

I obtained a copy of Cayan’s entire expert testimony from Huff and gave it to Rogers, who had not read it before. Rogers responded to Cayan’s contentions while reading them. The following is what Rogers said in response to Cayan’s two quoted claims.

(In response to #30) We don’t protect the iwi because the enemy wants to come to take the mana. You can’t take the mana like that. You have to know how. It has to be done using
specific cultural protocol. We protected the iwi at Naue because we had to, because they should not be disturbed. Because they were laid at rest. She is so totally off. She was on the burial council, I thought she would know.

(In response to #31) I like cry. The whole point of us doing it is to show that we not assimilated to Western thinking. It is like everything we did doesn’t matter to her. She better be careful, she will get spiritual visitations. She better be able to handle the spiritual repercussions. I am Hawaiian and she is Hawaiian and I don’t believe what she believes. I am sorry that she don’t think the way we do. I am surprised she doesn’t. (Rogers paused) They are pitting Hawaiian against Hawaiian.  

In her response, Rogers shows just how tenuous claims of inauthenticity are. Rogers responds to Cayan’s claims by refuting her exclusionary framework for evaluating culture. This comes through most clearly around Cayan’s claim of assimilation. Rogers passionately stated that the Kanaka Maoli protecting Naue from disturbance saw the action as opposing Western values of commoditization and establishing authority through scientific analysis. Naue was made into a present vision of a Native place. Chatterjee explains that the division between the spiritual inner domain and the material outer domain is recognized in the physical world as a division between home and the world.  

Chatterjee states that such a division is necessary because within the spiritual domain: “nationalism launches its most significant project: to fashion a “modern” national culture that is nevertheless not Western. If the nation is an imagined community, then this is where it is brought into being.” Through the vigil and the Ku’ė, Naue was made into a physical location of the spiritual inner domain. For the Kanaka Maoli involved, the time and space devoted to protecting Naue were experiences of wholeness. Cayan’s claims of
inauthenticity based on adopted practices is imposing an external binary that intentionally limits and excludes.

For the purposes of this analysis, it does not matter whether Cayan’s or Rogers’ beliefs are more traditional than the other. They are both personal beliefs and as in any culture, religion, or spiritual practice there are constant disagreements over what constitutes correct belief and protocol. For example, Rogers, Sausen, and Edens-Huff had disagreements during the vigil over the appropriate protocol and ritual for entering and honoring the kupuna at Naue. These disagreements would, at times, become arguments but this was all part of the process of coming to a consensus over appropriate practice, which they did. Later in our discussion of the expert testimony Rogers looked through Cayan’s resume and said, “She is one the who is assimilated. She works for the military, she works for the state. She is not thinking like a Hawaiian. She is totally unfeeling about our cultural practices.” This last comment highlights that the lived reality of culture cannot be defined through intellectual theorizing. As stated in the introduction, Rogers intuitively knows something is authentic or appropriate – she ‘follows her na`au.’. Documented knowledge inevitably influences intuitive senses, but the very nature of Native cultural practice defies singular definition. Settler culture liberally appropriates aspects and practices from Native culture such as the house blessing ceremony. Yet, Native culture is not allowed the same freedom and instead is exclusionarily defined because traditional and customary culture is used to support legal challenges to settler development.
This is why working from the third space is required in settler colonial situations in order to practice culture and in this specific case to preserve Naue. In August 2010, Hanalei Fergerstrom submitted a petition to intervene in *Chandler v. Brescia, Aiu, et al.* Judge Watanabe summarily rejected the petition but is valuable because it perfectly highlights the reasons that Watanabe’s decision in the case was a miscarriage of justice. The petition articulates the issue of burial protection in terms of cultural appropriateness instead of institutional precedent or authenticity:

CULTURAL APPROPRIATENESS is the problem that was supposed to be addressed through the consultation process that this court ordered. This is the greatest concern of the Religious and Cultural practitioners. It is still the subject most avoided by the State Historic Preservation division. It is not for the State Historic Preservation Division to solely or arbitrationally make those decisions as they lack the expertise. Without considerable consultation with the Hawaiian Community, especially in consideration of the Historic Value, Religious and Cultural values and the concentration of IWI KUPUNA, any burial treatment plan will certainly fail.\(^78\)

The concept of cultural appropriateness situates contemporary Kanaka Maoli as unparalleled experts in their own culture, and moreover they have the sole authority to define it. Thus as Fergerstrom states, any plan that fails to consult with Kanaka Maoli will certainly fail because the SHPD, a state agency operates by an entirely different set of logics in regards to burial protection then individuals from the Hawaiian community. This petition was written for Naue but it speaks to the entire state structure of burial preservation in Hawai`i.
IV. Conclusion

This chapter examined the ways that archaeological knowledge is used to frame Native Hawaiian burial sites as prehistoric as a means to justify their removal. Naue, however, presents an example of how the Kanaka Maoli are using the third space to ‘talk back’ and oppose dehumanizing archaeological knowledge constructions, challenges to their cultural authenticity and the supposed supremacy of property rights. In talking back, Native Hawaiians rejected their categorization as either prehistoric or historic. Though Dega and McMahon do not use this rhetoric, prehistoric is a euphemism for savage. As Rogers said, “I am a modern Hawaiian.” Rogers enunciates her position from the third space, from which she opposes settler constructions of burials and demands their recognition within the law. She speaks for the iwi kupuna, thus assuming their position as an original inhabitant, to demand that their rights be upheld to the land in which they are interred.

The struggle over representing Naue, and thus the prehistoric past, bears a notable similarity to the “invention of tradition” debates of the early 1990s in that representations from non-Natives almost invariably harmed Native claims. Reading Dega and McMahon’s arguments brings back Haunani Kay Trask’s statement from “Natives and Anthropologists: The Colonial Struggle:” “In a colonial world, the work of anthropologists and other Western-trained "experts" is used to disparage and exploit Natives. What Linnekin or Keesing or any other anthropologist writes about Hawaiians has more potential power than what Hawaiians write about themselves.” I am not comparing Linnekin and Keesing to Dega and McMahon but rather pointing
out that regardless of academic expertise, intentions, or forum of discussion, if a haole “expert” discusses Native culture, the ideas expressed in that discussion are liable to be used to oppose Kanaka Maoli claims. This only further highlights the importance of Fergerstrom’s petition calling for the recognition of Kanaka Maoli’s rightful structural position as unparalleled experts in Kanaka Maoli culture. This is not to preclude scholarship, but as Mary Kawena Pukui says of beliefs regarding the spirits of the dead, “Some things are `e`epa. Unexplainable,” and the care of the dead should be left to the experts.
Conclusion

The August sun beat down on Kawaihae, on Hawai`i Island. Puanani Rogers and I stopped to take a drink of water. Looking up the hill, I could see the spears move up and down in unison as na koa (the warriors) from ka i mua (the men’s house) prepared for their mock battle. Pu`ukhohola Heiau sat proudly at the top of the hill, overlooking the ocean. Rogers and I continued walking for some time to find the Hokule`a, a Polynesian double-hulled sailing vessel built in 1972 that helped revitalize traditional Hawaiian voyaging practices and became a symbol of the Hawaiian renaissance.¹

When we arrived at the dock, Rogers was warmly greeted by the captain of the Hokule`a, Attwood Makanani. Rogers introduced me as her friend doing research on Naue. Makanani invited us onboard and told one of the three crewmembers to prepare some `awa. Makanani, Rogers, and I walked to the stern where a man was kneeling over a large wooden bowl. He poured water into the bowl from a canteen and submerged dried `awa roots wrapped in a cheesecloth. He took out a couple of young coconuts from a storage space, cracked them open with a large stick and poured the coconut water into the bowl. While the `awa soaked, Makanani spoke with Randy Wichman, the director of the Kaua`i Historical Society and former Hokule`a crewmember, about appropriate protocol for offering a special pohaku (stone) at the following day’s ceremony. As Wichman would later tell me, “Just getting my marching orders.”² When the `awa was ready, the man dipped half of the coconut
shell into the bowl, filling it. A different crew member then took the coconut filled with `awa and kneeled before Rogers, holding the coconut above his head. Rogers took it from him, said a prayer in Hawaiian and drank. This process was repeated for each person on the boat, Makanani drank next, followed by Wichman, the third crewmember, the man serving, then me. The man who prepared the `awa drank last. Soon, the crew had to prepare the Hokule`a to be buoyed. I disembarked the Hokule`a and Makanani helped Rogers to the dock.

On the dock, Makanani looked at me and said, “What you gotta understand is that in the 70s we had the Hokule`a and we dealt with our connection with the sea. Then we had Kaho`olaw and we reconnected to the land. With Honokahua we took...
care of the iwi kupuna. We moved into political rights for Hawaiian culture. That was part of an education process where Hawaiians learned what kuleana they could manage.” I asked, “So what is next?” He said, “Now we are evaluating lahui (nation).”

The comments show that Makanani understands Kanaka Maoli as a people with a continuous history that is renewed through connection to the sea, the land, and the ancestors. Renewing these connection is the process of Native Hawaiian decolonization. It does not start with opposing American colonial rule, as Trask writes, “a choice has been made for things Native over things non-Native. Politically, the choice is one of decolonization.” The opposition to American rule becomes necessary as Kanaka Maoli connect with values and grow into traditional lifeways.

Traditional in this sense is what Kanaka Maoli make of it. Earlier in the summer I asked Wilma Holi how she determined cultural authenticity. She smiled wryly and said, “Hawaiians are resourceful.” Holi’s response is an intentional unwillingness to define tradition and culture. Holi was involved with the Protect Kaho‘olawe Ohana (PKO) and participated in the occupation of Honokahua and experienced firsthand the events that Makanani referred to as foundations of an emerging lahui. She also talks about Kaho‘olawe and Honokahua as foundational events but in the mo‘olelo (story, history) of the Honokahua occupation, she emphasized the rushed and slightly chaotic process of sending out the kahea (call) to occupy the site, organizing those that came from across the islands, and the inner
conflicts within the group during the occupation. These details though are left out of the common retelling of what happened at Honokahua not to hide them but because they aren’t important. Honokahua is significant as a symbol of decolonization, of Native Hawaiians upholding their kuleana in the face of settler colonial destruction. Honokahua was about what it means to be a modern Kanaka Maoli. Honokahua led to the establishment of the burial council system and thus legal recognition for unmarked Kanaka Maoli burial sites. Here we can see the outlines of the third space, where cultural practice is constituted as extending beyond the boundaries of the settler state into a pre-colonial past while demanding legal recognition from the settler state itself. This is how Honokahua can still be regarded as a step towards lahui while simultaneously working within the state.

Through the binary of prehistory, settler colonialism, constructs contemporary Kanaka Maoli as categorically different than pre-contact Kanaka Maoli rendering pre-contact Native sites as vestiges of a dead culture and modern Hawaiians as inauthentic. Kanaka Maoli articulate themselves as a people with a continuous history which maintains their politically sovereign status. However, as modern subjects they exploit the ambivalence of the settler state to demand legal rights and protections. They thus occupy the third space. Protecting burial sites has become one of the foremost fronts of cultural decolonization. As Halealoha Ayau states, “Maintaining the kuleana to care for the iwi and moepū (grave goods) is a profound expression of our cultural identity as Kanaka ‘Ōiwi (lit. people of the bone, fig. Native Hawaiians)” [Emphasis in Original]. Ayau states that protecting the iwi is a
fundamental Native Hawaiian practice wherein colonial binaries have no power. The kuleana of malama na iwi kupuna (the duty to care for the bones of the ancestors) is metaphorically synonymous with the idea of a pu`uhonua (city of refuge) because protecting the bones is a sovereign spiritual domain where identity and culture are whole and violent colonial fractures are healed. “Native place” signifies these kinds of decolonized spaces where Kanaka Maoli forge their identity and culture amid the threat of settler colonial violence. At Naue, Kanaka Maoli asserted that Natives have a right to place by virtue of being there first. This position was simultaneously routed through the state to demand legal protections while it denied the state’s legitimacy.

Naue also exposes the reality that eighteenth and nineteenth century colonial ideologies are still deeply laden in the evaluative frames of the burial protection system in the state of Hawai`i. Naue was constructed through spatial and frameworks densely imposed in all aspects of settler life in Hawai`i. Theses everyday forms of settler colonial structural violence are so prevalent, they seem almost banal. Yet in their commonplaceness, they conceal a radically fragile foundation upon which the settler colonial lifestyle rests. At the end here, it is worth taking a moment to consider the structural construction of this context.

In early July, Puanani Rogers and I carpooled to the Kaua`i/Ni`ihau Island Burial Council meeting. We were driving on the Kapa`a Bypass towards Prince Kuhio Highway, the main road which travels the perimeter of the island. Rogers pointed out the mountain range in front of us and said, “People here call that ‘Sleeping Giant’ but that is wrong. Its real name is Nounou. You know, people don’t
even know what ahupua’a they are in. We know where other Hawaiians are born and that still matters to us.” Rogers was lamenting the settler colonial cartography overlaid on top of Native Hawaiian place. Looking at Kauai from this perspective, it is startling to recognize the comprehensiveness of the settler colonial reproduction and recoding that has occurred. Zip codes, cities, counties, roads—all of these reform the physical and conceptual cartography of Hawai‘i. The settler colonial project of recoding goes deeper though. On Kaua‘i, the Kukui Grove Center in Līhu‘e, on Kauai’s South shore, looks exactly like an open-air mall in Southern California. Grocery stores are aesthetically indistinguishable from their mainland counterparts and are located in strip malls that are also nearly identical. Subdivisions and cul-de-sac’s that populate the East and South sides of Kaua‘i in particular model those of Mainland suburban developments so closely it could be disorienting. If I ignored the mountains in the distance and focused on the two story houses neatly arranged in straight lines with grass yards and driveways, I could have been in any suburb in the United States. This effect though is intended. Kaua‘i is marketed and consumed as a balance between the familiar and the exotic.

The Kaua‘i visitors bureau website features a picture with two men in mid-stride on a tranquil green golf course in the foreground with the sun setting behind a darkened mountain range in the back. On top of this image it reads “I am a tropical garden…I am Kaua‘i.” This picture is evocative in the way that it contrasts the exotic and familiar, the foreign and the domestic. This image represents Kaua‘i as a wild yet passive space that has been remade, but not fully so. The darkened mountains express
something powerful and timeless about Kauai that can still be felt but is no longer visible.

Fig. 14

At the February 2nd, 2008 Kaua`i/Ni`ihau Island Burial Council (KNIBC) meeting, the same meeting where the Naue case was first introduced, Nancy McMahon announced that Native Hawaiian bones had been unearthed from the Wailua Municipal Golf course and re-interred to a lower traffic area on the course.\textsuperscript{11} Ostensibly, the SHPD took this action to better preserve the burials but it also served another, critical, purpose which was to symbolically maintain the narrative of American colonial supremacy in Hawai`i and its attendant process of continuously producing Hawai`i as “America’s paradise.”\textsuperscript{12} This narrative of paradise is critical to economic growth on Hawaii because it is the belief in this narrative that drives demand for tourism and new residents. In his book, \textit{Hawaii: The Legend that Sells}, Bryan Farrell states that Hawaiian land has been discursively transformed into a \textit{conceptual resource}. As he explains:

\begin{quote}
For centuries Hawaiian land provided all needed resources. Later, through commercial agriculture, the land continued to provide the bulk of Hawaii’s monetary income. Most recently,
\end{quote}
the land has been transformed into a conceptual resource, economically the most valuable. Collectively this may be viewed as an ambient resource, that special combination of elements such as warm, sensuous and nondebilitating climate; exciting coastal and mountain scenery; warm clear ocean water; and one of the most interesting cosmopolitan populations in the world.\textsuperscript{13}

Farrell is pointing to the reality that Hawaii’s construction as paradise adds tremendous value to land because it becomes the essential possession in order to experience this idealized Hawai`i. However, as the term paradise subtly implies, the lifestyle that visitors and many residents live are highly illusory and the narrative of paradise requires constant maintenance and repair lest the curtain fall.

Hawaii is one of the most remote landmasses in the entire world, yet it imports eighty-five percent of its food and ninety-five percent of its energy resources. At any given time on Hawai`i there is a ten-day supply of food and a thirty-day supply of fuel.\textsuperscript{14} On Kauai the barge bringing food and other goods comes every other day. The barge bringing diesel fuel to the diesel fuel burning power plant that provides ninety-two percent of Kauai’s on-grid electricity.\textsuperscript{15} Older residents know that if the barges don’t come, then life on Kaua`i as they know it, stops. This is exactly what happened in the aftermath of Hurricane Iniki in 1992.\textsuperscript{16} Much like these material concerns, the Hawaii’s past also requires constant maintenance.

Brescia wanted to own his piece of paradise. Despite ceremonies representing the property as sacred, and protests calling for Naue to be protected as sacred, Brescia, consciously or unconsciously, decided that building his house was more important. He applied pressure to the burial protection system until he got what he
wanted. As Louise Sausen said in the video, he controlled Hawaiian culture by determining the treatment for the burials and in so doing, ruined the graveyard at Naue. The concrete caps used to cover the burials under the house are an evocative metaphor because they sealed the burial in the stasis of pre-history. Looking at the property with the completed house, one would never know that thirty known burials lie just beneath the surface. The boundary between colonial present coded as paradise and Native past is symbolically, materially, and aesthetically maintained through the dehumanizing logic of pre-history to allow settler property development.

In the face of this, Native Hawaiians asserted their rights as the indigenous people of Hawai`i. They asserted that the bones’ presence and right to remain took precedence over Brescia’s right to build. The history of Kanaka Maoli sovereignty was brought to bear in the present through the opposition to the house. Kanaka Maoli refuted the undignified archaeological treatment of the iwi kupuna by passionately and publicly refuting it. At the time of this writing, the entire event is raw. Like Honokahua, the way Naue is remembered will probably have little to do with many of the details that I have described in this thesis. Its memory will be largely defined by what happens as a result of it and that is as yet unclear. For now, Brescia’s house stands on top of the burials. Jeff Chandler can go and pray to his ancestors with advance notice to the property owner. Nancy McMahon was fired from the SHPD for undisclosed reasons. There is a Democratic Governor Neil Abercrombie who appointed William Aila, Jr., the director of the Department of Land and Natural Resources. Aila is a board member of the repatriation group Hui Malama I Na
Kupuna O Hawai`i Nei. His appointment offers hope that unmarked burial grounds will receive appropriate protection.

At this point, only one thing remains certain—the demand for land in Hawai`i will increase for the foreseeable future and Naue will be far from the last case of a zealous property owner demanding to build a house. At the same time as Makanani’s trajectory of Kanaka Maoli cultural nationalism indicates, Native Hawaiians will not willingly allow na iwi kupuna to be desecrated, meaning that there will almost certainly be many battles ahead.
Notes

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Damage here is interpreted within a materialist perspective to mean any harm to the physical bones.


Indeed HRS chapter 6E does not use the word desecration once. 6E does however stipulate under 6E-11(b) that violators are also subject to prosecution under HRS 711-1107. In 2002, HRS 711-1107 was amended to strengthen the penalties to imprisonment for up to one year, $10,000 fine, or both; making them the same as those in 6E-11. In the special commentary for the amendment it states, “the legislature believed that a burial place or grave deserved no less a penalty for damage than did a historical monument.” In 2005, the legislature amended HRS chapter 6E-11, the section on penalties, repealing any mention of HRS 711-1107.


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