

Restorative Energy Justice

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ABSTRACT

While distributive justice and procedural justice have received substantial attention from energy scholars, recent work identifies restorative justice as an underdeveloped component of the energy justice framework. As conceived in the context of criminal law, restorative justice seeks to more precisely account for harms and obligations that arise from wrongdoing, and to widen the circle of participation in repairing those harms. Restorative environmental justice wields these principles to advance the environmental justice framework beyond a tight focus on disparate environmental and health impacts. Restorative energy justice faces the challenge of deploying this restorative approach in an energy landscape that is often tightly focused on technology choices and business concerns.

In Hawai'i, we find an opportunity to operationalize the concept of restorative energy justice. The origin of Hawai'i's regulated electricity industry is indelibly intertwined with the illegal overthrow of the Hawaiian Kingdom. By incorporating a restorative approach that more fully considers the implications of those roots, energy regulators can better account for the future costs and benefits associated with Hawai'i's effort to decarbonize its electricity system. In turn, this improved accounting can reduce the risk that the urgency of decarbonization will be placed in a false tension with the imperative of justice.

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“Whatever the other effects of these actions, they created a favorable political climate in which local industries could begin to plan for the future.”

—C. Dudley Pratt, *Former President of Hawaiian Electric, describing the illegal overthrow of the Kingdom of Hawai‘i*

INTRODUCTION

Restorative energy justice was identified in 2018 as part of a proposed “triumvirate of tenets” intended to organize energy justice into a discrete set of first principles.¹ The authors of that proposal described restorative energy justice as underdeveloped in comparison to the more entrenched concepts of distributive justice and procedural justice in the energy sphere.²

This work responds to that call. Parts I and II are descriptive. They outline foundational vocabulary and analytical structures capable of joining the previously independent disciplines of energy justice and restorative justice. Part I describes a variety of still-evolving proposed frameworks in the relatively young academic inquiry into energy justice. Part II describes the criminal law roots of restorative justice, where it generally refers to principles and practices that respond to crime by focusing on participants and balancing the needs of victims, offenders, and the communities around them.³ It aims to repair harms, both concretely and symbolically, and it emphasizes accountability and responsibility.⁴

To help translate from the criminal law context into an energy context, Part II also illustrates how these restorative principles and practices are being applied to environmental issues by courts, regulators, and scholars. This form of restorative justice aims to advance the environmental justice framework beyond a focus on distributive impacts such as disparate environmental and health outcomes. Part II also describes how restorative justice theory can apply to societal-scale conflicts and wrongdoing. Applied to environmental issues, this restorative approach attempts to uncover the latent role of colonization in contributing to environmental harms, better understand complex issues related to communities’ social and cultural connections to natural resources, and support ongoing work to repair cultural, economic, and political self-determination.⁵ The ubiquity of the energy sector and the broad goals of energy justice demand the same transformative capacity.

1. Darren McCauley & Raphael Heffron, *Just Transition: Integrating Climate, Energy and Environmental Justice*, 119 ENERGY POL’Y 1, 2, 5 (2018).

2. *Id.* at 2; *see also infra* Part B (describing distributive and procedural justice and how they relate to other concepts of justice).

3. *See* HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 235–36 (2015).

4. *See id.*; *see also infra* Part A.

5. *See* Melody Kapilialoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV’T 37–38 (2007) (describing restorative justice for Native Hawaiians in the context of land conservation); *see*

Hawai'i's regulated electricity sector provides an opportunity to critically examine how these concepts might then be operationalized in an energy landscape. Part III conducts a thought experiment⁶ by employing a four-part framework for restorative inquiry (recognition, responsibility, reconstruction, repair).⁷ It presents historical evidence of the deeply intertwined relationship between Hawai'i's regulated electricity industry and the illegal overthrow of the Hawaiian Kingdom.⁸ This work identifies indelible marks of colonization on the resulting energy system.

Looking ahead, Hawai'i has embarked on a once-in-a-lifetime plan to decarbonize its electricity sector. The policies driving this transition are imbued with concepts and phrases such as energy independence, self-sufficiency, indigenous energy resources, and community resilience. Moreover, such policies arose in a legal landscape that, in some ways, embraces restorative justice principles.⁹ Yet energy policy is often framed within an ahistorical and densely technical context, or it focuses tightly on questions about where to site individual instances of energy infrastructure.¹⁰ Carrying the thought experiment forward, Part III argues that energy planning could instead begin with more fundamental questions, reframed through the lens of restorative justice. This approach has direct relevance to at least two ongoing policy debates. First, energy planning should more deeply consider the relationship between Native Hawaiians and 'āina (land). This might push those plans to incorporate more distributed energy resources on developed land, such as rooftop and community-scale solar, and rely less upon greenfield development of utility-scale renewable energy. Second, a restorative approach might reinvigorate a slow-burning investigation into alternatives to the present investor-owned utility business model. In sum, by employing a restorative approach that more

also *infra* Part B, C.

6. As further explained below, this is presented as a thought experiment because restorative justice requires that we begin by engaging in an open multi-perspective dialogue. This paper, in contrast, is inherently a tool for one-way communication, rather than open dialogue. Therefore, the value of this work is in evaluating how energy justice *might* be operationalized, rather than how it *should* be operationalized.

7. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 174–209 (1999); see also *infra* Part C.

8. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103–150, 107 Stat. 1510 (1993) [hereinafter *Apology Resolution*] (apologizing for “the illegal overthrow of the Kingdom of Hawaii on January 17, 1893” and acknowledging “the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people”); see also *infra* A.

9. See D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 *STAN. ENV'T. L.J.* 157, 185–94 (2016).

10. See Benjamin K. Sovacool et al., *Energy Decisions Reframed as Justice and Ethical Concerns*, 1 *NATURE ENERGY* 1, 1–16 (2016); see also *infra* Part A.

critically considers the context of past and present energy decisions, energy regulators can more accurately account for the future costs of business-as-usual energy development.

I. EVOLVING VIEWS ON ENERGY JUSTICE

A. *An Explosive Decade of Scholarship*

To understand the role of restorative justice in energy law and policy, it is useful to first review some interrelated and still-evolving articulations of “energy justice.” Lakshman Guruswamy has been credited as one of the first scholars to define energy justice.¹¹ Approaching the issue largely from a sustainable development perspective in 2010, Guruswamy’s focus was on “framing energy justice as a moral obligation to ensure that those who lack access to clean energy, the energy poor, have access to clean energy technologies that limit exposure to harmful indoor pollutants.”¹²

Given the ubiquity of energy needs and uses around the globe, the concept of energy justice must also apply in other contexts. Therefore, it continues to evolve and incorporate principles of climate justice, environmental justice, and energy democracy.¹³ In step with this evolution, a variety of approaches have been proposed to identify and organize justice concepts in ways that can be operationalized in the energy landscape.

A substantial 2014 text by Benjamin Sovacool and Michael Dworkin describes a continuum of international energy justice theories, principles, and practices.¹⁴ Other work focuses on identifying more discrete analytical frameworks within that continuum. For example, Kirsten Jenkins and coauthors organize core notions of energy justice as the “‘three A’s’ of availability, accessibility and affordability.”¹⁵ Others propose a similar trilemma of security, affordability, and sustainability.¹⁶ While outcome-based principles such as these can be useful, particularly as a template for evaluating the distributional impacts of particular energy decisions, justice considerations are necessarily broader. In 2015, Sovacool and Dworkin worked to outline an energy justice

11. Shalanda H. Baker, *Mexican Energy Reform, Climate Change, and Energy Justice in Indigenous Communities*, 56 NAT. RES. J. 369, 379 n.72 (2016).

12. *Id.*; see also Lakshman Guruswamy, *Energy Justice and Sustainable Development*, 21 COLO. J. INT’L ENV’T. L. & POL’Y 231 (2010); LAKSHMAN GURUSWAMY, *GLOBAL ENERGY JUSTICE* (2016).

13. Baker, *supra* note 11, at 379–85.

14. BENJAMIN K. SOVACOO & MICHAEL H. DWORKIN, *GLOBAL ENERGY JUSTICE* 366–77 (2014).

15. Kirsten Jenkins et al., *Humanizing Sociotechnical Transitions Through Energy Justice: An Ethical Framework for Global Transformative Change*, 117 ENERGY POL’Y 66, 67 (2018).

16. Aileen McHarg, *Energy Justice*, in ENERGY JUSTICE AND ENERGY LAW 15, 16 (Iñigo Del Guayo et al. eds., 2020) (citing Raphael Heffron et al., *Resolving Society’s Energy Trilemma Through the Energy Justice Matrix*, 87 ENERGY POL’Y 677, 689 (2015)).

decision-making tool: a “concept of energy justice [that] connects energy policy and technology with . . . eight philosophical concepts, influences, applications, injustices, and solutions.”¹⁷ These eight themes are summarized as: availability, affordability, due process, good governance, sustainability, intergenerational equity, intragenerational equity, and responsibility.¹⁸ This approach is founded upon well-known work on social justice theory, such as concepts enunciated by John Rawls and Michael Sandel.¹⁹ It explicitly acknowledges the key foundational concepts of distributive justice (“to ask whether a society is just is to ask how it distributes the things we prize”) and procedural justice (“how decisions are made in the pursuit of social goals, or who is involved and has influence in decision-making”).²⁰

Shelley Welton and Joel Eisen map a four-part “clean energy justice” agenda applicable to the rapid transition to clean energy: (i) funding the transition; (ii) examining who benefits from a clean energy economy; (iii) evaluating who participates in decisions about that new economy; and (iv) deciding how and where to site new energy infrastructure.²¹ This approach acknowledges ties to the traditional environmental justice agenda.²² However, it can be distinguished from that agenda, in part on the basis that energy law is often bound up with the economic regulation of monopolies and with the emergence of new technologies. Moreover, Welton and Eisen assert that because of “its history of attempting to ensure that consumers are treated fairly, . . . energy law pays more attention to distributive concerns than U.S. environmental statutes.”²³ They also specify *clean* energy justice as a distinct subcomponent of energy justice, insofar as clean energy justice is focused on inequities that

17. Benjamin K. Sovacool & Michael H. Dworkin, *Energy Justice: Conceptual Insights and Practical Applications*, 142 APPLIED ENERGY 435, 437–38 (2015).

18. *Id.* at 439.

19. *Id.* at 437. This approach to energy justice is reminiscent of early work on environmental justice by Robert Bullard, who outlined a five-part framework to influence environmental decision making. Robert D. Bullard, *Environmental Justice for All: It's the Right Thing to Do*, 9 J. ENV'T. L. & LIT. 281, 307 (1994). That framework characterized the five basic characteristics:

(1) incorporate the “right” of all individuals to be protected from environmental degradation; (2) adopt a public health model of prevention (elimination of the threat before harm occurs) as the preferred strategy; (3) shift the burden of proof to polluters/dischargers who do harm, discriminate, or who give unequal protection to racial/ethnic minorities, and other “protected” classes; (4) allow disparate impact and statistical weight, as opposed to ‘intent,’ to infer discrimination; and (5) redress disproportionate risk burdens through targeted action and resources.

Id.

20. Sovacool & Dworkin, *supra* note 17, at 437 (quoting MICHAEL SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 19 (2009) on the topic of distributive justice).

21. Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV'T. L. REV. 307, 310–11, 323–62 (2019).

22. *Id.* at 313.

23. *Id.*

may persist or worsen in the transition to new forms of sustainable energy, while energy justice more broadly examines injustices associated with existing energy systems.²⁴ This approach is commendable for highlighting the need to incorporate justice into renewable energy law and policy, rather than resting on the assumption that eliminating fossil fuels will also eradicate injustices from energy systems.

Shalanda Baker, appointed as the first-ever Deputy Director of Energy Justice at the U.S. Department of Energy,²⁵ approaches similar concerns by proposing an “anti-resilience” framework. That approach asserts that:

Energy policy, at this particular moment of transition, could restructure society by redistributing power along lines of race and class. This redistribution could help to mitigate vulnerability in the entire energy system, making us all better able to withstand the catastrophic climate change events that lay ahead. However, if system resilience, rather than system transformation, becomes the focus of energy policy, we will miss an important opportunity to foster lasting justice.²⁶

In other words, a growing focus on the need for energy systems that are resilient to climate change impacts should not equate “resilience” with a hardening of the status quo. Rather, energy justice should capture an opportunity for transformative change, foremost by disrupting unjust structural norms which are embedded *within* energy systems and which are also emblematic of wider systemic injustices.²⁷

B. *Energy Justice Foundations—Distributive, Procedural, and Restorative Justice*

Though the review above does not intend to capture the entire “explosion”²⁸ of scholarly interest in energy justice over the last decade, it does begin to illustrate the breadth and depth of the issues in question.²⁹ It also illustrates that despite a decade of work by energy law scholars, there remains value in conceptualizing a well-defined set of first principles, to help organize and orient the spectrum of energy justice issues and practices.

24. *Id.* at 312.

25. Kara Baskin, *How the First-Ever U.S. Energy Justice Leader Develops Ideas*, MIT MGMT. SLOAN SCH. (May 12, 2021), <https://mitsloan.mit.edu/ideas-made-to-matter/how-first-ever-u-s-energy-justice-leader-develops-ideas> [<https://perma.cc/TYA4-VDZJ>].

26. Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 6 (2019).

27. *See id.*

28. McHarg, *supra* note 16, at 15.

29. Various authors have provided more complete reviews of how energy justice concepts have evolved since 2010. *See id.* at 20–25 (describing how various authors have grounded energy justice scholarship in justice principles); Sovacool & Dworkin, *supra* note 17, at 437; Kirsten Jenkins et al., *Energy Justice: A Conceptual Review*, 11 ENERGY RES. & SOC. SCI. 174 (2016).

Each formulation of energy justice described above seems to recognize central roles for distributive energy justice (ensuring that benefits and burdens associated with energy systems are fairly distributed) and procedural energy justice (equitable procedures designed to engage energy stakeholders and perspectives in a non-discriminatory way³⁰). As noted above, these are well-recognized social justice principles. But distributive and procedural concerns alone do not capture the full panoply of energy justice considerations. Sovacool and Dworkin assert that energy justice should be more robustly conceived of as a “mesh of procedural, distributional, recognition, and cosmopolitan aspects.”³¹ They argue that a conceptualization like this “does more than create an integrated, synthetic concept; it also is a useful analytical tool for altering how energy problems exist or are framed.”³²

This broader approach also aligns with the foundations of environmental justice. In the context of international environmental law, Sumudu Atapattu and Carmen Gonzalez describe that the environmental justice framework

provides a compelling moral narrative with justice at its core as an antidote to the technical, ahistoric approach that dominates much of mainstream environmental discourse. The objective is to reconceptualize environmental problems as manifestations of social, economic, and environmental injustice between and within nations and to place them in historical context rather than treating them as technical problems to be overcome by scientific innovation or more effective planning.³³

While the contextual distinction between energy justice and environmental justice articulated by Welton and Eisen is compelling, it is not clear that the *theoretical* underpinnings of the two movements should be radically distinct. Indeed, the phrases “technical” and “ahistoric” aptly describe many facets of energy law and policy just as well as they describe traditional environmental law and policy.³⁴ In light of the relative maturity of environmental justice compared to energy justice, environmental justice scholarship can capably inform energy justice theory.

To that end, consider Gonzalez’s four-part definition of environmental justice: (i) distributive justice; (ii) procedural justice; (iii) corrective justice; and

30. Darren McCauley, et al., *Advancing Energy Justice: Triumvirate of Tenets*, 3 INT’L ENERGY L. REV. 107, 108 (2013).

31. Sovacool & Dworkin, *supra* note 17, at 437.

32. *Id.*

33. Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH* 13 (Shawkat Alam et al. eds., 2015).

34. See, e.g. Welton & Eisen, *supra* note 21, at 310, 313 (describing the “centrality of new technologies” in the development of energy law); Baker, *supra* note 26, at 24 (“[E]nergy justice remains rather ahistorical and focused on remediation of harm at the margins, rather than utilizing energy policy as an equity-based tool of empowerment and system transformation”).

(iv) social justice.³⁵ A definition of environmental justice framed in this way is useful for at least three reasons. First, it relies upon justice concepts that are relatively well developed in other fields, such as criminal law. Second, it is broad enough to serve as an organizing tent for many different facets of an operationalized environmental justice movement. For example, it can be deployed in an international context just as effectively as a national or sub-national context. And third, utilizing common concepts and labels across related but distinct disciplines—such as environmental justice, energy justice, and climate justice—creates a “joint conceptual space for reflection” and recognizes that these disciplines inherently intersect with each other.³⁶

For similar reasons, energy scholars have also proposed energy justice frameworks compiled from core justice principles. As early as 2013, Darren McCauley and coauthors presented the “most frequently discussed” energy justice framework, which is comprised of a core “triumvirate of tenets”: (1) distributive justice; (2) procedural justice; and (3) recognition justice.³⁷ In this context, they define recognition justice as something “more than tolerance” which is based on the procedural notion “that individuals must be fairly represented, that they must be free from physical threats and that they must be offered complete and equal political rights.”³⁸ They also assert that recognition justice “includes calls to recognize the divergent perspectives rooted in social, cultural, ethnic, racial and gender differences.”³⁹ Others have described recognition justice in more distributive terms: “Recognition justice emphasizes the need to understand different types of vulnerability and specific needs associated with energy services among social groups (especially marginalized communities).”⁴⁰

In 2018, McCauley and Raphael Heffron proposed a revised triumvirate of tenets, replacing recognition justice with restorative justice.⁴¹ Although the complete rationale for this change is not precisely articulated, it is a sensible amendment. First, it may be problematic that the original triumvirate largely defined recognition justice in procedural and distributive terms. Although

35. Carmen G. Gonzalez, *Environmental Justice and International Environmental Law* in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 78 (Shawkat Alam et al. eds., 2013).

36. McCauley & Heffron, *supra* note 1, at 1 (asserting that climate justice, energy justice, and environmental justice scholarship each “suffers through the lack of a joint conceptual space for reflection”).

37. McCauley, *supra* note 30, at 107–08; *see also* McHarg, *supra* note 16, at 20 (describing McCauley et al.’s triumvirate as “[t]he dimensions of justice most frequently discussed in the literature on energy justice”).

38. McCauley, *supra* note 30, at 108.

39. *Id.*

40. Joojee Lee & John Byrn, *Expanding the Conceptual and Analytical Basis of Energy Justice: Beyond the Three-Tenet Framework*, 7 FRONTIERS ENERGY RES. 1, 2 (2019).

41. McCauley & Heffron, *supra* note 1, at 2, 4–5.

one can expect overlap between various justice concepts,⁴² a useful conceptual framework must also ensure distinction between its component parts, or otherwise risk redundancy and imprecision. Second, and as further described below, restorative justice incorporates the recognition principles identified in the original triumvirate. It also adds important principles and practices that are particularly relevant and helpful to ensure that the reach of energy justice stretches beyond the typical litany of questions regarding emissions and environmental damage, energy costs and access, and infrastructure siting. Instead, restorative principles can base energy justice firmly in a transformational frame that acknowledges the role of energy systems in creating or hardening systemic injustices rooted in racial, cultural, gender, and class differences.

This, at last, is the jumping-off point for an exploration of what “restorative energy justice” means. As Heffron and McCauley noted in 2018, restorative justice predates the fields of energy, environmental, and climate justice.⁴³ Yet in those contexts, “[r]estoration as a concept has not been explored in sufficient detail.”⁴⁴

II. HEALING JUSTICE

A. *Three Pillars of Restorative Justice in the Context of Criminal Law—Harms, Accountability, and Participation*

The phrase “restorative justice” has been traced to an English-language interpretation of the German phrase “heilende Gerechtigkeit” used by German theologian Schrey Walz in 1955.⁴⁵ Others suggest that a more accurate translation of that phrase would have been “healing justice.”⁴⁶

Although the phrase *healing justice* conveys important and relevant ideas, the operative framework adopted in this paper stems more directly from work by criminologist Howard Zehr and others beginning in the 1970s.⁴⁷ In turn, Zehr and others acknowledge that the contemporary restorative justice framework is an offshoot of “Indigenous [w]isdom and [j]ustice” that long predates the 1950s.⁴⁸ “As many restorative justice advocates are aware, the ideas

42. See Sovacool & Dworkin, *supra* note 17, at 435.

43. McCauley & Heffron, *supra* note 1, at 5.

44. *Id.*

45. Shadd Maruna, *The Role of Wounded Healing in Restorative Justice: An Appreciation of Albert Eglash*, 2 RESTORATIVE JUST. 9, 9–10 (2014); ZEHR, *supra* note 3, at 14.

46. Maruna, *supra* note 45, at 10.

47. See Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 162 (2007) (identifying Zehr, John Braithwaite, and Mark Umbreit, “among others” as the conceptual and practical founders of restorative justice); ZEHR, *supra* note 3, at 14; HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2015).

48. FANIA E. DAVIS, RACE AND RESTORATIVE JUSTICE 19–29 (2019); see also ZEHR, *supra* note 3, at 15 (explaining that “the concept of restorative justice as [Zehr has] articulated it, “owes much to many sources and discussions” and describing it as “a work of synthesis more than invention”); ZEHR, *supra* note 47, at 29 (describing how restorative principles compare

and principles at the foundation of contemporary restorative justice have their roots in ancient societies, numerous world religions, and the traditional practices of native or Indigenous cultures across the world.”⁴⁹ No doubt, these deep and broad roots help to explain why the contemporary restorative justice movement sprouted in the 1970s, and why its principles and applications continue to expand today.

Zehr’s formulation, in the context of criminal law, distinguishes restorative justice from retributive justice. He argues that through the retributive lens—embedded, for example, in the typical approach to criminal justice in the United States—”[c]rime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a context between the offender and the state directed by systematic rules.”⁵⁰ A restorative lens, in contrast, counsels that crime is a violation of people and relationships.⁵¹ This leads to an obligation to “make things right. Justice involves the victim, offender, and the community in search for solutions which promote repair, reconciliation, and reassurance.”⁵²

This conceptualization leads to three pillars of a restorative approach. First, it begins with a focus on victims,⁵³ on their needs, and on repairing harms both concretely and symbolically.⁵⁴ Second, it recognizes that wrongs or harms result in obligations, and it emphasizes accountability and responsibility for those who cause harm.⁵⁵ And third, it promotes significant engagement and participation, by both victims and offenders, and by members of the community around them.⁵⁶ Justice Brian Preston, Chief Judge of the Land and Environment Court in New South Wales, Australia summarizes that:

Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is a more holistic solution to crime, seeking to understand and address the dynamics of criminal behaviour, its causes and consequences. Central to restorative justice is the empowerment, participation and healing of victims of crime.⁵⁷

to the “notion of centrality of relationships” as expressed in a variety of cultures).

49. Maruna, *supra* note 45, at 10; see also Hadeel Al-Alosi & Mark Hamilton, *The Potential of Restorative Justice in Promoting Environmental Offenders’ Acceptance of Responsibility*, 44 UNIV. NEW SOUTH WALES L.J. 487, 491 n.22 (2021) (“Restorative justice was prevalent in antiquity, especially in Jewish, Christian, and Islamic traditions.”) (citing Chris Marshall, *Restorative Justice*, in RELIGION MATTERS: THE CONTEMPORARY RELEVANCE OF RELIGION 101, 103–04 (Paul Babie & Risk Sarre. eds., 2020)).

50. Zehr, *supra* note 3, at 183.

51. *Id.*

52. *Id.*

53. The phrases “victims” and “offenders” seem themselves subject to critique.

54. Zehr, *supra* note 47, at 32.

55. *Id.* at 33.

56. *Id.* at 35.

57. Brian J. Preston, *The Use of Restorative Justice for Environmental Crime 2* (2011), available at https://lec.nsw.gov.au/documents/speeches-and-papers/preston_use%20of%20restorative%20justice%20for%20environmental%20crime.pdf [<https://perma.cc/>

The themes that emerge are readily apparent: healing, responsibility, reconciliation, participation, community, empowerment, and understanding.

These principles and goals are implemented through a variety of restorative practices. In the criminal law context, the focus is often on voluntary, facilitated, and participatory encounters between those harmed and those causing the harm.⁵⁸ These can include victim-offender conferences (focused on one-to-one interaction between the parties), family group circles (widening the circle of participants to include families and other individuals significant to the parties), and peacemaking circles (widening further, to include community members connected to, or interested in, the matters being discussed).⁵⁹ Obviously, the goals of these practices focus on implementing the restorative principles described above, but key concrete outcomes include apologies (“crucial in a restorative process”) and restitution agreements between the parties.⁶⁰ In New Zealand, the default response to most serious juvenile crimes is a family group conference.⁶¹ Zehr describes this approach as a response to a crisis in New Zealand’s juvenile criminal justice system, and he asserts that the introduction of restorative techniques was responsive to Maori criticism that the court-based retributive approach to juvenile crime utilized an “imposed, alien, colonial system.”⁶²

Restorative practices have migrated widely into other public systems, too. Restorative justice practices are applied frequently in response to juvenile crime in Australia, the U.S., and elsewhere.⁶³ They are also increasingly applied in the context of criminal offenses such as assault, domestic violence, and sexual assault.⁶⁴ A study of restorative practices reports that they have

CNK3-Y9HS] (published at 35 CRIM. L.J. 136 (2011)) (citing UNITED NATIONS OFFICE OF DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMS 6 (2006)).

58. See Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, 36 WASH. UNIV. J.L. POL’Y 91, 122 (2011) (describing four features of restorative conferencing: (i) physical proximity; (ii) clearly defined participation as opposed to non-participation; (iii) focus on a common target; and (iv) a common emotional mood).

59. ZEHR, *supra* note 47, at 60–66; see also Preston, *supra* note 57, at 8 (describing the use of community impact panels).

60. Walgrave, *supra* note 58, at 125; see also Preston, *supra* note 57, at 6, 16.

61. ZEHR, *supra* note 47, at 62–64.

The goals of these conferences are flexible, but they generally involve seeking a plan for the young person who offended. That plan should include pathways to repairing the harms caused, preventing future harms, and perhaps settling on suitable retributive punishment. These plans are intended to be consensual; the victim, the offender, and the police are each entitled to object.

Id. at 62.

62. *Id.* at 62.

63. See Nicola Pain, *Encouraging Restorative Justice in Environmental Crime*, 13 NEWCASTLE L. REV. 29, 31 (2018); DAVIS, *supra* note 48, at 69–70 (describing youth-focused restorative justice programs in Baltimore, Oakland, Brooklyn, and the Bronx); Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1030–33 (2020).

64. Pain, *supra* note 63, at 31 (citing DAVID O’MAHONY & JONATHAN DOAK, REIMAGINING

been codified into statutory or regulatory law in forty-five out of fifty U.S. states, with examples such as reparative sentencing, probation structures, prison-based processes, and truth and reconciliation commissions at the city and state level.⁶⁵

B. *Restorative Justice in Environmental Law*

Restorative *environmental* justice has been described as “repairing the harm of the Anthropocene” by “healing earth systems and healing the relationship of humans with nature and with each other.”⁶⁶ This philosophy has been deployed in a variety of contexts, three of which are briefly described here for illustrative purposes: (i) by courts in the context of environmental crimes, (ii) by environmental regulators in the context of pollution violations, and (iii) in a creative proposal to marry a remedy for harms caused by an unjust penal system with a remedy for harms caused by environmental pollutants.

1. Environmental Crimes

The application of restorative justice principles to environmental crime has taken hold in Australia.⁶⁷ Two justices sitting on the Land and Environmental Court of New South Wales have written about how it can be an effective response to criminal conduct that harms or destroys the natural environment, the built environment, or biocultural resources.⁶⁸

For example, Justice Nicola Pain describes how restorative justice principles and practices were explicitly applied in criminal cases involving the destruction of Aboriginal cultural heritage.⁶⁹ In one, a mining company defendant pled guilty to knowingly destroying Aboriginal heritage, and the company thereupon participated in (and funded) a restorative justice conference involving the prosecutor, the defendant, and the chairperson of the local Aboriginal land council. The results included an apology from the mining company and a private agreement (i) guaranteeing that traditional owners of the destroyed Indigenous resources would be involved in any salvage operations

RESTORATIVE JUSTICE: AGENCY AND ACCOUNTABILITY IN THE CRIMINAL PROCESS 4, 13 (2017)).

65. González, *supra* note 63, at 1030–33. Interestingly given the rapid adoption of restorative programs, empirical assessment of their success in criminal law is mixed. See Walgrave, *supra* note 58, at 128–29. Some metrics, such as victim satisfaction, generally outpace traditional judicial processes. *Id.* at 107. Other metrics, such as reoffending rates have results that are “complicated and sometimes contradictory.” *Id.* at 113.

66. John Braithwaite et al., *Restorative Environmental Justice: An Introduction*, NEWSLETTER (Eur. F. for Restorative Just., Leuven, Belg.), Sept. 2019, at 4, 5, available at https://www.euforumrj.org/sites/default/files/2020-02/vol_20_3.pdf [https://perma.cc/8BXY-G2WV].

67. See Rob White, *Reparative Justice, Environmental Crime and Penalties for the Powerful*, 67 CRIME LAW SOC. CHG. 117 (2017); Rob White, *Indigenous Communities, Environmental Protection and Restorative Justice*, 18 AUSTRALIAN INDIGENOUS L. REV. 43 (2014).

68. Preston, *supra* note 57; Pain, *supra* note 63.

69. Pain, *supra* note 63, at 38–40.

and (ii) requiring the defendant to provide money, training, and employment opportunities for the local community. This agreement was then expressly taken into account during sentencing.⁷⁰

2. Pollution Regulation

In the U.S., Michael Rustad and coauthors evaluate restorative justice principles utilized by the country's environmental regulator. They argue that Congress imposed a statutory "restorative justice mandate" on the Environmental Protection Agency (EPA) by granting authority to impose monetary penalties as "necessary for deterrence, restitution, and retribution."⁷¹ The agency's policy on penalties directs that they "generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law."⁷² Although this is not wholly reflective of the restorative approach's focus on repairing harms, it does comport with the restorative justice goal of placing parties (including an offender) in the same position as before the offense.

Rustad and coauthors develop an even stronger case for restorative justice embedded in agency settlements that utilize Supplemental Environmental Projects (SEPs).⁷³ Reviewing all settlements arising from agency actions against coal-fired power plants between 2000 and 2011, they conclude that each settlement incorporated a restorative component, such as SEP mitigation responsibilities with a nexus to the harm caused by emissions of particulate matter, sulfur dioxide, and nitrogen oxides.⁷⁴

The agency's own description of SEPs indeed strikes a restorative tone by focusing on benefits to an affected community or environment:

70. *Id.* The court specified, however, that "the restorative justice intervention is not itself a substitute for the Court determining the appropriate sentence for the offences committed by the defendant." *Id.* at (quoting *Garrett v Williams* (2007) 151 LGERA 92 [64] (Austl.)).

71. Michael L. Rustad et al., *Restorative Justice to Supplement Deterrence-Based Punishment: An Empirical Study and Theoretical Reconceptualization of the EPA's Power Plant Enforcement Initiative, 2000–2011*, 65 OKLA. L. REV. 427, 467–68 (2013) (quoting S. Rep. No. 101–228, at 373 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3756); see also EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 Update n.5 [hereinafter 2015 EPA SEP Policy] (attached to Memorandum from Cynthia Giles, EPA Asst. Admin. to EPA Regional Admin. (Mar. 10, 2015), <https://www.epa.gov/sites/default/files/2015-04/documents/sepupdatedpolicy15.pdf> [<https://perma.cc/QU7L-GNJJ>]) ("The statutes the EPA administers generally provide a court with broad authority to order a defendant to cease its violations, take necessary steps to prevent future violations, and to remediate any harm caused by the violation.").

72. EPA GENERAL ENFORCEMENT POLICY GM-21, POLICY ON CIVIL PENALTIES 3 (1984), <https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf> [<https://perma.cc/QN86-DTTE>] (emphasis omitted).

73. See Rustad et al., *supra* note 71, at 468–77.

74. See *id.* at 469–72.

As part of a settlement, an alleged violator may propose to undertake a project to provide tangible environmental or public health benefits to the affected community or environment, that is closely related to the violation being resolved, but goes beyond what is required under federal, state or local laws. The voluntary agreement to perform a Supplemental Environmental Project (SEP) is one factor that is considered in determining an appropriate settlement penalty, and may be the basis for a reduction in the final penalty. EPA supports the inclusion of SEPs in appropriate settlements.⁷⁵

2015 agency guidance on SEPs incorporates additional restorative principles, explaining that, among other things, settlements generally should require that defendants “take action to remedy the harm or risk caused by past violations.”⁷⁶ The policy “encourages input on [SEP] proposals from the local community that may have been adversely impacted by the violations” in order to “better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility.”⁷⁷ The policy also requires that settling defendants must “retain full responsibility to ensure satisfactory completion” of the SEP;⁷⁸ this responsibility cannot be transferred to a third party.⁷⁹

This approach to resolving environmental disputes is “widely viewed as a win-win-win for government, industry and the public,” but curiously it was suspended under the Trump administration.⁸⁰

3. Renewable Rikers

In a third example of restorative environmental justice, Rebecca Bratspies authored a creative proposal to install a solar facility at the site of the to-be-closed Rikers correctional facility.⁸¹ This proposal is premised on the recognition of two categories of harms: (i) harms arising from a history of slavery

75. *Supplemental Environmental Projects*, EPA, <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps#policy> [<https://perma.cc/7KTR-QXT5>] (last visited Apr. 8, 2022).

76. 2015 EPA SEP Policy, *supra* note 71, at 1.

77. *Id.* at 18 (citing Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003)).

78. *Id.* at 17.

79. *Id.* at 26.

80. Joel Mintz, *EPA Needs to Reinstate a Critical Environmental Tool Scrapped by Trump*, THE HILL (Feb. 23, 2022, 6:00 PM), <https://thehill.com/opinion/energy-environment/595569-epa-needs-to-reinstate-a-critical-environmental-tool-scrapped-by> [<https://perma.cc/636E-B2D3>]. The Trump administration’s SEP policy was revoked by the Biden administration in a May 2022 interim final rule. Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, 87 Fed. Reg. 27,936 (May 10, 2022) (to be codified at 28 C.F.R. pt. 50).

81. Rebecca Bratspies, *Renewable Rikers: A Plant for Restorative Environmental Justice*, 66 LOYOLA L. REV. 371 (2020).

and brutal violence related to the Rikers family and Rikers facility⁸² and (ii) harms arising from environmental racism that has long sited polluting peaker plants in New York City's environmental justice communities.⁸³ These harms are bridged in the sense that the same communities were impacted by both harms.⁸⁴ This is a wonderfully elegant proposal, particularly insofar as it follows the restorative template of focusing on themes like healing, responsibility, reconciliation, and community. In addition to its direct impacts on pollution and distributive justice, the proposal may also create a substantial impact on narratives surrounding New York's energy system. Bratspies concludes with a critical recognition that, ultimately, the harmed communities must be part of decision-making about the plan.⁸⁵

Although all three of these restorative environmental justice examples show that the relevant principles and practices have made substantial inroads in the environmental context, Bratspies' is perhaps the most informative for the work of conceptualizing restorative energy justice. This is because it illustrates how those principles and practices can be deployed in an *ex ante* planning context, in addition to the *ex post* adjudicative or enforcement context. This has particular relevance for energy justice in regulated power systems because the role of an energy regulator frequently spans both contexts.

C. *Restorative Justice as a Transformative Tool*

Before moving on to a case study of how restorative *energy* justice might be operationalized in Hawai'i, it is necessary to address one additional conceptual building block—the call from Baker⁸⁶ and others for energy justice to be deployed as a transformative tool that can contribute to solving wider systemic injustices.

A potential criticism of the restorative practices as first described by Zehr and others is that those practices appeared to focus on private conduct and private resolutions—thus limiting the utility of restorative justice when applied to broader public conduct and public injuries. But this view is too narrow. A helpful review of restorative justice principles and practice by Carrie Menkel-Meadow sets out the ways in which restorative justice has placed attention on healing those directly affected by crime *and* on institutional reform “from the beginning.”⁸⁷

For example, one might view restorative interventions in juvenile crimes as a way to unseat criminal justice systems from their carceral foundations, thus short-circuiting cycles of harm that affect both individuals and wider social

82. *Id.* at 375–84.

83. *Id.* at 385–95.

84. *Id.* at 372.

85. *Id.* at 400.

86. See Baker, *supra* note 26 and accompanying text.

87. Menkel-Meadow, *supra* note 47, at 163–64.

systems.⁸⁸ Attorney and restorative justice activist Fania Davis, explaining how the intersection of race and restorative justice can promote U.S. social transformation, describes how the Common Justice program based in Brooklyn and the Bronx prioritizes victim services for youth of color, “[s]hattering the stereotype that victims are white and perpetrators are black.”⁸⁹ She asserts that youths of color are statistically at greatest risk of being criminally harmed, yet they are least likely to receive victim services from traditional providers.⁹⁰ Thus, Common Justice is addressing individual harms while also attempting to address the social norms and harms that arise from systemic racism.

Davis identifies opportunities for similarly transformative restorative justice in the context of police violence and education systems.⁹¹ This potential application as a transformative tool for wider institutional structures has also been illustrated in the context of transitional justice and political change, perhaps most notably in the Truth and Reconciliation Commission established after the fall of apartheid in South Africa.⁹²

In the environmental context, Kapua‘ala Sproat has applied a transformative version of restorative justice principles to argue in favor of self-determination for Native Hawaiians in the face of global climate change, explaining how Hawai‘i’s constitution, supreme court, and legislature each have taken steps to commit Hawai‘i to restorative justice for Indigenous people.⁹³ Eric Yamamoto has similarly linked restorative justice principles to “broader indigenous peoples’ claims for repair of the ravages of western expansion.”⁹⁴ In the context of environmental justice, the framing from Yamamoto and coauthor Jen-L Lyman focuses on treating “racial and indigenous communities and

88. See DAVIS, *supra* note 48, at 69–70.

89. *Id.* at 70.

90. *Id.*

91. *Id.* at 44–52, 78–81.

92. See RUTI G. TUTEIL, TRANSITIONAL JUSTICE 5, 119–47 (2000) (examining the role of law, including “reparatory justice,” in political change); ZEHR, *supra* note 47, at 54–56, 99–100 (describing how restorative justice can serve in the role of conflict transformation and peacebuilding); YAMAMOTO, *supra* note 7, at 254–75 (describing the Truth and Reconciliation Commission established in South Africa after the fall of apartheid, and how it began its work via regional hearings to provide victims of human rights abuses a public forum for storytelling and confession); Menkel-Meadow, *supra* note 47, at 164–65 (describing the role of restorative justice in South African society’s transition away from apartheid, and noting that “restorative justice has been adapted for cases involving murder, rape, genocide, and other serious transgressions against large groups or even a whole society”) (citing MARK S. UMBREIT ET AL., THE HANDBOOK OF DISPUTE RESOLUTION, 455–70 (Michael L. Moffitt & Robert C. Bordone eds., 2005); Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. 2 (2003)).

93. See Sproat, *supra* note 9, at 185–94.

94. *Id.* at 183; cf. ZEHR, *supra* note 47, at 54 (noting that restorative justice can “serve as a catalyst to reevaluate, resurrect, legitimate, and adapt older customary approaches” that were repressed by colonization).

their relationships to ‘the environment’ with greater complexity”⁹⁵ and “recogniz[ing] that each racial group is differently situated according to its specific needs, political power, cultural values, and group goals.”⁹⁶ This adopts a restorative approach by seeking remedies that are tailored to the harms that are specific to each community.

These formulations highlight a duality in the phrase “restorative.” It embodies both the notion of remaking or replacing what has been lost (e.g., seeking uniquely tailored remedies⁹⁷) while also seeking to repair wider social relationships and rectify injustice. Before employing this restorative framework to investigate environmental justice, Yamamoto had also deployed it in a wider inquiry into interracial justice in the United States. He developed a four-dimensional approach for examining “intergroup tensions marked both by conflict and distrust and by a desire for peaceable and productive relations.”⁹⁸ Notably, this characterization may also aptly describe tensions in the realm of energy and climate justice—where there is a general recognition that decarbonized energy is a critical and urgent imperative, and simultaneously there is a sense of distrust about whether existing energy operators can be relied upon to participate in that transition without reinforcing social wounds caused by carbon-heavy infrastructure and business models in the first place.

Yamamoto’s later work broadened focus to examine transformative social change in contexts other than interracial tensions in the United States, utilizing the label “reparative justice.”⁹⁹ This work continues to deploy a four-dimensional approach:

1. *Recognition*, asking racial group members to recognize and empathize with those who have been harmed and to re-examine old narratives surrounding interracial relations.¹⁰⁰ This dimension examines social structures, historical causes and present-day consequences, and the respective roles of culture, economics, and politics.¹⁰¹
2. *Responsibility*, asking racial groups to carefully assess the dynamics of group agency and accept responsibility for harms.¹⁰² Responsibility can arise in the context of direct participation in the acts that created harm.¹⁰³ But even in the absence of direct participation, it can arise from

95. Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 UNIV. COLO. L. REV. 311, 312 (2001).

96. *Id.* at 359.

97. *Id.*

98. YAMAMOTO, *supra* note 7, at 174–209.

99. See ERIC K. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF INJUSTICE ix-x, 120–29 (2021).

100. YAMAMOTO, *supra* note 7, at 174–76; see also YAMAMOTO, *supra* note 99, at 120–29 (further describing recognition in the context of the 4R framework).

101. YAMAMOTO, *supra* note 99, at 120.

102. YAMAMOTO, *supra* note 7, at 175, 185–88; see also YAMAMOTO, *supra* note 99, at 129–35 (further describing responsibility in the context of the 4R framework).

103. YAMAMOTO, *supra* note 99, at 130–31.

knowledge of and complicity in those wrongful acts.¹⁰⁴ And just as importantly, indirect participation can arise simply by enjoying the benefits of wrongful acts—leading to responsibilities that attach to wider portions of the populace.¹⁰⁵

3. *Reconstruction*, entailing performative acts toward healing social and psychological wounds.¹⁰⁶ This dimension often includes the act of apology, designed as an expression of responsibility and intended to help reconstruct social relationships.¹⁰⁷ Other reconstructive acts can include things like creating memorials and educational opportunities designed to reinforce and broadcast recognition and responsibility.¹⁰⁸ These acts can also include institutional restructuring, such as making changes to legal, political, or economic systems.¹⁰⁹
4. *Repair*, seeking meaningful change in social relationships in order to heal harms and attenuate one group's power over another.¹¹⁰ This dimension can focus on economic justice (i.e., repairing material harms) in the interest of ensuring that things like apologies and institutional restructurings actually result in enduring transformative change.¹¹¹

Yamamoto cautions that this is not a formula for justice.¹¹² Nonetheless, the following Part explores these components as they might apply to justice in the regulated electricity sector in Hawai'i. This approach capitalizes on the utility of a framework composed of discrete components to understand what "restorative energy justice" might mean and how it might be operationalized.

III. RESTORATIVE ENERGY JUSTICE? — A CASE STUDY IN HAWAI'I

The need for an effective, well-founded, structured approach to energy justice is as sharp in Hawai'i as it is elsewhere in the world. Today Hawai'i is far-and-away more dependent on imported petroleum than any U.S. state due

104. *Id.* at 131.

105. *Id.*

106. YAMAMOTO, *supra* note 7, at 175, 190–91; *see also* YAMAMOTO, *supra* note 99, at 135–42 (updating the concept of reconstruction in the context of the 4R framework).

107. YAMAMOTO, *supra* note 99, at 136 (quoting NICHOLAS TAVUCHIS, *MEA CULA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 18 (1991) and describing that an apology's "remedial potential, unlike that of an account, stems from acceptance by the aggrieved party of [a sorrowful] admission of iniquity").

108. *See id.* at 138.

109. *See id.* at 139.

110. YAMAMOTO, *supra* note 7, at 175, 203–05; *see also* YAMAMOTO, *supra* note 99, at 142–149 (describing the concept of repair in the context of the 4R framework); *cf.* Menkel-Meadow, *supra* note 47, at 162 ("In its most idealized form, there are four Rs of [criminal law] restorative justice: repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared community.").

111. *See* YAMAMOTO, *supra* note 99, at 142–46 (describing the economic justice components of repair).

112. YAMAMOTO, *supra* note 7, at 174. Lode Walgrave similarly counsels that "[r]estorative justice is a compass, not a map." Walgrave, *supra* note 58, at 96.

to its unusual reliance on oil-fired electricity generation and due to a heavy reliance on jet fuel for transportation needs.¹¹³ This oil dependence has distributive impacts, such as those arising from a high per-unit cost of oil-fired electricity relative to the average cost of electricity in U.S. states.¹¹⁴ These oil-linked costs can also be volatile due to broader geopolitical forces and other global phenomena¹¹⁵—an important consideration for communities who may struggle to pay monthly energy costs. Another distributive impact arises from Hawai‘i’s support for a petroleum industry that plays a central role in creating and deepening the climate crisis. Other distributive impacts can also be felt outwardly; Hawai‘i imports its petroleum from a short roster of oil-exporting states, including states with troubling records on issues like climate change, human rights, and armed conflict.¹¹⁶

Procedural justice concerns are also present in Hawai‘i’s energy systems. A single investor-owned electric utility is the electricity supplier for more than 90 percent of electricity consumers (i.e., households and businesses on every island except Kaua‘i and Ni‘ihau).¹¹⁷ This naturally concentrates market and

113. HAW. STATE ENERGY OFF., HAWAII’S ENERGY FACTS & FIGURES 3 fig.4 (Nov. 2020), https://energy.hawaii.gov/wp-content/uploads/2020/11/HSEO_FactsAndFigures-2020.pdf [<https://perma.cc/R56P-WTZ2>].

114. *Id.* at 7 (explaining that the average per-unit cost of electricity in Hawai‘i has been at least twice the average in the U.S.).

115. *See, e.g., Jeanne Whalen & Jacob Bogage, Gasoline Prices Are One Way Americans Could Feel the Impact of War in Ukraine*, WASH. POST (Feb. 24, 2022, 6:14 PM), <https://www.washingtonpost.com/us-policy/2022/02/24/oil-price-russia-ukraine> [<https://perma.cc/G7H7-VMQY>] (describing “wild price gyrations for crude oil” arising from uncertainty in global markets due to Russia’s invasion of Ukraine); HAW. STATE ENERGY OFF., *supra* note 113, at 5, 7 (explaining that Hawai‘i’s oil-linked electricity costs correlate closely with oil market fluctuations).

116. The top three foreign oil exporters to Hawai‘i in 2019 were Russia, Libya, and South Sudan. HAW. STATE ENERGY OFF., *supra* note 113, at 3 fig. 6. The geopolitical stances of these states are beyond the scope of this paper, but it should not be surprising that the oil industry has ties to troubling practices in places like this. *See generally*, Zeinab Mohammed Salih, *A Crude Role in South Sudan’s War*, U.S. NEWS & WORLD REP. (July 20, 2018, 9:29 AM), <https://www.usnews.com/news/best-countries/articles/2018-07-20/south-sudans-dependence-on-oil-money-imperils-un-arms-embargo-expert-warns> (reporting that “[s]o long as South Sudan’s oil exports enrich the people in the country who have strong ties to arms suppliers, a United Nations-imposed arms embargo will be ineffective, says a former government minister in the conflict-torn nation.”). It is not clear how much oil Hawai‘i imports from the U.S. Some perspectives will conclude that the U.S. shares a troubling record on issues such as climate change, human rights, and armed conflict.

117. *See* Haw. Dep’t of Bus., Econ. Dev. & Tourism, *Monthly Energy Data*, https://dbedt.hawaii.gov/economic/files/2022/06/Monthly_Energy_Data.xlsx (last visited Apr. 2022) (detailing the number of electricity consumers on each island as of March 2022: O‘ahu 308,749; Maui 68,746; Lana‘i 1,757; Moloka‘i 3,283; Hawai‘i 88,316; and Kaua‘i 38,753—i.e., 509,604 total, of which 470,851 or approximately 92 percent are in the Hawaiian Electric service territories, while 38,753 or 8 percent are in the Kaua‘i Island Utility Cooperative service territory); *see also Power Facts*, HAWAIIAN ELEC. (Apr. 2022), https://www.hawaiianelectric.com/documents/about_us/company_facts/power_facts.pdf [<https://perma.cc/SAV3-CTRG>].

political power in a single entity. Energy policy decisions and processes are often focused on the island of O‘ahu, which serves as headquarters for entities like the legislature, electricity regulators (the Public Utilities Commission), land use regulators (the State Land Use Commission), the Consumer Advocate (created by statute to protect public interests in electricity regulation), and other actors in the public sphere. Particularly in the “pre-Zoom” era, if residents of other islands in Hawai‘i wished to participate in energy policy processes, it often involved purchasing airfare to O‘ahu.

Looking ahead, Hawai‘i has embarked on an effort to decarbonize its economy by 2045, including a mandate for electric utilities to achieve a 100 percent renewable portfolio standard by the same deadline.¹¹⁸ These are potentially transformative sparks for Hawai‘i’s energy sector, implicating energy justice concerns and opportunities such as those outlined in Welton and Eisen’s call for clean energy justice.¹¹⁹ This is readily apparent in a variety of debates and conflicts about siting renewable energy infrastructure. For example, communities on the island of Hawai‘i are opposing the siting and operation of a proposed tree-burning biomass generator located alongside a residential community.¹²⁰ Communities on the island of Kaua‘i are highlighting procedural concerns stemming from a proposal for pumped-hydropower storage, asking energy regulators to defer decision-making on the project’s utility contract until after the environmental review process is complete.¹²¹ Communities on the island of O‘ahu have highlighted combined distributional and procedural inequities associated with siting wind energy infrastructure and solar energy infrastructure.¹²²

118. HAW. REV. STAT. § 269–92 (2021).

119. See Welton & Eisen, *supra* note 21.

120. See, e.g., *Hu Honua Courts Community, Activists Push Back*, BIG ISLAND VIDEO NEWS (Oct. 3, 2019, 9:19 AM), <https://www.bigislandvideonews.com/2019/10/03/hu-honua-courts-community-activists-push-back> [<https://perma.cc/KHH8-8PA9>]; see also Division of Consumer Advocacy’s Post-Hearing Brief, *In re* Haw. Elec. Light Co. at 19 (No. 2017–0122) (Haw. Pub. Util. Comm’n Mar. 29, 2022), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A22C30A93538F00768> [<https://perma.cc/539X-896A>].

121. See, e.g., Po‘ai Wai Ola/West Kaua‘i Watershed Alliance’s Motion for Reconsideration and/or Clarification of Decision & Order No. 38905 Filed on December 1, 2021, *In re* Pub. Util. Comm’n (No. 2020–0218) (Haw. Pub. Util. Comm’n Dec. 13, 2021), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A21L15A92716I01174> [<https://perma.cc/PZ96-G23L>].

122. See, e.g., Christian Palmer, *Is Hawaii Leading the Clean Energy Revolutions?*, CIVIL BEAT (Oct. 26, 2020), <https://www.civilbeat.org/2020/10/is-hawaii-leading-the-clean-energy-revolution> [<https://perma.cc/Q64P-JX4K>] (describing that “[a]t a subsequent PUC meeting that was packed with community members who wanted to be involved in the process, I heard organizers say that we would all be expelled from the meeting if any one of us said anything”); Suveon Lee, *Lawsuit: Closed-Door Board Of Ed Meeting Violated Sunshine Law*, CIVIL BEAT (April 22, 2020), <https://www.civilbeat.org/2020/04/lawsuit-closed-door-board-of-ed-meeting-violated-sunshine-law> [<https://perma.cc/HH2M-GWB2>] (describing a lawsuit by a Kahuku community member against the State Board of Education “for shutting her out of a meeting where she hoped to convince board members to accept public input” on the

As one illustration of the complexity and nuance of these types of siting questions, consider the now-withdrawn Palehua wind power proposal. The hillside land designated for the project is owned by a family of well-known environmentalists who hoped to use revenue from the project to restore forest areas on the land. The land has been degraded by erosion and non-native plants, leading to “ecological chaos.”¹²³ A nearby neighborhood board unanimously opposed the project, including one member who succinctly captured the distributive concerns: “We get it, no matter what’s bad. We get [it] in West Oahu. We get the dumps, we get the refineries, we get all the ugly things nobody else wants.”¹²⁴ Community members also noted that the area is home to a concentration of ‘elepaio and pueo, endangered bird species that could be harmed by wind turbines.¹²⁵ At the same time, the type of habitat degradation the project pledged to remedy is a factor in causing the birds’ endangered status.¹²⁶

Siting-focused questions like these are important and relatively visible components of energy justice. They often succeed in surfacing distributive and procedural injustices. But they are also merely the visible tip of a much larger iceberg. If energy justice focuses too closely on *where* to site a project, it will discount opportunities to address precursor questions.

What do we need from the power system?

What type of infrastructure should be sited, if sited at all?

Who will decide where to site infrastructure?

Who will own it? Who will control it, and how?

Who will benefit from it, and how? Who will be (and who has already been) harmed from it, and how?

then-proposed wind turbines).

123. Rick Daysog, *A planned wind farm is getting opposition from an unusual source: Environmentalists*, HAWAII NEWS NOW (Feb. 11, 2019), <https://www.hawaiiinewsnow.com/2019/02/12/planned-wind-farm-is-getting-opposition-an-unusual-source-environmentalists> [https://perma.cc/FS6B-J99C]; see also Hawaiian Electric Application, *In re Haw. Elec. Co. Ex. 9* at 9 (No. 2018–0400) (Haw. Pub. Util. Comm’n Nov. 21, 2018), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A18K23B02134I00298> [https://perma.cc/FXV6–38YW].

For three generations, the Gills have demonstrated their commitment to caring for Hawai‘i’s lands as passionate advocates for the environment. They have pledged to keep 1,600 acres of land on the Wai‘anae Range in agriculture and conservation. Working together, we will preserve the beauty and cultural significance of Palehua while contributing to a more sustainable and independent future for Hawai‘i.

Id.

124. Daysog, *supra* note 123.

125. *Id.*; see *O‘ahu ‘Elepaio*, HAW. DEP’T OF LAND AND NATURAL RESOURCES (last updated 2022) <https://dlnr.hawaii.gov/wildlife/birds/oahu-elepaio> [https://perma.cc/W7C3-PGTS] (describing the bird’s status, and threats); *Pueo*, HAW. DEP’T OF LAND AND NATURAL RESOURCES (last updated 2022), <https://dlnr.hawaii.gov/wildlife/birds/pueo> [https://perma.cc/KK23–97W2] (describing the bird’s status, and threats).

126. *O‘ahu ‘Elepaio*, HAW. DEP’T OF LAND AND NATURAL RESOURCES, *supra* note 125.

Questions like these overlap with energy planning, overseen in Hawai'i by the Public Utilities Commission. This facet of energy policy has a well-deserved reputation for being extraordinarily dense, filled with technical jargon and legalese that is familiar to frequent participants such as utilities, developers, and energy advocates, but which is difficult to penetrate for communities who participate less frequently.¹²⁷ Information about energy projects in other public fora (such as media reports) is less impenetrable, but it may also be less reliable or representative.¹²⁸

Decarbonization of energy systems will require good answers to the type of regulatory questions outlined above, tackled *before* deciding whether to site particular instances of energy infrastructure in a particular community. Thus, the energy justice agenda must develop in ways that are designed to address

127. Hawai'i's energy regulators accept written public comments via email. And they often direct utilities to conduct public outreach (or to make public outreach a component of project proposals from energy developers). But these efforts have injected new problems into the process. For example, the developer of a recently contested biomass-burning project set up a website to enable the submission of pre-generated public comments supporting the project, with the click of a button. See Letter from Warren Lee, President, Hu Honua Bioenergy, to Hawai'i PUC, *In re* Haw. Elec. Light Co. (No. 2017-0122) (Haw. Pub. Util. Comm'n Sep. 3, 2020), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A20I04A85041I00913> [<https://perma.cc/H8X4-N7EV>]. The commission determined that some comments were submitted without the authorization of the person with whom the comment was associated, "call[ing] into question the credibility and legality of other public comments filed in this docket, which the Commission notes number in the thousands." Letter from Hawai'i PUC to Service List, *In re* Haw. Elec. Light Co. (No. 2017-0122) (Haw. Pub. Util. Comm'n Sep. 2, 2020), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A20I02B10937F00398> [<https://perma.cc/32XV-R8J3>]. In response, the developer suggested that an opponent of the project may have been involved in submitting the unauthorized comments, as a potential "deceptive form of sabotage." Letter from Warren Lee, President, Hu Honua Bioenergy, to Hawai'i PUC, *In re* Haw. Elec. Light Co. (No. 2017-0122) (Haw. Pub. Util. Comm'n Sep. 8, 2020), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A20I08B55328J01342> [<https://perma.cc/RJ9F-TD9V>].

128. As an example of how quotes in the media might lead public debate astray, consider the following from Hawai'i State Senator Gil Riviere, a respected and frequent participant in environmental and other public policy debates. Discussing a hotly contested wind farm development, Senator Riviere was reported to have commented that "the public probably didn't realize just how much of Oahu's flat land suited for agriculture will have to be given up to solar farms to achieve the state's [100 percent renewable energy] goal. The trade-off in land for green energy might not be worth it, he said." Stewart Yerton, *Residents And Policymakers Battle Over Hawaii Wind Energy Projects*, CIVIL BEAT (March 29, 2020) <https://www.civilbeat.org/2020/03/residents-and-policymakers-battle-over-hawaii-wind-energy-projects> [<https://perma.cc/KN2N-S674>]. Media coverage of that perspective ended with this quote: "If the price is to have every square inch of farm land covered in solar panels," he said, "maybe we need to rethink it." *Id.* "Covering every square inch of farm land" was probably intended more as hyperbole rather than fact, insofar as it does not accurately represent the potential tradeoffs and/or synergies between energy and agriculture. But for some community members, particularly those deeply involved in opposition to a particular energy project and those familiar with Senator Riviere's respected reputation, such hyperbole (presented without qualification from the media) may be accepted as a social fact.

these fundamental precursor questions, particularly if decarbonization will also succeed in promoting the type of transformative justice outlined by Baker and others. At their core, these efforts should examine how social systems and social relations underpinning energy regulation might ultimately affect distributive and procedural equity. That is exactly the role of restorative justice.

With this context in mind, the remainder of this work will engage in a thought experiment to envision how restorative principles and practices might apply to energy regulation in Hawai'i. As noted earlier, the intention is *not* to prescribe exactly what restorative justice would mean for Hawai'i's energy systems. The issues are far too nuanced and contextual¹²⁹ for any single person to predict an outcome—particularly when that person is a foreigner to Hawai'i and is not a member of the countless communities whose voices would sit at the center of a restorative approach. Rather, this work simply hopes to illustrate how restorative justice can be more than a theoretical construct, that it can be operationalized in the energy sector just as it could be operationalized in other social and legal contexts, and that its outcomes could be directly relevant to contemporary energy policy questions. I thank readers in advance for indulging this experimental approach, and I encourage others to think about how their own participation and conclusions would differ from those envisioned here. With that *crucial* caveat, this experiment proceeds by asking questions about recognition, responsibility, reconstruction, and repair.

A. *Recognition*

Speaking at a conference on restorative justice, Cornel West summarized that restorative justice means re-evaluating what happened and giving up old narratives (paraphrased).¹³⁰ This succinctly captures the concept that restorative practices start with facilitated dialogue to unearth harms in ways that give voice to all parties who wish to speak, without constraining them to dominant narratives. In an energy context, this would mean constructing a truth and reconciliation process to re-examine narratives about how energy systems have evolved, who has participated in that evolution and how, and what harms and benefits have accrued along the path to the modern system.¹³¹

Such a process would necessarily stretch to issues that are typically far beyond the scope of “public outreach” in the energy regulation sphere.

129. See Yamamoto & Lyman, *supra* note 95, at 312 (calling for environmental justice to “treat racial and indigenous communities and their relationships . . . with greater complexity”).

130. Cornel West, Keynote, 2015 Conference of the National Association of Community and Restorative Justice: Shaping Justice (June 1, 2015), <https://soundcloud.com/nacrj-sound/cornelwestjune12015> [<https://perma.cc/3TZS-5LTA>].

131. That process should also be constructed to serve a long-term monitoring role beyond this initial inquiry, to allow for iteration and learning as energy systems continue to evolve. *Cf.* John Braithwaite, *Learning to Scale Up Restorative Justice*, RESTORATIVE JUSTICE IN TRANSITIONAL SETTINGS, 173–174 (Kerry Clamp ed., 2016) (warning against “short-termism” in the truth and reconciliation process, in the context of transitional justice).

One can imagine that the resulting storytelling would include a broad swath of the issues that are already being heard in the energy realm, such as concerns about how high electricity prices are impacting families or businesses and how some Hawai'i communities feel disconnected from energy decision making (particularly in rural areas, such as the island of Moloka'i). From a regulator's perspective, a common starting point for energy narratives is to explain the creation of the "regulatory compact" that grants monopoly power to utilities in exchange for the obligation to provide regulated service without discrimination.¹³² In the contemporary pandemic-shaped world where power is a necessity for remote access to education, work, and recreation, we might also expect to hear appreciation for reliable access to electricity. Undoubtedly, the frequently contentious issues about siting new infrastructure would also be raised.

Themes like these—reliability, cost, siting, and community autonomy—are indeed accounted for in various formulations of energy justice. But restorative justice asks that we start by examining the narratives, social structures, and historical precursors that undergird those themes. In Hawai'i, this means considering the story of how the birth and evolution of the state's dominant investor-owned electric utility is intertwined with the illegal overthrow and colonization of the Kingdom of Hawai'i.¹³³

1. Hawaiian Electric and the Illegal Overthrow of the Kingdom of Hawai'i

On January 12, 1893, in one of her last official acts before being illegally deposed, Hawai'i's Queen (Mō'ī) Lili'uokalani signed Bill 219, providing that the "Minister of the Interior is hereby directed to sell at public auction . . . the *exclusive right and franchise* to furnish and supply electric light and electric power [in Honolulu] during the *term of ten years* from the date of such sale."¹³⁴ The bill included shades of the present regulatory compact by creating an exclusive right to sell power in exchange for the obligation to serve.¹³⁵ It also

132. See Order 32052 at Exhibit A: Commission's Inclinations on the Future of Hawaii's Electric Utilities, *In re* Integrated Resource Planning at 2 (No. 2012-0036) (Haw. Pub. Util. Comm'n Apr. 28, 2014), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A14D29A91612I82852> [<https://perma.cc/94E2-37CL>].

133. See generally Apology Resolution, *supra* note 8 (acknowledging and apologizing for "the illegal overthrow of the Kingdom of Hawaii on January 17, 1893").

134. Act to Regulate and Control the Production and Furnishing of Electricity in Honolulu (Haw. King. 1893) [hereinafter Bill 219 or B. 219 (Haw. King. 1892)]; see also LEGISLATURE JOURNAL, at 472, 473, 491, 492, 530, 539, 549 (Haw. King. 1892) (recording amendments, debates, and votes related to Bill 219 before it was enacted); EVENING BULLETIN (Honolulu), Dec. 17, 1892, at 3 (describing Bill 219 as a bill "to regulate and control the production and furnishing of electricity in Honolulu") (on file with author); EVENING BULLETIN (Honolulu), Dec. 23, 1892, at 4 (describing Bill 219 as a bill "to regulate and control the production and furnishing of electricity in Honolulu") (on file with author).

135. See *id.*

reserved the government's right to sell power from a hydropower generating station built four years earlier at the direction of Lili'uokalani's predecessor, King (Mō'ī) David Kalākaua.¹³⁶

Lili'uokalani's signing of Bill 219 occurred at the end of 1892–93 legislative session, which had been marked by her attempts to re-form a cabinet that would be loyal to her efforts to “restore some measure of the native rule lost to the Bayonet Constitution.”¹³⁷ “Bayonet Constitution” is the English-language name given to an 1887 document signed by Kalākaua under threat of force by members of a secretive group of “haole [foreign] businessman, attorneys, laborers, and artisans” calling itself the Hawaiian League.¹³⁸ To secure Kalākaua's forced assent to the 1887 constitution, the Hawaiian League allied with an all-Caucasian armed militia called the Honolulu Rifles. This new constitution stripped the Mō'ī of most governing power and established a new cabinet occupied by members of the Hawaiian League.¹³⁹ Although Kalākaua remained monarch until he was succeeded by Lili'uokalani after his death in 1891, she later described the bayonet-installed cabinet as “the absolute monarch of the kingdom of the Hawaiian Islands.”¹⁴⁰ The San Francisco Chronicle described the new government as a “military oligarchy.”¹⁴¹ One of the leaders of the Hawaiian League, Lorrin Thurston, was installed as Minister of the

136. See *id.*; The Electric Light, DAILY BULLETIN, March 24, 1888, available at <https://chroniclingamerica.loc.gov/lccn/sn82016412/1888-03-24/ed-1/seq-3> [<https://perma.cc/6LCM-XVYM>] (describing the hydropower generator).

137. TOM COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAII 120 (2016); see also 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 582 (1979), available at <http://ulukau.org/elib/collect/kingdom3/index/assoc/D0.dir/doc624.pdf> [<https://perma.cc/P4E6-2FE3>] (“The proximate cause of the of the Revolution of January 17, 1893, was the attempt by Queen Liliuokalani on the previous Saturday afternoon, January 14, to promulgate a new constitution which she had prepared. The hour or two immediately following the prorogation of the legislature was the time in which the queen planned to sign and proclaim the new constitution.”)

138. JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, 235 (2002). Here the phrase haole or foreign is intended to mean not Native Hawaiian, rather than meaning not born in Hawaii'i. Cf. *id.* at 237 (“Castle's use of the word Hawaiians [in discussing the composition and intent of the Hawaiian League] to refer to those of Hawaii'i birth obscures things rather thoroughly. By lumping together those of Hawaiian 'birth, parentage and affiliation,' Castle appeared to be saying that some form of common identify bound together the few part-Hawaiians with those of missionary children who had been born in the Islands.”). See generally *He Mau Hoomanao No Kela Au Kahiko o Na Alii o Hawaii Nei*, Ke Alakai o Hawaii Aug. 8, 1930 at 2 (referring to the 1887 constitution as kumu kanawai elau pu) (translation by Devin Forrest).

139. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 121–23 (2008) (quoting OSORIO *supra* note 138, at 240 (“this constitution meant the abrupt and nearly total termination of any executive power or royal authority”)).

140. *Id.*

141. *Id.* at 123–24 (citing LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN at 375; then quoting SAN FRANCISCO CHRONICLE, September 5, 1887).

Interior—and thus took on oversight over the electricity franchise created by Bill 219.¹⁴²

Two days after Lili‘uokalani signed Bill 219, she set out to announce a new constitution to replace the Bayonet Constitution.¹⁴³ Author Tom Coffman describes this as “the event Thurston and [U.S. Minister John] Stevens had been waiting for.”¹⁴⁴ Subsequent events are described by the following excerpts from the “Apology Resolution” adopted in 1993 by a substantial majority vote of both the U.S. Senate and House of Representatives.

- “[O]n January 14, 1893, [the] United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii.”
- In “pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government.”
- “[O]n the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendants of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government.”
- “[T]he United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law.”
- U.S. President Cleveland later “concluded that a ‘substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair’ and called for the restoration of the Hawaiian monarchy,”
- However, the Provisional Government successfully lobbied against such restoration, and later “declared itself to be the Republic of Hawaii.”
- “[W]hile imprisoned in Iolani Palace, Queen Liliuokalani was forced by representatives of the Republic of Hawaii to officially abdicate her throne.”
- In “1898, as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution,” and through this

142. *See id.* at 114 (noting Thurston’s role as Minister of the Interior); B. 219 (Haw. King. 1892), *supra* note 134 (describing the various oversight roles of the Minister of the Interior).

143. COFFMAN, *supra* note 137, at 121.

144. *Id.* at 120.

Resolution “the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States.”

- However, “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States.”¹⁴⁵

In the midst of this illegal overthrow of the Kingdom of Hawai‘i, the Hawaiian Electric Company was born. It was incorporated in October 1891 by four founders, including William W. Hall, who served as its first President.¹⁴⁶ Six months later—and four months after the January armed coup d’etat—Hall secured Bill 219’s electricity franchise by submitting the only bid, agreeing to pay the Provisional Government 2.5 percent of the company’s gross receipts (the minimum set forth in the bill).¹⁴⁷ In fact, Bill 219 had already set the stage for Hawaiian Electric to obtain the franchise. The bill provided that if any other bidder won, it would be required to purchase the company’s equipment.¹⁴⁸

A century later in 1988, another Hawaiian Electric President, C. Dudley Pratt, told a similar story:

Early in 1893, Queen Liliu‘okalani was placed under house arrest and ultimately deposed. A provisional government was formed, headed by Sanford B. Dole, and from this government Hawaiian Electric received an exclusive franchise to furnish electric light and power to Honolulu, the franchise to run for [ten] years.¹⁴⁹

Legal writing students everywhere will spot Pratt’s use of the passive voice, known to hide the actor. And indeed, Pratt’s story omits the role of important players.

William Hall was not just the first President of Hawaiian Electric; he was also a leader in the illegal overthrow. He was a member of the core committee of the Hawaiian League, and he participated in forcing King Kalākaua to sign the Bayonet Constitution.¹⁵⁰ Later he bragged that he had also furnished

145. Apology Resolution, *supra* note 8, at 1510–12.

146. CARL MYATT, HAWAII: THE ELECTRIC CENTURY 134 (1991).

147. *Id.* at 135; B. 219 (Haw. King. 1892), *supra* note 134, § 3.

148. B. 219 (Haw. King. 1892), *supra* note 134, § 16.

149. C. Dudley Pratt Jr., President & Chief Exec. Officer, Haw. Elec. Indus., Inc., Remarks to the Newcomen Society: HEI - The Start of a New Hawaii Tradition 13 (Oct. 20, 1988), <https://evols.library.manoa.hawaii.edu/bitstream/10524/23428/1988%20-%20HEI.pdf> [<https://perma.cc/KM3R-KWJF>]. Pratt described the franchise term as “sixteen years” but Bill 219 conferred a term of ten years. *See* B. 219 (Haw. King. 1892), *supra* note 134, § 2.

150. DAILY BULLETIN (Honolulu), Sept. 30, 1887, <https://chroniclingamerica.loc.gov/lccn/sn82016412/1887-09-30/ed-1/seq-3> [<https://perma.cc/ZM3Y-BQY4>].

William W. Hall of Honolulu is in town. He was one of that committee of thirteen that called on King Kalakaua and demanded that he either abdicate or sign the new Constitution. “We committeemen filed into the palace,” said Mr. Hall, “and found the King at his desk in one of the rooms. He was pretty well frightened and extremely conciliatory. He asked us to-be seated, but we declined, and delivered our message standing. “Your Majesty,” our spokesman said, “we have a communication for you.” The King took the message and began to read

rifles for the Hawaiian League's militia.¹⁵¹ This role as an arms supplier carried on into the overthrow of Queen Lili'uokalani. A few days after she was deposed, Hall was installed as quartermaster of the Provisional Government's National Guard.¹⁵²

Moreover, Hall was not the only founder of Hawaiian Electric involved in the overthrow. Jonathan Austin, who is described as the "Founding Father" of the company,¹⁵³ was also a member of the Hawaiian League alongside Hall. An attorney, Austin is credited as one of the drafters of the Bayonet Constitution, along with Lorrin Thurston and others.¹⁵⁴

2. After the Overthrow

Pratt's 1988 narrative described the "annexation" (i.e., illegal overthrow) of Hawai'i as a launching point for the company's subsequent growth: "Whatever the other effects of these actions, they created a favorable political climate in which local industries could begin to plan for the future."¹⁵⁵ That narrative mirrored the sentiment of an 1893 editorial, which concluded:

The fact that the electric light franchise has found its way to the hands of men who will use it to the best advantage of the city is an agreeable circumstance. The electric service is now greatly circumscribed, but under the new deal it will be made convenient to everybody. The arrangement is in the nature of an advance step.¹⁵⁶

In 1894 the company purchased the electric plant from the royal palace and installed it alongside additional coal-fired generators at a site that came to be known as the Alakea plant.¹⁵⁷ To illustrate the longevity of these early power decisions, consider that the site eventually grew to house a 113-megawatt

it. The spokesman said "Your Majesty will be given twenty-four hours within which to make an answer; find if there is none by that time it will be considered a negative one." "We then filed out. We felt no uneasiness, because all the reputable people of Honolulu were with us. We formed a secret league there in January and took in members until we had, at the time of the revolution, about 500 citizens sworn. They had all joined the Honolulu Rifles, the only local militia, and I had furnished them all with Springfield rifles. The King had simply his police, composed of 100 natives and about sixty palace attendants."

Id.

151. *Id.*

152. MYATT, *supra* note 146, at 134–35.

153. *Id.* at 133.

154. KUYKENDALL, *supra* note 137, at 367.

155. Pratt, *supra* note 149, at 14.

156. MYATT, *supra* note 146, at 135. Note that this statement is erroneously credited to an editorial in the May 5, 1893 issue of the Hawaiian Star, although it actually appeared in the May 3 issue. HAWAIIAN STAR (Honolulu), May 3, 1893, available at <https://chroniclingamerica.loc.gov/lccn/sn82015415/1893-05-03/ed-1/seq-2>.

157. MYATT, *supra* note 146, at 135–36.

oil-fired generating station that was not deactivated until over a hundred years later, in 2014.¹⁵⁸

Bill 219 granted the government the right to “take over” the company’s equipment at the expiration of the ten-year franchise term by paying for the equipment’s value.¹⁵⁹ With the franchise set to expire in 1903, the company sought an extension from the then-territorial legislature and succeeded in obtaining a thirty-five year extension.¹⁶⁰ However, this territorial act required ratification by the U.S. Congress.¹⁶¹ The company’s attorneys and executives thus travelled to Washington D.C. and successfully lobbied Congress to approve an extension.¹⁶² But Congress also modified the territorial legislation in several ways, including one change with particularly lasting relevance—it deleted the thirty-five year term and instead granted the company a *perpetual* franchise.¹⁶³

There was apparently some local controversy over this issue. The Territorial House Committee on Agriculture and Manufactures reported that “[f]rom the comments of the local press regarding the term of years for which franchise was asked, namely, fifty years, there seems to be strong opposition to granting franchises except for a very short period” and that “there is a strong feeling in this city against granting franchises for longer period than ten years.”¹⁶⁴ The territorial committee thus initially recommended that it be limited to fifteen years: “As a large corporation of a quasi-public nature, such as this, should not be subject to the whims of nearly every succeeding legislature, your committee suggested in its partial report that the term be limited to fifteen years.”¹⁶⁵ After reviewing utility franchises granted in cities on the U.S. continent, ranging from

158. See Duane Shimogawa, *Hawaiian Electric to shut down Honolulu power plant in January*, PACIFIC BUSINESS NEWS (Sep. 3, 2013), <https://www.bizjournals.com/pacific/news/2013/09/03/hawaiian-electric-to-shut-down.html> [<https://perma.cc/RQD5-YTE3>] (reporting on the deactivation of the Honolulu power plant).

159. B. 219 (Haw. King. 1892), *supra* note 134, § 15 (“At the termination of the franchise granted hereunder, the Minister may take over on behalf of the Government all of the plant of the contractor [Hawaiian Electric] upon payment to him of the value thereof.”).

160. Act 48 § 2 (Haw. Terr. 1903).

161. Hawaiian Organic Act § 55, Pub. L. No. 56–339, 31 Stat. 141(1900) (requiring that the territorial “legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress”).

162. See S. Rep. No. 58–156, at 4–7 (1903) (reproducing a letter from Hawaiian Electric’s attorneys to the Senate Committee on the Pacific Islands and Puerto Rico: “Inasmuch as the undersigned have traveled about 5,000 miles to present this matter to your committee, we respectfully urge a hearing at an early date convenient to the committee.”); see also MYATT, *supra* note 146, at 139 (describing the delegation the company sent to Washington D.C. to press its case).

163. H.R. 7266, 58th Cong. (1903). This perpetual right was made subject to subsequent acts of Congress or the territorial legislature. *Id.* § 2.

164. H.R. Rep. 58–18, at 7–8 (1903) (attaching the territorial committee’s report).

165. *Id.* at 8.

twenty to 999 years, the committee later deemed fifteen years as “very short.”¹⁶⁶ The territorial legislature thus set the extension at thirty-five years.

It appears that the Hawaiian Electric delegation in Washington D.C. succeeded in reopening this issue with Congress. The Congressional House Committee on Territories struck the time limitation in its entirety (without written explanation) and replaced it with a provision clarifying that Congress or the territorial legislature could later amend or repeal the act.¹⁶⁷ Nearly 120 years later, the company still operates under this perpetual franchise granted by Congress.

3. The “Big Six?”—Hawaiian Electric and the Sugar Industry

Back in Honolulu and holding this newly perpetual franchise, the company continued to expand its footprint by leasing the government hydropower station installed in 1888.¹⁶⁸ This essentially erased the last vestige of a public power project initiated by King Kalākaua, and it required the government to begin buying power from Hawaiian Electric.¹⁶⁹ A news report conveyed that at least one local electrician was “decidedly opposed to the proposed transfer, as, he state[d], this would give the Hawaiian Electric Company a monopoly which might become dangerous to the community.”¹⁷⁰ This concern was not unique to Hawai‘i, nor to the electricity sector.¹⁷¹ In 1913, Act 89 established a Public Utilities Commission (PUC) to regulate entities like Hawaiian Electric,¹⁷² as had two-thirds of U.S. states.¹⁷³ This new regulatory approach coincided with an effort to open room for a competing electric utility. Opponents of incumbent Hawaiian Electric launched a “media blitz” and drafted the PUC bill, which the governor initially vetoed over concerns that it would allow for two electricity franchises.¹⁷⁴ The legislature overrode the veto in a midnight vote,¹⁷⁵ but the second utility did not materialize.

166. *See id.*

167. H.R. Rep. 58–1593, at 1 (1904).

168. *See* EVENING BULLETIN (Honolulu) (July 6, 1905) <https://chroniclingamerica.loc.gov/lccn/sn82016413/1905-07-06/ed-1/seq-1> [<https://perma.cc/P27G-LF6G>], (describing Hawaiian Electric’s proposal to lease the station).

169. *See* MYATT, *supra* note 146, at 139 (“In 1904, HECO started to light up government offices.”).

170. EVENING BULLETIN (Honolulu) (July 6, 1905) <https://chroniclingamerica.loc.gov/lccn/sn82016413/1905-07-06/ed-1/seq-1> [<https://perma.cc/P27G-LF6G>].

171. *See generally* ROBERT R. NORDHAUS & SAM KALEN, ENERGY FOLLIES 11 (2018) (comparing concerns about electric monopolies to concerns about oil and transportation monopolies); LEAH CARDMORE STOKES, SHORT CIRCUITING POLICY 77 (2020) (describing concerns in the early 1900s about utility monopoly power and how this led to utility regulation, and describing that this limited growth in public utilities).

172. Act 89 (Haw. Terr. 1913).

173. STOKES, *supra* note 171, at 77.

174. MYATT, *supra* note 146, at 141–42.

175. *Id.* at 142.

Shortly after this regulatory change, control over Hawaiian Electric was purchased by two influential estates tied to Castle & Cooke¹⁷⁶—one of the “Big Five” companies that by 1920 dominated ninety-four percent of Hawai‘i’s sugar industry.¹⁷⁷ Much has been written about the role of these sugar companies in the occupation and colonization of Hawai‘i.¹⁷⁸ These corporate players were characterized by three attributes which enabled them “to dominate not just the sugar and pineapple sectors of the economy, but also shipping, retail, and finance”: vertical integration, interlocking directorates, and extensive lobbying in Washington D.C.¹⁷⁹ By the early 1900s, Hawaiian Electric plainly shared all three attributes,¹⁸⁰ placing it squarely within the web of colonial corporate control usually ascribed to the sugar industry.

Today, the five sugar companies have largely either been liquidated or spun off into subsidiaries (e.g., Dole Foods), although Castle & Cooke and Alexander & Baldwin continue to maintain relatively large footprints in Hawai‘i as landholding and development entities.¹⁸¹ Alexander & Baldwin,

176. *Id.* at 142–43; *see also* Eric Pape, *Friends In High Places Helped HECO Tighten Its Grip On Hawaii*, CIVIL BEAT (July 6, 2016), <https://www.civilbeat.org/2016/07/friends-in-high-places-helped-heco-tighten-its-grip-on-hawaii> [<https://perma.cc/KTM5-9N3W>]. The new owners were the C.M. Cooke Estate and the J.B. Atherton Estate. C.M. Cooke was an heir to one of the founders of Castle & Cooke. J.B. Atherton served as Castle & Cooke’s president.

177. CAROL A. MACLENNAN, *SOVEREIGN SUGAR: INDUSTRY AND ENVIRONMENT IN HAWAII* 82 (2014).

178. *See, e.g.*, SUMNER LA CROIX, *HAWAII, EIGHT HUNDRED YEARS OF POLITICAL AND ECONOMIC CHANGE* 153 (2019).

Caucasian voters were a key element in the dominant political coalition due to their large share in the electorate during the territory’s first 40 years. The pay-offs to these voters for participating in the coalition were indirect ones, stemming primarily from the benefits provided to five key corporations for which Caucasians were employed as skilled workers, managers, and owners. C. Brewer & Co., Theo H. Davies & Co., Castle & Cooke, Inc., H. Hackfeld & Co., and Alexander & Baldwin, Ltd., were together known as the “Big Five.” Along with a string of affiliated corporations, they dominated the Hawai‘i economy from the overthrow of the monarchy to the early years of statehood.

Id.

179. *Id.* at 158 (“Interlocking directorates—that is boards of directors with overlapping membership from a common group of elites—fostered relationships among trust companies, the Big Five firms, and affiliated companies.”).

180. *See id.* at 155 fig.72 (illustrating Hawaiian Electric’s place within the web of interlocking directorates); *see also* Pape, *supra* note 176 (illustrating Hawaiian Electric’s place within the web of interlocking directorates); MACLENNAN, *supra* note 177, at 94 (“Most of the new companies providing essential support services to plantations and the new industrial economy were creations of resident missionary descendants. While some sons and sons-in-law (collaterals) specialized in managing a plantation or running the Honolulu agency, others used family wealth to start new initiatives in shipping, telephone service, electrification, railroads, and in necessary plantation operation inputs such as ranches and fertilizers.”).

181. *See* Castle & Cooke Hawai‘i, (April 8, 2022, 12:01 AM), <https://www.castlecookehawaii.com/Page/Home> [<https://perma.cc/H28W-E2KV>]; Alexander & Baldwin, (April 8, 2022, 12:01 AM), <https://alexanderbaldwin.com> [<https://perma.cc/6JP4-GF9M>].

for example, is the fifth-largest private landowner in Hawai‘i.¹⁸² It is also one of a relatively small number of publicly traded corporations in Hawai‘i. Yet in comparison, Hawaiian Electric today remains a more visible and ubiquitous component of Hawai‘i’s financial, political, and social structures. The vast majority of households and businesses in the state are customers. It employs over 3,700 people, making it the third-largest private employer in Hawai‘i.¹⁸³ A proposed 2016 merger of the utility was described as “one of the biggest business deals in state history.”¹⁸⁴ And compared to Alexander & Baldwin, the utility’s publicly traded holding company Hawaiian Electric Industries has nearly three times the market capitalization, at \$4.5 billion compared to \$1.6 billion.¹⁸⁵ Through this lens, Hawaiian Electric might be viewed as the most direct contemporary link to the era of “Big Five” domineering. One might even wonder whether the “Big Five” should have been described as the “Big Six.”

4. Hawaiian Electric and Militarization

The company’s business grew rapidly between 1894 and World War II, driven by population growth (including colonial settler migration) and a business model that encouraged adoption of electric conveniences.¹⁸⁶ Indeed, the name of the company’s employee newsletter at this time was the “Load Builder.”¹⁸⁷ But that growth was also integrally tied to militarization. A PUC report from the late 1930’s reportedly describes that when “the military decided to upgrade and dredge Pearl Harbor,” the “monthly energy requirements of one contractor doing dredging work exceeded 4 million kilowatt-hours per month.”¹⁸⁸ When the Wai‘aleale power plant was installed on the shores of Pu‘uloa

182. HAWAII‘I DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, 2020 STATE OF HAWAII DATA BOOK, tbl. 6.07, <https://files.hawaii.gov/dbedt/economic/databook/db2020/section06.pdf> [<https://perma.cc/TMG7-DRAK>].

183. *Id.* at tbl. 12.15. <https://files.hawaii.gov/dbedt/economic/databook/db2020/section12.pdf> [<https://perma.cc/DP6K-CQRB>].

184. Duane Shimogawa, *Hawaii regulators shoot down \$4.3B NextEra Energy-Hawaiian Electric deal*, PACIFIC BUSINESS NEWS (July 15, 2016), <https://www.bizjournals.com/pacific/news/2016/07/15/hawaii-regulators-shoot-down-4-3b-nextera-energy.html> [<https://perma.cc/X3LJ-UQSW>].

185. See Alexander & Baldwin Financial Statistics, GOOGLE FINANCE, [<https://perma.cc/W8AQ-HKJN>] (last visited Feb. 26, 2021); Hawaiian Electric Industries, Inc. Financial Statistics, GOOGLE FINANCE, [<https://perma.cc/RF9X-3UJQ>] (last visited Feb. 26, 2021).

186. See generally Eric Pape, *Learning to Live in the Electric Century*, CIVIL BEAT (July 7, 2016), <https://www.civilbeat.org/2016/07/learning-to-live-in-the-electric-century> [<https://perma.cc/C5ZA-VHA8>] (“By the mid-1920s, Honolulu was stuffed with more than 125,000 residents. Hawaiian Electric had sold 7,000 home appliances, including toaster stoves, flat irons and vacuum cleaners, not to mention an array of other tools for the everyday homemaker.”).

187. HAWAIIAN ELECTRIC COMPANY, 75 YEARS OF LIGHT AND POWER FOR HONOLULU: THE DIAMOND ANNIVERSARY STORY OF HAWAIIAN ELECTRIC COMPANY (1966).

188. Eric Pape, *How HECO Helped Pull Hawaii Through the Tough Times*, CIVIL BEAT (July 11, 2016), <https://www.civilbeat.org/2016/07/how-heco-helped-pull-hawaii-through-the-tough-times> [<https://perma.cc/QQY9-JB7W>] (describing how military buildup in Hawai‘i boosted Hawaiian Electric sales after the slump of the Great Depression).

(Pearl Harbor) in 1940, its entire “22,500-kw [output] was quickly absorbed by military establishments and plantation communities in Central Oahu.”¹⁸⁹ During World War II, “[t]he demands of military establishments strained [the company’s] power production capabilities,” causing disruptions such as diverting power away from two residential neighborhoods during peak hours while an aircraft carrier was repaired at Pearl Harbor.¹⁹⁰ After the war, power also flowed in the other direction. While the company built additional capacity at the Waiiau facility in 1946, it leased a former U.S. Navy floating power barge moored offshore.¹⁹¹ Notably, the Waiiau plant is still operating today in 2022.

During the war, company employees began to unionize.¹⁹² The early years of this relationship between the company and the union are described as “acrimonious.”¹⁹³ In 1943 union leaders lobbied to municipalize the utility, “with the aim of furnishing electric power and light to the consumers at greatly reduced rates, and of improving the security and status of the employees by associating them with a public utility in the proper sense of the word rather than with a private ‘gravity train.’”¹⁹⁴ In response, the company’s president asserted that the union proposal would not protect the public interest, and came from people who had “no background or experience in the utilities field and hence exhibit the boldness of pure ignorance.”¹⁹⁵ He called the concept of a “private gravity train” “silly” and argued that the company balanced the interests of investors, employees, and the public while it expanded and kept pace with the military’s demand for power.¹⁹⁶

Today, the U.S. military is the company’s largest customer.¹⁹⁷ In 2018 the company completed the construction of a fifty-megawatt generating station located on the Army’s Schofield Barracks facility. While this plant is generally available to serve the grid-at-large, in emergencies the military has a right to “island” the plant such that it serves only military facilities.¹⁹⁸ In 2020 the PUC

189. MYATT, *supra* note 146, at 151; *see also* U.S. DEPARTMENT OF THE INTERIOR, HISTORIC AMERICAN ENGINEERING RECORD No. HI-120, HAWAIIAN ELECTRIC COMPANY, WAIIAU POWER PLANT, UNIT 1 & 2 BUILDING.

190. MYATT, *supra* note 146, at 155.

191. U.S. DEPARTMENT OF THE INTERIOR, *supra* note 189, at 6.

192. MYATT, *supra* note 146, at 155.

193. *Id.*

194. *Id.*

195. *Id.* at 156.

196. *Id.*

197. Kieran McInerney, *Schofield Generating Station Highlights Value of Reciprocating Engines*, POWER ENGINEERING (Aug. 21, 2017), <https://www.power-eng.com/on-site-power/schofield-generating-station-highlights-value-of-reciprocating-engines/#gref> [<https://perma.cc/8XY8-52UY>].

198. *See* Press Release, Hawaiian Electric, U.S. Army Announce Completion of Schofield Generating Station (May 31, 2018), <https://www.hawaiianelectric.com/hawaiian-electric-us-army-announce-completion-of-schofield-generating-station> [<https://perma.cc/CGB8-AWD9>].

also approved a fifty-year contract for the Hawaiian Electric to own, operate, maintain, and upgrade infrastructure serving twelve military facilities.¹⁹⁹

5. Epilogue and the Need for Further Inquiry into the Role of ‘Ōiwi Agency in Hawai‘i’s Early Energy System

Much more could be said—and undoubtedly has been said—about other facets of this story. Other relevant chapters might include discussion of how oil dependence in the electricity sector might be linked to air transportation and a tourism industry that comprises a large part of Hawai‘i’s economy, but which is increasingly viewed as extractive and unsustainable. Or a discussion of how offshoring ownership²⁰⁰ of Hawaiian Electric via listing on the New York Stock Exchange enabled it to acquire other utilities and dramatically expand its service area. Or more recently, how a proposal to acquire the company by NextEra Energy (one of the largest renewable energy developers in the world, and also a political opponent of rooftop solar power in its home state of Florida²⁰¹) was opposed by Hawai‘i stakeholders and regulators in part on the basis of how that might have further eroded local control over Hawai‘i’s energy decisions.²⁰² And certainly, a robust multi-perspective dialogue would also include recognition of ways in which Hawaiian Electric’s evolution has benefitted members of

199. *See id.*; Press Release, Hawaiian Electric, Hawaiian Electric Approved to Take Over Electric Systems at 12 U.S. Army Facilities on Oahu (Nov. 2, 2020), <https://www.hawaiianelectric.com/hawaiian-electric-approved-to-take-over-electric-systems-at-12-us-army-facilities-on-oahu> [<https://perma.cc/9SDJ-LYUN>].

200. When the company initially sought Congressional approval to extend its franchise in 1903, it stressed that the “company [was] essentially a local Hawaiian Island institution and not a foreign affair.” S. REP. NO. 58–156, at 5 (attaching as an appendix a letter from the company’s attorneys lobbying for Congressional approval). The Territorial House Committee on Agriculture and Manufactures similarly noted that “[t]here [were] but four shareholders residing outside of the islands.” H.R. REP. NO. 58–18, at 6 (1903) (attaching as an appendix the report of the territorial committee).

201. *See, e.g.*, Ivan Penn, *Florida’s Utilities Keep Homeowners From Making the Most of Solar Power*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/business/energy-environment/florida-solar-power.html> [<https://perma.cc/85RX-PHPM>] (describing various barriers to rooftop solar in Florida); Mary Ellen Klas & Mario Alejandro, *Revealed: the Florida power company pushing legislation to slow rooftop solar*, THE GUARDIAN (Dec. 20, 2021), <https://www.theguardian.com/environment/2021/dec/20/revealed-the-florida-power-company-pushing-legislation-to-slow-rooftop-solar> [<https://perma.cc/CVE6-MX4E>] (describing various lobbying efforts by NextEra’s Florida Power Light related to rooftop solar policy).

202. Order No. 33795 Dismissing Application Without Prejudice and Closing Docket, *In re* Haw. Elec. Co. at 158 (No. 2015–0022) (Haw. Pub. Util. Comm’n July 15, 2016), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A16G15B50426D71136> [<https://perma.cc/R3JS-JYXN>] (discussing issues of local control: “[T]here is no means of ensuring that the decisions made by NextEra’s management will reflect the interests of Hawaii given that the local management can only make recommendations and, ultimately, are employees of NextEra. Indeed, despite repeated assurances that the HECO Companies would remain locally managed, Applicants’ Witness Gleason admitted that it is possible that the presidents of HECO, MECO, and HELCO could be executives from NextEra.”)

Hawai'i's various communities, including employees, shareholders, or energy consumers who are themselves Kānaka Maoli (Native Hawaiian).²⁰³

Perhaps most importantly, a complete historical inquiry could unearth key elements of 'Ō'iwi (Indigenous)²⁰⁴ agency in the development of energy structures in Hawai'i. Such an inquiry would remove colonial spectacles²⁰⁵ and their focus on the actions of people like Hawaiian Electric founders William Hall and Jonathan Austin. In their place, this inquiry would evaluate the role of Native Hawaiian leaders in exercising their will against or within those energy structures.²⁰⁶

Foremost, this author wonders about the rationale underlying King Kalākaua's 1886 decision to invest in a public power system in the form of lighting in Honolulu powered by a hydropower generation facility—a facility described as “an installation equal to that of any city” of the era.²⁰⁷ The same year, Kalākaua twice chose to create public lighting displays at 'Iolani Palace. The first was in July 1886 and garnered an “immense crowd.”²⁰⁸ The second display occurred in conjunction with Kalākaua's jubilee in November 1886.²⁰⁹ More than a simple birthday celebration, the display of lighting technology was featured alongside public cultural performances which “demonstrated pride in Kanaka culture, art, dance, religion, and history, and in doing so they strengthen[ed] the collective identity of the lahūi [nation, race, tribe, or people] as a nation.”²¹⁰

In the context of the political power struggles happening at that time (reflected, for example, in the coerced signing of the Bayonet Constitution

203. See Sproat, *supra* note 9, at 160 n.8 (using “Native Hawaiian, native Hawaiian, Hawaiian, Kānaka Maoli, and Maoli . . . interchangeably and without reference to blood quantum). “Kānaka Maoli or Maoli is the indigenous Hawaiian name for the population inhabiting Hawai'i at the time of the first western contact,” although “Kānaka Maoli historically referred to a full-blooded 'Hawaiian person.’” *Id.* (citation omitted).

204. “Literally, this translates to ‘of the bones.’ This is a word used for those who have genealogical ties to the Hawaiian Islands, specifically those of ethnic aboriginal Hawaiian descent.” B. Kamanamaikalani Beamer, *Na wai ka mana? Ōiwi Agency and European imperialism in the Hawaiian Kingdom* 6 (Aug. 2008) (Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with author).

205. KAMANAMAIKALANI BEAMER, *NO MĀKOU KA MANA: LIBERATING THE NATION* 9 (2014) (describing the relative vantage of scholarship “conducted through a colonial gaze” which can provide “insight into the mindset of some American missionaries in the Hawaiian Kingdom,” in comparison to scholarship conducted “with the colonial spectacles placed on the table” which can “give voice to a story outside that colonialism”).

206. See generally *id.* at 8–16 (describing the importance of 'Ō'iwi agency and optics when analyzing the Hawaiian Kingdom); Beamer, *supra* note 204, at 9–10 (distinguishing a colonial analysis from one centered on examining 'Ō'iwi agency).

207. VAN DYKE *supra* note 139, at 156 (quoting Lucien Young, *REAL HAWAII: ITS HISTORY AND PRESENT CONDITIONS INCLUDING THE TRUE STORY OF THE REVOLUTION* 38–39 (1970); MYATT, *supra* note 146, at 130–32 (describing early lighting in Honolulu).

208. MYATT, *supra* note 146, at 130.

209. *Id.*

210. TIFFANY LANI ING, *RECLAIMING KALĀKAUA* 166 (2019) (quoting NOENOE K. SILVA, *ALOHA BETRAYED* (2004)).

the following year), the jubilee is thus recognized as a political and cultural affirmation of Kalākaua’s role as a sovereign leader who earned the affection and loyalty of “a proud and independent Hawaiian Kingdom—a picture very different from the one often painted by his contemporary foes and later chroniclers.”²¹¹ Those other accounts veer toward an image of a “playboy king.”²¹² That narrative might paint his work with electricity and other technologies as a passing fancy. But scholars engaging in a deeper inquiry—informed by a fuller picture of his role as sovereign leader and a critical inquiry into how his chroniclers’ political perspectives colored historical accounts—have revealed more. Tiffany Lani Ing’s insightful text on Kalākaua concludes that “the mōi employed emerging technologies—photography, telephones, electricity, and transportation innovations . . . —to strengthen his traditional claims of his own sovereignty and that of his nation.”²¹³

Although Ing’s work does not focus on electricity, at least one contemporary newspaper account suggests that Kalākaua’s energy policy was indeed focused on the public interest and his role in the reciprocal relationship between the mōi and the public. Describing Kalākaua’s 1881 visit to Edison Electric Light Company, the *New York Times* painted a picture that does not comport with a “playboy king” narrative:

[He] appeared to be more than ordinarily familiar with the theoretical aspects of the subject. The visit, indeed, was not altogether one of curiosity, nor was the Edison light wholly unfamiliar to his Majesty, who had already observed it in operation in Paris. It has for several years been one of the dreams of his Majesty, in the development of the civilization toward which his people are rapidly struggling, to introduce the electric light in Honolulu and light the city with it, in preference to gas. He has, however, patiently awaited the perfection of some one of the many systems before the public, and will probably on his return reduce the purpose to practice.²¹⁴

211. *Id.* at 170.

212. JOSEPH R. CONLIN, *THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY VOLUME II* 554 (2014) (“The oligarchy of rich sugar planters had happily ruled Hawaii during the reign of Lili‘uokalani’s brother and predecessor, the affable playboy king David Kalakaua.”).

213. ING, *supra* note 210, at 102.

214. *King Kalakaua’s Movements*, N.Y. TIMES, Sept. 26, 1881. Contemporary accounts in ‘Olelo Hawai‘i (Hawaiian language) have proven to be a rich resource for scholarly inquiry into ‘Ō‘iwi agency. At present, this author is aware of one such account focused on electricity policy around the time of Hawaiian Electric’s birth. Continued research is warranted. A 1903 opinion written in the newspaper *Ka Nupepa Kuokoa* expressed support for renewing Hawaiian Electric’s franchise after the expiration of its initial ten-year term, describing a blend of public and private benefits, together with unidentified issues and burdens associated with Hawaiian Electric. Particularly pertinent parts of this account translate as:

Because this company was granted the ability to do this work here in Hawaii, we have seen the progress this company has made in many aspects, both the public and the company have benefitted. Its many wires crisscross upon the power poles throughout the city, and from them the electricity that brightens each and every dark city night that no resident could fault.

Within its many reports the profits to the Government by this company is ev-

More inquiry is warranted to understand how Kalākaua and other ʻŌiwi actors envisioned the pre-overthrow public power system. With a better understanding, that vision could be compared to the privatized alternative that eventually grew out of Bill 219. It could also be compared to the earlier private development of electricity on the island of Maui, which was apparently motivated by the prospect of longer working hours and increased productivity for a sugar mill.²¹⁵

ident through its filling of the public chest by payment of taxes that the Government levies against its yearly profits, even with this, the company has done very well, its employment has done well, its administration has done well, and it has amassed a large net profit for its shareholders that none can deny, and the tabling of the bill that would renew the right of this company is a great blow to this electric company.

...

There is some truth that there are some issues and burdens in dealing with this electric company, and the members of the legislature are aware of these issues and it is probably because of these that the House has tabled the bill, but, if you analyzed and weighted all the issues, the Kuokoa will tell you that these issues are far less than the benefits this company provides, and these issues are not enough to necessitate the extinguishment of this company, therefore to deny the bill would be the improper move and to grant the right is what is proper, with the understanding that the issues with the company will be worked out.

KA NUPEPA KUOKOA, April 14, 1903, *available at* Papakilo Database, [https://www.papakilodatabase.com/pdnupepa/?a=d&d=KNK19030424-01.2.16&e=——en-20-1-txt-tx-IN%7ctxNU%7ctxTR——\[https://perma.cc/Y7C7-M46R\]](https://www.papakilodatabase.com/pdnupepa/?a=d&d=KNK19030424-01.2.16&e=——en-20-1-txt-tx-IN%7ctxNU%7ctxTR——[https://perma.cc/Y7C7-M46R]) (translation by Devin Forrest). Notably, the paper was established with the express purpose of publicizing haole (foreign) opinions, ideas, and beliefs, “in order to correct, increase, and lead the thoughts of Hawaiian people so that the Kanaka will be like the haole.” Noenoe Silva, *Ke Kū’e Kūpa’a Loa Nei Mākou: Kanaka Maoli Resistance to Colonization 58* (Aug. 1999) (Ph.D. dissertation, University of Hawai’i at Mānoa) (on file with author) (translating the paper’s published objectives). Although the paper initially supported Kalākaua, it later “became outspoken in [its] attacks” on him. ING, *supra* note 210, at 89.

215. See MYATT, *supra* note 146, at 129 (“Convinced that electric light meant longer hours and therefore increased productivity, sugar plantations pioneered the use of electricity on land [in Hawai’i].”). One could also explore how assertions of political sovereignty—such as Kalākaua’s firm stance on granting the United States only a time-limited treaty right to use Pearl Harbor—might parallel the decision to grant Hawaiian Electric a time-limited utility franchise in Bill 219. See King David Kalākaua, His Majesty’s Speech at the Opening of the Legislative Assembly (Nov. 3, 1887), in *ROSTER OF LEGISLATURES OF HAWAII 1841–1918* 171 (Robert C. Lydecker ed., 1918) (describing the extension of the Treaty of Reciprocity which provided the United States with an exclusive privilege to coal and repair ships in Pearl Harbor). Kalakaua explained:

This has been done after mature deliberation, and the interchange between My Government and that of the United States of an interpretation of the said clause whereby it is agreed and understood that it does not cede any territory, or part with, or impair any right of sovereignty, or jurisdiction, on the part of the Hawaiian Kingdom, and that such exclusive privilege is co-terminous with the treaty.

Id.

B. *Beyond Recognition*

As previously noted, the story presented above is not intended to be comprehensive. It cannot be, because it was created in the absence of a well-developed process for gathering perspectives in multiple dimensions—and particularly without a process designed to acknowledge a leading role for the voice of Native Hawaiians whose cultural, political, and economic interests are so uniquely tied to harms caused by the illegal overthrow. Thus, the above narrative simply serves as a placeholder until a full truth and reconciliation process is undertaken. It also serves as a thought experiment on how recognition in a restorative justice framework can raise issues that bridge a divide between the typically technical and ahistoric world of energy policy, and the nuanced and complex world of operationalized justice.

An energy narrative that fully recognizes the role of Hawai'i's leading energy utility in 125 years of colonial rule would help all involved to understand how energy decisions reflect and influence social relationships and norms that at first blush seem unrelated. Ultimately, it is these wider norms and relationships that will undergird new narratives and successful solutions to more discrete issues like energy infrastructure siting.

Because the above discussion on recognition is inherently limited, the remainder of this analysis will be designed to briefly identify potential highlights of a subsequent post-recognition restorative approach.

1. Responsibility

Heffron and McCauley's decision to replace "recognition justice" with "restorative justice" in their triumvirate of energy justice tenets is sensible in the sense that recognition is a sub-component of restoration. But it is not the only component. In Yamamoto's four Rs of transformative interracial justice, *recognition* is followed by *responsibility*. This step asks groups to assess group agency, accept responsibility for social or physical wounds, and identify the historical roots of contemporary conflicts.²¹⁶

Recognition and responsibility are linked, but the story of energy in Hawai'i serves as an illustration of how and why they are distinct. Many details of the story presented above were indeed recognized in two books created for Hawaiian Electric to mark its 75th and 100th anniversaries—even describing founder William Hall's role as quartermaster for the military arm of the Provisional Government that replaced Lili'uokalani.²¹⁷ But the inherent nature of that form of storytelling—a unidirectional narrative created to celebrate Hawaiian Electric—stops short of accepting responsibility for those acts. For

216. YAMAMOTO, *supra* note 7, at 185 ("Responsibility asks racial groups to assess group agency and accept responsibility for racial wounds . . . It recognizes the historical roots of many contemporary group interracial conflicts and examines the hurtful actions of a group toward other groups.")

217. See MYATT, *supra* note 146, at 135.

example, one book describes the “annexationists” who formed the Provisional Government,²¹⁸ without recognizing Hall’s central role in what is now recognized as an illegal armed overthrow rather than a peaceful annexation.

The books’ historical accounts also stop short of acknowledging the role of those acts in shaping Hawaiian Electric’s place in contemporary Hawai‘i. This empowers unbalanced narratives like former Hawaiian Electric President C. Dudley Pratt’s history of the company, which cleansed the company of its role in colonization and instead presented a sanitized celebration of entrenched norms:

The year 1898 dawned without any startling evidence that it would be such a momentous year for Hawaii, as well as the rest of the world. Admiral Dewey had destroyed the Spanish navy in Manila Bay, and the global nature of the war caused an immediate military interest in Hawaii as a mid-Pacific military base. A joint resolution was introduced in both houses of Congress calling for the annexation of Hawaii to the United States. On July 7, 1898, President William McKinley signed the Treaty of Annexation, putting Hawaii into protectorate status. In 1900, Congress passed the Organic Act that made Hawaii a territory and an inseparable part of the United States. Whatever the other effects of these actions, they created a favorable political climate in which local industries could begin to plan for the future.²¹⁹

A dialogue of recognition for company’s role in colonization and militarization, followed by acceptance of responsibility for that role, would not allow these “other effects” to remain latent. Indeed, the company’s own historical archives may prove to be a helpful source of information to understand and evaluate that role.

Responsibility would further unearth the realization that some aspects of Hawaiian Electric’s present form are a highly visible and economically powerful vestige of Hawai‘i’s colonial plantation economy. In turn, this would enable a more accurate balancing of the benefits arising from Hawaiian Electric’s modern role in the regulatory compact (e.g., relatively reliable and widespread access to electricity) with the burdens (e.g., concentrated market and political power, attendant to the fiduciary obligations the company owes to its shareholders). Here, the ubiquity of Hawaiian Electric in modern Hawai‘i presents an opportunity. Responsibility attaches not only to people or entities who directly participate in something like the illegal overthrow, but also to indirect participants who later enjoy the benefits of such an act. Thus, to the extent that a large portion of Hawai‘i’s present population participates in the electricity sector as Hawaiian Electric investors, business partners, or customers, a dialogue of recognition and responsibility necessarily involves that wide slice of the populace. This broad opportunity for critical self-reflection would open the door for reconstruction.

218. *See id.* at 134.

219. Pratt, *supra* note 149, at 14 (emphasis added).

2. Reconstruction and Apology

Reconstruction entails performative acts designed to begin the process of healing social wounds.²²⁰ Some readers may have bristled at the long quotation of the Apology Resolution earlier in this paper, which provides more detail than necessary to support the proposition that the overthrow of the Kingdom of Hawai'i was a radically illegal act with long-lived consequences. But that long quotation was provided specifically to illustrate an instance of apology as a reconstructive act.

The Apology Resolution provides little in terms of the concrete outcomes some might expect from traditional legal instruments. It confers no legal rights or duties, provides no recognition of Hawaiian self-governance, and does not return any money or lands.²²¹ Yet it can forevermore re-shape collective memories of how Hawai'i arrived at its present state. It replaces the concept of "annexation" with an "illegal overthrow" and stakes out relationships between "sugar planters, descendants of missionaries, and financiers," alongside Native Hawaiians and various governments. And when combined with other historical accounts (such as a historical account of energy systems), it can help to inform our understanding of contemporary social relationships.

Thus, a restorative act of apology from Hawaiian Electric for its role in the overthrow, colonization, and militarization might open the door for mutual participation in advancing justice by other parties, including: (i) efforts at recognition, responsibility, and reconstruction from others involved in energy decision-making (e.g., regulators, advocates, and settlers such as this author); and (ii) under the right conditions, potential forgiveness from those harmed by the overthrow and/or subsequent energy decisions (e.g., Native Hawaiians, communities asked to bear disproportionate health, environmental, or economic burdens arising from energy systems and infrastructure).²²² This form of mutual participation might provide hope for moving beyond an unproductive cycle of divisive name-calling (NIMBY!) on issues like infrastructure siting.

This form of corporate apology is not unprecedented. For example, in 1986 Volkswagen commissioned an independent history of the company, including its ties to the Nazi regime and forced labor.²²³ It subsequently engaged in

220. See YAMAMOTO, *supra* note 7, at 175.

221. Cf. Haunani-Kay Trask, *Settlers of Color and "Immigrant" Hegemony: "Locals" in Hawai'i*, 26 AMERASIA J., no. 2, 2000, at 9 ("no amount of alleged 'reconciliation' can equal the return of lands, money, and self-government to the Hawaiian people").

222. These conditions cannot be pre-determined, but at a minimum would require the apology to be perceived as sincere and meaningfully impactful on the parties' relationship. See YAMAMOTO, *supra* note 7, at 194–95; see also Menkel-Meadow, *supra* note 47, at 171 (describing "legalistic claims that restorative justice unfairly coerces and manipulates its participants to forgive (victims) or confess and accept harsher terms (offenders) than legal rights and rules would permit in foral justice institutions"); Trask, *supra* note 221, at 9 ("substantive 'reconciliation' would mean Hawaiian control of the sovereignty process from beginning to end").

223. See U.S. HOLOCAUST MUSEUM, *Volkswagen*, HOLOCAUST ENCYCLOPEDIA, <https://>

follow-on efforts to repair resulting harms. These efforts included acknowledging “historical responsibilities,” and an “obligation of responsible action in the present and future.”²²⁴ Accordingly, the company established a new corporate archive, including autobiographic accounts and memoirs of victims.²²⁵ And although the company did not acknowledge “legal” liability arising from this history, it established a “humanitarian fund” to provide financial reparations for victims.²²⁶

In addition to acts of apology, reconstruction ushers in questions and ideas about how to restructure legal and political norms embedded in the energy sector. With respect to electricity in Hawai‘i, the current effort to reconstruct the physical system (i.e., replacing fossil fuel-fired generation with renewable generation) creates an opportune moment to examine restructuring in the power system’s other components, such as regulatory models, power system planning, and utility business models.

C. *Repair*

The ultimate goal of restorative justice is to heal injuries and repair social relationships. Thus, apology alone is insufficient. Indeed, an apology without meaningful change can deepen division if it is viewed as insincere or “cheap grace.”²²⁷ This inquiry into the meaning of “restorative energy justice” therefore concludes with consideration of how restorative steps might translate into enduring and meaningful changes in modern energy policy—recognizing that such changes would be only a small step in the context the broad harms caused by the illegal overthrow, militarization, and subsequent efforts at economic, cultural, and political colonization.²²⁸

encyclopedia.ushmm.org/content/en/article/volkswagen-1 [https://perma.cc/G87L-DRWE]; Claudia I. Janssen, *Corporate Historical Responsibility (CHR): Addressing a Corporate Past of Forced Labor at Volkswagen*, 41 J. APPLIED COMMUN RSC. 64, 72 (2013).

224. Janssen, *supra* note 223, at 73.

225. *Id.*

226. *Id.*

227. *Cf.* Trask, *supra* note 221, at 24 n.17 (“Given that reparations moneies (totaling over a million dollars) from church hierarchy went to Hawai‘i churches rather than to Native Hawaiians, my conclusions were that while the [church] attained their ‘cheap grace,’ we Hawaiians, as usual, received nothing.”).

228. Of course, reparations in the context of Native Hawaiians can mean much more than changes in energy policy. Scholar and Native Hawaiian nationalist Haunani-Kay Trask explained that:

[T]he goals of Ka Lāhui Hawai‘i Hawai‘i are simple: final resolution of the historic claims of the Hawaiian people relating to the overthrow, State and Federal misuse of Native trust lands (totaling some two million acres) and resources, and violations of human and civil rights. Resolution of claims will be followed by self-determination for Hawaiians; Federal recognition of Ka Lāhui Hawai‘i as the Hawaiian Nation; restoration of traditional lands, natural resources, and energy resources to the Ka Lāhui National Land Trust.

Id. at 18.

A restorative lens can bring important perspective to two energy issues that are hotly debated in Hawai'i and other jurisdictions: (i) finding an appropriate balance between distributed and centralized energy infrastructure (i.e., the ongoing debates about rooftop solar and other types of decentralized energy infrastructure) and (ii) restructuring utility business models to match the pace, scope, and scale of the transition to renewable electricity while also delivering the clean energy justice outcomes identified by Welton and Eisen.²²⁹

1. Restorative Energy Justice in the Rooftop Solar Debate

The idea of decentralized power infrastructure as an opportunity to operationalize energy justice is certainly not new.²³⁰ But in the typical tradition of energy policy, this concept has often been wrapped up in debates thick with impenetrable jargon such as NEM, DERs, and DR,²³¹ and even more impenetrable complexity over technical details like voltage regulation and inverter settings. Further muddying this landscape, advocates and trade groups have seized opportunities to brand various aspects of regulatory processes with sticky phrases like a “utility death spiral” and claims of unfairness caused by “private solar” placed on rooftops rather than “universal solar” constructed via greenfield development of utility-scale energy infrastructure.²³²

Although regulatory proceedings should closely consider how to remedy and avoid potential distributive impacts of decentralized energy infrastructure, this is not where energy justice starts. Much like starting by asking *where* to place a large-scale wind or large-scale solar installation, starting with regulatory complexities skips past more fundamental questions. Restorative energy justice counsels us to start by examining deeper social relationships.

In Hawai'i, one such relationship is between Native Hawaiians and *āina*.

For Native Hawaiians, the land, or *āina*, is not a mere physical reality. Instead, it is an integral component of Native Hawaiian social, cultural, and spiritual life. The land, like a cherished relative, cared for the Native

229. See *supra* note 21 and accompanying text.

230. See, e.g., SHALANDA H. BAKER, *REVOLUTIONARY POWER* 97–116 (2021) (recommending that energy advocates prioritize and place a premium on rooftop solar in energy justice communities).

231. Net-energy metering, distributed energy resources, and demand response, respectively.

232. See THE EDISON ELEC. INST.'S DISINFORMATION HANDBOOK, <https://www.utilitysecrets.org/eei-lexicon-project> [<https://perma.cc/M5L7-YXDZ>] (attaching an Edison Electric Institute handbook on utility communications that recommended re-branding rooftop solar as “private solar” and utility-scale solar as “universal solar”); TOM TANTON, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, *REFORMING NET METERING: PROVIDING A BRIGHT AND EQUITABLE FUTURE* (Mar. 2014), <https://alec.org/wp-content/uploads/2015/12/2014-Net-Metering-reform-web.pdf> [<https://perma.cc/75BT-HV3J>] (arguing to curtail rooftop solar policies in the interest of the “free market”); BAKER, *supra* note 230, at 102–12 (describing the concept of a “death spiral and other parts of the “playbook” to slow rooftop solar adoption). Of course, proponents of distributed resources like rooftop solar similarly work to frame debates with slogans like “democratized energy.”

Hawaiian people and, in return, the people cared for the land. The principle of mālama ‘āina (to take care of the land) is therefore directly linked to conserving and protecting not only the land and its resources but also humankind and the spiritual world as well.

Western colonialism throughout the eighteenth and nineteenth century dramatically altered Hawaiians’ relationship to the land.²³³

While typical regulatory law, policy, and procedures may be able to stretch to recognize that this value of place crosses political, cultural, and socio-economic boundaries,²³⁴ it does not seem—in current form—suited to recognizing that the full depth of this relationship and how it may be harmed by greenfield energy development.

It is not dissimilar to connections to one’s father or mother, which are strengthened through lessons and cosmological links. The ali’i [chiefs] and maka‘āinana [commoner] history of places, the names of places and the mo‘olelo [stories] behind those names, the kūpuna [grandparents, ancestors, relatives, or close friends of the grandparents’ generation] or who told the stories, the reasons certain places were used to mālama [take care of] ‘iwi [bones] and store unique cultural resources, undetected but complex natural systems that function in seamless union—when one understands all this, the ‘āina becomes alive, amazing, and awe inspiring. This is analogous to a child looking to a parent or grandparent as the source of all things true and righteous.²³⁵

On the basis of this deep importance, Melody Kapilialoha MacKenzie and coauthors argue that land conservation and reclamation is central to the concept of restorative environmental justice in Hawai‘i.²³⁶ It follows that it should also be central to restorative energy justice. But at present, the value of land use and changes in land use are typically not a meaningful component of energy planning processes such as integrated resource planning. And even if these land-use considerations were to be incorporated, it seems unlikely they would be accorded quantitative weight in the same way that energy regulators typically weigh more traditionally quantified costs and benefits associated with various technologies.

Moreover, development of land for energy projects has direct implications for Native Hawaiian rights. Under Hawai‘i law, Native Hawaiians have a guaranteed right of access to undeveloped lands.²³⁷ Although this right neither

233. Mackenzie et al., *supra* note 5, at 37 (internal citations omitted).

234. Kamanamaikalani Beamer, ‘Ōiwi Leadership and ‘Āina, in I ULU I KA ‘ĀINA: LAND 55, 56 (Jonathan K. Osorio ed., 2014) (“Our place shapes the ways we see and are in the world. This concept and value of place often cross political, cultural, and socio-economic boundaries.”) (inline translations adapted from ULUKAU HAWAIIAN DICTIONARIES, <https://wehewehe.org>).

235. *Id.* at 56.

236. See Mackenzie et al., *supra* note 5, at 38.

237. *Pub. Access Shoreline Haw. v. Haw. Cty. Plan. Comm’n* (PASH), 903 P.2d 1246, 1272 (1995), *cert. denied* 517 U.S. 1163 (1996); see also David M. Forman, *Reoccurring Cultural*

prohibits the development of land nor necessarily prohibits Native Hawaiians from accessing developed land for customary and traditional practices (“to the extent feasible”),²³⁸ the special relationship between Native Hawaiians and ‘āina shows that it could have a substantial impact on the calculus of balancing distributed resources (typically sited on developed lands) versus utility-scale resources (typically built on undeveloped lands).

At present, this type of consideration *might* occur in the context of community outreach or during land-use permitting for individual energy projects. But it does not arise in precursor planning by energy regulators. Energy planning in this sort of contextual vacuum ignores the harms of the illegal overthrow and risks cementing extraordinarily long-lived infrastructure decisions that may deepen those wounds in the future. And even for consideration of individual projects, this vacuum is especially pronounced if the projects are reviewed by energy regulators before environmental and land-use reviews are complete.²³⁹ This is inconsistent with restorative energy justice.

Even more troubling, this is a lesson that should have been learned decades ago. *Pele Defense Fund v. Paty* is one of the foundational cases delineating the Native Hawaiian right to access land, and it arose in the context of an energy development proposed in the 1980s.²⁴⁰ After a large landowner proposed to develop geothermal energy in a Natural Area Reserve on Hawai‘i Island, a group of Native Hawaiian cultural practitioners objected on the basis that the project would impair cultural and religious rights.²⁴¹ The resulting twenty-five year dispute involved a series of decisions in state and federal courts, new lava flows, a proposed land swap, and protests that culminated in arrests.²⁴² Eventually, the project was abandoned and the land was acquired by the Office of Hawaiian Affairs (OHA) under a novel conservation agreement in 2007.²⁴³ This was the first return of “ceded”²⁴⁴ lands to Native Hawaiian

Insensitivity: Confronting the Abdication of Core Judicial Functions, 43 UNIV. HAW. L. REV. 341, 347–69 (2021) (providing a “guided tour” of PASH’s details and contours).

238. PASH, 903 P.2d at 1272.

239. See *supra* note 111 and accompanying text.

240. 837 P.2d 1247 (Haw. 1992).

241. See Davianna Pōmaika‘i McGregor & Noa Emmett Aluli, *Wao Kele O Puna and the Pele Defense Fund*, in *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* 180, 185 (Noelani Goodyear-Kaōpua, Ikaika Hussey, & Erin Kahunawaika‘ala Wright, eds.) (2014) (describing that the “primary concern of the practitioners was that the extraction of geothermal steam is tantamount to draining the goddess [Pele] of her life force”); MacKenzie, *supra* note 5, at 38–40 (describing the series of decisions and other developments related to the Wao Kele O Puna controversy).

242. MacKenzie et al., *supra* note 5 at 38–39.

243. *Id.* at 39–40.

244. These are lands which were classified as government or crown lands prior to the 1893 overthrow. *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1254 (Haw. 1992). The Apology Resolution describes that these lands were “ceded” “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.” Apology Resolution, *supra* note 8, at 1512.

ownership since the 1893 overthrow.²⁴⁵ At the dedication ceremony, the then-chair of the OHA Board of Trustees presented remarks that strike a restorative note: “I congratulate the trustees of our OHA board for joining with our partners to seize this moment by demonstrating leadership that reminds our Native and non-Native community that despite disagreements of the past, reconciliation and healing can occur one opportunity at a time.”²⁴⁶ This is a lesson that should be carried forward into ongoing debates about the role of rooftop solar, community-scale solar, and other forms of distributed energy infrastructure.

In those debates, the question of “cost” is often a focal point. It is absolutely necessary to consider costs and benefits in the interest of distributive justice, insofar as rising electricity prices might be borne by those who can least afford it, while lowering prices or reducing price volatility might most benefit the same group. But it is inherently myopic for energy planning, in Hawai‘i or elsewhere, to take on that task by considering *only* costs and benefits that have previously been quantified in dollars while leaving out other important costs and benefits.²⁴⁷ Indeed, restorative energy justice practice is *intended* to reveal latent notions of costs and benefits, thus sharpening the cost-benefit calculus.²⁴⁸

A restorative approach reveals that greenfield development of centralized energy infrastructure in Hawai‘i imposes a yet-to-be-quantified cost by reinforcing traditional and cultural land-use harms that date back to the illegal overthrow. The demonstrable links between the birth of the modern utility and that illegal overthrow only strengthen the need to consider those costs in energy planning and policy. And even through a simple lens of efficiency, restorative practices might uncover societal savings. *The Pele Defense Fund*

245. MacKenzie et al., *supra* note 5, at 40.

246. Macgregor & Aluli, *supra* note 241, at 197.

247. Cf. James Bushnell, *Everyone Should Pay a “Solar Tax,”* ENERGY INST. AT HAAS BLOG, (Feb. 14, 2022) <https://energyathaas.wordpress.com/2022/02/14/everyone-should-pay-a-solar-tax> [<https://perma.cc/M8ZL-PDZW>] (presenting a blended economics and policy argument on California’s rooftop solar debate, with a focus only on traditionally quantified notions of “cost”). If it succeeds in prodding regulators and advocates toward more robust mechanisms to consider relative costs and benefits, perhaps restorative justice can provide an ancillary benefit—broadening these debates to also consider other potential benefits such as a latent value of competition spurred on by decentralized energy options (i.e., a belt-tightening effect as utilities work to avoid partial grid defection).

248. See Raphael J. Heffron & Darren McCauley, *The Concept of Energy Justice Across the Disciplines*, 105 ENERGY POL’Y 658, 660 (2017) (“The application of restorative justice when applying energy justice decision-making forces decision-makers to engage with justice concerns and consider the full range of issues, as any injustice caused by an energy activity would have to be rectified. In some cases, these costs of ‘restoration’ would be prohibitive and consequently that energy activity would cease or not be proposed.”). Cf. YAMAMOTO, *supra* note 7, at 205 (“Reparations that repair are costly. They require change. Change means the loss of some social advantages by those more powerful.”). The need to identify new metrics is not unique to restorative justice in the energy context. In the context of criminal law, it was similarly necessary to develop new criteria for measuring the efficiency of restorative interventions, and those criteria were different from criteria traditionally used to evaluate other types of criminal law interventions. See Walgrave, *supra* note 58, at 99–101.

controversy shows how traditional adversarial mechanisms can incur costs in the form of time, energy, and money devoted to twenty-five years of litigation.

2. Restorative Energy Justice as a Tool for Utility Reform

Another area of active dispute in the power sector involves utility business and ownership models. Baker argues that utility reform is the “linchpin” of transforming the energy system, and that in 2014 Hawai‘i’s PUC issued the opening shot in attempts across the United States to link utility reform with social justice.²⁴⁹ This opening shot occurred when the PUC issued a set of inclinations “on the vision, business strategies and regulatory policy changes required to align the [Hawaiian Electric] business model with customers’ interests and the state’s public policy goals.”²⁵⁰

Subsequent efforts have succeeded in incremental steps toward the type of realignment the PUC described. In a direct response to the PUC’s call for realignment, in 2018 the state adopted legislation requiring the PUC to establish a performance-based ratemaking mechanism in place of traditional cost-of-service regulation.²⁵¹ This new mechanism was intended to break the direct link between power rates and utility investments,²⁵² which is criticized as an incentive for investor-owned utilities to maximize expenditures to the detriment of consumers. Final details of the new mechanism went into effect in June 2021,²⁵³ making Hawaiian Electric the first investor-owned utility in the U.S. to transition away from cost-of-service regulation. This has been justifiably hailed by advocates as “the starting point for a new way of doing business.”²⁵⁴ The legislation’s intent was characterized in partially restorative terms, aiming to “ensur[e] that Hawaii’s residents and businesses do not suffer economic and

249. BAKER, *supra* note 230, at 41, 45. *See id.* at 41–64.

250. Order 32052 at Exhibit A: Commission’s Inclinations on the Future of Hawaii’s Electric Utilities, *In re* Integrated Resource Planning at 1 (No. 2012–0036) (Haw. Pub. Util. Comm’n Apr. 28, 2014), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A14D29A91612I82852> [<https://perma.cc/94E2-37CL>].

251. S.B. 2939, 29th Legislature, Reg. Sess. (Haw. 2018).

252. *See id.* (requiring the PUC establish a mechanism to “directly tie an electric utility revenues to that utility’s achievement on performance metrics and break the direct link between allowed revenues and investment levels”).

253. Press Release, Pub. Utils. Comm’n, State of Haw., Hawaii PUC Approves Portfolio of Performance Mechanisms for Hawaiian Electric (June 1, 2021), https://puc.hawaii.gov/wp-content/uploads/2021/06/PBR-PIM-DO-Press-Release.Final_V2.06-01-2021.pdf [<https://perma.cc/EX7F-K8RX>]; *see also* Decision and Order No. 37787, *In re* Pub. Util. Comm’n (No. 2018–0088) (Haw. Pub. Util. Comm’n May 17, 2021), <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A21E17B53226E00118> [<https://perma.cc/R3HL-E52Y>] (instituting a proceeding to investigate performance-based regulation).

254. Jeff St. John, *Hawaii’s Bold Step into Utility Performance-Based Ratemaking*, GTM2 (Feb. 10, 2021), <https://www.greentechmedia.com/squared/dispatches-from-the-grid-edge/hawaiis-bold-step-into-utility-performance-based-ratemaking> [<https://perma.cc/9PTD-EDXA>].

environmental harm from the State's energy systems."²⁵⁵ But the legislation was also explicit about a parallel goal: to "ensure the ongoing viability of the State's regulated electric utilities."²⁵⁶ This is a marker of the entrenched norms in place for over one hundred years, insofar as it did not entertain questions about harms that might flow from that regulatory status quo.

Thus, the legislation was not fully responsive to Baker's call for utility reform characterized in terms of a need for public *ownership* of electric utilities, rather than merely an iteration of the investor-owned utility business model.²⁵⁷ Notably, the performance metrics adopted in Hawai'i also do not include the types of metrics Baker identified, such as decreasing emissions within certain heavily impacted environmental justice communities and providing greater access to community energy programs that result in wealth creation in those communities.²⁵⁸

Here again, a restorative justice approach may open the door to a more systemic transition. In 2016, the Hawai'i State Energy Office commissioned a study of utility ownership and regulatory models. In 2019 this resulted in a 184-page report evaluating various metrics, such as the ability of different ownership models (e.g. municipal ownership, cooperative ownership) to meet state energy goals, maximize consumer cost savings, enable grid access for distributed resources, address conflicts of interests, align stakeholder interests, and minimize transition costs.²⁵⁹

While this effort incorporated a great deal of analysis and clear energy policy expertise, it is quintessentially technical and ahistoric—in other words, rather than transformative, it was more of the same.²⁶⁰ Community outreach on ownership models yielded input from 141 people over a series of eight meetings,²⁶¹ out of a population exceeding one million. Compare this to attendance at a single protest focused on a wind power development in the rural community of Kahuku, which resulted in nearly as many arrests (111) as there were stakeholder participants in the utility ownership study.²⁶² This is not unexpected. Utility ownership and regulatory models are dry; they undoubtedly

255. S.B. 2939, 29th Legislature, Reg. Sess. (Haw. 2018).

256. *Id.*

257. BAKER, *supra* note 230, at 54–57.

258. *Id.* at 58.

259. LONDON ECON. INT'L LLC, EVALUATION OF UTILITY OWNERSHIP AND REGULATORY MODELS FOR HAWAII 11, 51–55 (2019), https://energy.hawaii.gov/wp-content/uploads/2019/06/HI_DBEDT_UtilityModelStudy.pdf [<https://perma.cc/ZS69-4K6B>].

260. This is not intended to denigrate the authors and managers of the report. The effort was the result of legislation that essentially pre-determined its approach.

261. LONDON ECONOMICS, *supra* note 259, at 137.

262. See Mahealani Richardson, *Despite Ongoing Arrests, Company Behind Wind Farm Project Says It's Making Progress*, HAW. NEWS NOW (Oct. 24, 2019, 11:35 AM), <https://www.hawaii.newsnow.com/2019/10/24/farmers-see-first-glimpse-wind-turbine-under-construction-kahuku> [<https://perma.cc/CK4K-H93H>].

seem less salient to community members than infrastructure siting, even though the two issues are probably linked.²⁶³

Reconsidered through a restorative justice lens that spotlights ties between the current utility model and the loss of political, cultural, and economic sovereignty from the illegal overthrow, perhaps the issue of utility reform would appear more salient to those communities.²⁶⁴ And perhaps lessons from Kalākaua’s public power project could be relevant to today’s energy transition. Or perhaps not. If a multi-perspective dialogue of recognition, responsibility, and reconciliation determines that utility models are distinct from priority issues like land conservation, then perhaps no additional reparative steps would be necessary. Or perhaps such a process would determine that the potential benefits²⁶⁵ of an investor-owned utility model outweigh the potential ability of alternate models²⁶⁶ to address those political, cultural, and

263. An additional question relevant to low turnout—how many people are interested in the issue *and* fortunate enough to afford the time and energy to participate?

264. For an illustration of how a restorative approach might catalyze a bottom-up and community-driven interest, consider recent efforts by *kia’i* (protectors) in Hawai’i to halt the development of new telescope on the summit of Mauna Kea. This effort mobilized thousands of people to the mountain in opposition to the telescope, in an “Indigenous restorative justice movement for self-determination, including the return and restoration of ancestral land and resources.” Eric K. Yamamoto & Susan K. Serrano, *Foreword to the Republication of Racializing Environmental Justice*, 92 U. COLO. L. REV. 1383, 1390 (2021) (describing the Mauna Kea resistance movement as “emblematic of the longstanding damage of U.S. colonization (land dispossession, cultural destruction, and the loss of political sovereignty)”); *see also* Forman, *supra* note 237, at 370–89 (describing legal disputes and decisions related to telescope development on Mauna Kea, with particular focus on their restorative justice context). The movement expressly borrowed from the Standing Rock-Dakota Access Pipeline opposition, which has been identified as an exemplar of restorative practice. *See, e.g.*, Andrew Gomes, *Standing Rock yields insight on Mauna Kea*, HONOLULU STAR-ADVERTISER, July 28, 2019 (describing various ways in which the Mauna Kea *kia’i* learned from the Standing Rock opposition); Davis, *supra* note 48, at 2 (“I think of the indigenous activists of Standing Rock who led the historic resistance to the Dakota Access Pipeline installation in 2016 and who engaged in ceremony as a form of social action, proclaiming they were water and earth protectors, not simply protestors.”). This type of public (and well-publicized) demonstration has been used to oppose energy projects and siting. *See* David B. Spence, *Regulation and the New Politics of (Energy) Market Entry*, 95 NOTRE DAME L. REV. 327, 358, 384 (2019) (noting that NGOs “routinely seek to mobilize mass publics to political action in opposition to energy projects” complimented by less frequent protests and boycotts). But it does not seem that it has been utilized in the context of opposing or supporting other aspects of utility operations and models.

265. Proponents of an investor-owned utility model might argue, for example, that it can help to lower energy costs by affording utilities a low cost of capital.

266. Several alternate ownership models were considered in the Hawai’i State Energy Office study. *See* LONDON ECON., *supra* note 259, at 40–63. These included consideration of a cooperative ownership model, such as the one utilized by Hawai’i’s only non-Hawaiian Electric-owned utility, Kaua’i Island Utility Cooperative (KIUC). The study projected that the transition to a cooperative model would increase residential electricity rates on the islands of O’ahu and Hawai’i, while lowering rate on Maui. *Id.* at 15. This was attributed to the anticipated cost of servicing acquisition-cost debt during the forecast period, which was

economic harms. But without a truth and reconciliation process designed to surface these considerations, it seems most likely that this question will lurk in a hidden technocratic realm forevermore.

CONCLUSION

These ideas about how restorative justice might respond to contemporary energy debates are necessarily tentative and inchoate. A first step of recognition would begin by building a structured, participatory, multi-perspective dialogue of recognition and storytelling, to competently consider how energy systems relate to social harms. Although this work focuses on Hawai'i, that first step could be undertaken in myriad other contexts. For example, a restorative process could evaluate how coal mining caused "national sacrifice areas" on Navajo lands in the Four Corners region or how hydroelectric electricity generation has stripped Indigenous communities of tribal lands, water resources, and fishing resources in the Pacific Northwest and Canada.²⁶⁷ Looking further afield, restorative energy justice could be deployed to consider harms arising from U.S. nuclear energy policy and its contribution to racism and colonialism in Africa.²⁶⁸ Or, in the context of today's energy transition, it could be deployed

forecasted to outweigh operational savings from the cooperative model. *Id.* This approach suffers from an important omission that could be considered in an energy justice context. Although "customer satisfaction" was considered in the context of ratemaking models, it was not a component of the study's evaluation of ownership models. *Id.* at 87. In a 2021 J.D. Power survey of utility customer satisfaction, fourteen of the twenty top scores were earned by cooperatives. VICTORIA A. ROCHA, *Seven Co-ops Take Top 10 Spots in J.D. Power Customer Satisfaction Poll*, NAT'L RURAL ELEC. COOP. ASS'N, <https://www.electric.coop/seven-co-ops-take-top-10-spots-in-j-d-power-customer-satisfaction-poll#:~:text=Overall%20residential%20satisfaction%20with%20electric,record%2Dhigh%20751%20in%202020> [<https://perma.cc/S7KL-QZD7>]. To the extent that "customer satisfaction" could serve as a proxy for assessing whether a utility's business and ownership model serves the community's needs (including delivering power at an acceptable price), a justice-focused approach might capably incorporate this sort of benefit into its analysis. For example, in Hawai'i, KIUC has most successfully responded to the public call for a renewable energy transition. See HAW. STATE ENERGY OFF., 2021 ANNUAL REPORT 17–18, https://energy.hawaii.gov/wp-content/uploads/2022/01/HSEO_2021_Annual_Report_1.4-3.pdf [<https://perma.cc/2DLF-FVUR>] ("The highest RPS level was reached by Kaua'i, which at 67%, is almost at the 2040 target already.")

267. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1630 (2007) ("Coal-fired power plants located on or near reservations also result in disproportionate levels of air and water pollution, affecting the health of tribal members. In fact, the American Academy of Sciences has referred to Navajo lands in the Four Corners region as 'national sacrifice areas,' in reference to the permanent damage and pollution caused by coal strip-mining. Hydroelectric dam projects in the Pacific Northwest and Canada have had a severe impact on Native communities, resulting in permanent loss of tribal lands, water resources, and fishing resources.")

268. See JACOB DARWIN HAMBLIN, *THE WRETCHED ATOM* 118, 255 (2021) (describing how nuclear energy policy led to the U.S. backing "the racially segregated government of South Africa" over Ghana, and contributed to "the evolution of international bodies and treaties into instruments of manipulation and control reminiscent of the colonial era").

in the interest of understanding harms associated with mining minerals presently used in some renewable energy infrastructure.

Turning back to Hawai'i, history and law dictate that Native Hawaiian communities must be afforded the opportunity to sit at the center of the restorative dialogue.²⁶⁹ This does not arise from some comfortable sense of inclusion. Rather, a lesson of restorative justice is that recognition is about the *uncomfortable* act of listening to ideas and facts that do not echo in reinforcement of our existing norms. This will mean facing difficult truths, like the fact that the unjust and illegal theft of political sovereignty from the Hawaiian people is reflected in so many facets of modern life—even in something as seemingly technical and dry as energy policy. We might also squirm when hearing about how our individual and collective inaction has contributed to a climate crisis in which every moment of continued delay steals from our children, their children, and succeeding generations to come.²⁷⁰ And we will squirm again when we listen to stories illustrating that these issues are linked via the principle of self-determination and that some of the communities most threatened by climate change—like Polynesian communities—are among the least responsible for causing it.

Restorative justice proposes that through these uncomfortable dialogues, we can learn, grow, and commence healing. Perhaps we can learn about ways in which lessons of 'Ōiwi agency might foster contemporary energy solutions, such as the effort toward community-based energy planning and ownership sprouting on the island of Moloka'i.²⁷¹ Or perhaps, by re-focusing our attention on urban and suburban energy development, we can better manage sharp conflicts over renewable energy siting in rural communities. Or indeed, perhaps we will learn that the costs of these energy concepts—if fully considered—do not outweigh the benefits, pushing us to consider energy solutions that today seem unpalatable.

But without the first step of recognition, there can be no responsibility, reconstruction, or repair. And without ultimate repair, there seems little hope that we can avoid placing the urgency of decarbonization in a false tension with the imperative of justice.

269. Indigenous communities must also be afforded the right of self-determination to decide *not* to participate in such processes.

270. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: SUMMARY FOR POLICYMAKERS SPM-11 to 16 (2022) (concluding that the “rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt,” “the most vulnerable people and systems are observed to be disproportionately affected,” and the “projected adverse impacts and related losses and damages escalate with every increment of global warming”).

271. Lauren Teruya, *Molokai Has an Electricity Problem. This Co-Op Wants to Change That*, CIVIL BEAT (Sept. 22, 2021), <https://www.civilbeat.org/2021/09/molokai-has-an-electricity-problem-this-co-op-wants-to-change-that> [<https://perma.cc/4J4U-FUSU>].