KU`E AND KU`OKO`A (RESISTENCE AND INDEPENDENCE): HISTORY, LAW, AND OTHER FAITHS[†]

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I. INTRODUCTION

On February 23, 2000, the United States Supreme Court issued a decision that has had a significant effect on Native Hawaiians and their seventeen-year-old movement to reclaim self-government. Chief Justice Kennedy articulated the opinion of the Court finding that Hawai`i's denial of petitioner Harold Rice's right to vote in the trustee elections for the Office of Hawaiian Affairs violates the Fifteenth Amendment of the US Constitution. However, Justice Breyer's concurring opinion that Hawaiian people have neither political nor cultural claims to distinct treatment by American law promises to transform Hawaiian civil society and provides powerful motivation for Hawaiians to seek independence from the United States.

As result of this decision, a handful of Hawai`i residents are seeking to dismember more than eighty years of Federal and State legislation that has set aside land and created two major State agencies for the benefit of legally defined Native Hawaiians. Several historic cases (*Bartlett v. Department of Hawaiian Homelands* and *Arakaki v. Office of Hawaiian Affairs*) filed in Federal courts argue that entitlements to Native Hawaiians, set up under Federal and State legislation, are violations of

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the equal rights protections of the US constitution. In response, the State and Kanaka Maoli (people of Hawaiian ancestry) individuals and agencies have been working to secure Federal legislation that recognizes Hawaiians as Native Americans. Another sovereignty initiative, the Council of Regency of the Kingdom of Hawai`i, managed to obtain a hearing before the Permanent Court of Arbitration (PCA) at The Hague, Netherlands. This group solicits international recognition that the nation-state status of the Kingdom has not been extinguished despite a century of US occupation.

The history of sovereignty movements in Hawai`i provides a framework for understanding the discursive trends that sustain and alter cultural identity. Ultimately, the confrontation between cultural identity and social-political frameworks such as law provides the clearest understanding of how institutions, especially colonial institutions, are translated and adopted.

To discuss how American law and international law address political questions of ethnic and national identity, I will compare two distinct legal avenues through which the aboriginal people of Hawai`i are seeking self-government—Ka Lahui Hawai`i (KLH) and the Council of Regency. I will describe how these two strategies are employing distinct and mutually exclusive interpretations of nationhood. While Ka Lahui has struggles to secure recognition as a Native nation within the larger American nation, the Council of Regency has pursued the reestablishment of the independent Hawaiian Kingdom. The differences between these two initiatives, I contend, contribute to the confusion over definitions of nationality, race, and self-determination, which cannot be solved by juridical decision at either the national or international level. Indeed, they can barely be addressed at the level of local politics because of certain important and historic ideological differences that separate Hawaiians.

II. A BRIEF AND CONTEMPORARY POLITICAL HISTORY

The liberal franchise extended by the 1900 Organic Act in Hawai`i defined Hawaiian as American citizens, despite their widespread opposition to the American takeover.[1] Yet, from 1902 until the decade before the Statehood Act, political control was maintained by the Republican Party, which successfully recruited thousands of Native Hawaiian voters, in part, through a carefully managed system of patronage. Territorial and county government positions were routinely dispensed to loyal Republicans. Labor unionism, associated with the

[1] See generally Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai`i* (Honolulu: Epicenter Press, 1998); and Noenoe. Silva and Nalani Minton, *Ku`e: The Hui Aloha `Aina Anti-Annexation Petitions 1897-1898* (Honolulu: manuscript published by authors, 1998).

Democratic Party, was stigmatized as antithetical to Hawaiian interests because it would primarily benefit the largely Asian plantation workforce.[2]

Under Republican control, a few powerful *haole* (Caucasian) corporations and families were able to manipulate all the important sectors of the economy, including finance, shipping, wholesale distribution, and, most importantly, cheap access to the Crown and Government Lands of the Kingdom, which made up nearly one-half the total land area of the archipelago. The labor movement grew stronger, and on the eve of Statehood the Republicans surrendered political supremacy to the Democratic Party without, however, surrendering their control over land and wealth.[3]

The first fifteen years of Statehood under Democratic Party control did not favor the economic or political aspirations of Hawaiians in general. Considered by many to be a failed minority in American society, Hawaiians demonstrated classic symptoms of an underprivileged minority: high levels of arrest and incarceration, alcoholism and increasing drug abuse, low levels of education and upward social mobility, and a virtual nonparticipation in what many saw as the economic miracle of the State's transformation from an agricultural to tourist-dominated economy.[4] In fact, many Hawaiians began to see their economic position erode after the 1930s, as well as into the 1960s and 1970s, when large estates began to evict Hawaiians from their homes and farms to make room for new and much more profitable urban developments.[5] At the same time, Japanese and Chinese Democrats replaced the Native Hawaiian Republicans in the legislatures, marginalizing Hawaiians politically.

In the mid-1970s, several issues converged: a Native-led opposition to the US military bombing of Kaho`olawe Island since 1941, outrage at the rising number of evictions from the land, and public discussion of the failure of the Native Hawaiian Trusts, especially the Department of Hawaiian Homelands. In 1977, two young Hawaiian activists were killed trying to prevent the US Navy from bombing Kaho`olawe, believing that the *`aina* (land) was sacred, conscious, and an elder sibling to the Kanaka Maoli themselves.

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[2] This requires context. Many Hawaiians belonged to and led labor organizations, especially among longshoremen and teamsters' unions in the 1930s and 1940s. Few Hawaiian Republican families did not have active union members by the late 1930s.

[3] See generally Noel J. Kent, *Hawai`i: Islands Under the Influence* (New York: Monthly Review Press, 1983).

[4] *Id.*, 180-185.

[5] Haunani Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai`i, Rev. ed.* (Honolulu: University of Hawai`i Press, 1999), 66.

In that same year, a Federal-State task force investigating the Department of Hawaiian Homes found a history of gross mismanagement of the trust, with only a few thousand leases awarded to qualified beneficiaries. More than half of the lands were leased to people and companies who were not Hawaiian. Thousands of acres were simply appropriated by the State and Federal governments. Nearly 20,000 claimants languished on waiting lists, some for as long as thirty years. The task force recommended a half-billion-dollar expenditure to create sufficient infrastructure to implement the aims of the program, calling on both the Federal and State governments to share the expense. Neither would.

Disgust with American promises and priorities, combined with a cultural renaissance in Hawaiian music, dance, art, literature, history, and language, fueled the nationalist movement. In 1978, future governor John Waihe`e led a group of Native delegates to the State Constitutional Convention to draft and secure the inclusion of laws that would protect Hawaiians and their culture. The new constitution mandated the teaching of Hawaiian history, language, and culture in all public educational institutions, included Hawaiian as the second official language of the State, and created the Office of Hawaiian Affairs to receive and distribute funds from the ceded lands for the benefit of Native Hawaiians. In 1978, the Hawai`i Supreme Court ruled that Native Hawaiians were entitled to 20 percent of the ceded lands' revenues because these represented one of five uses mandated by the Organic Act. The Office of Hawaiian Affairs, with special voting provisions allowing only Natives to participate, became a source of self-rule that was, nevertheless, limited and tightly controlled by the legislature and governor's office, which appropriated money for its operation.

Under the first elected Native Hawaiian governor, John Waihe`e (1986-1996), there was much publicity about native affairs but little substantial improvement in Hawaiians' economic standing. Politically, Hawaiians began to filter back into the legislature, usually as Democrats, and numerous grassroots organizations, including the original sovereignty movements, began to agitate for recognition. These organizations, some of them cultural and academic, such as the Hawaiian Language Immersion programs and the Center for Hawaiian Studies, strengthened Hawaiian resolve for sovereign control of Kanaka Maoli resources.

After reaching a high point of widespread discussion and acknowledgement in 1993 with the well-publicized centennial observation of the overthrow, the sovereignty movement has suffered a backlash of legal challenges: *Rice v. Cayetano*, State government intrigues under the current governor, and more internal disagreements among Native Hawaiian groups over strategies and goals.

In 1996, the State Attorney General began an investigation of the largest and richest Hawaiian private trust, the Bishop Estate, which employs a multibillion-dollar land and investment portfolio for the support of the

Kamehameha schools and for scholarship and outreach programs affecting tens of thousands of Native Hawaiian children, who are the primary beneficiaries. This investigation ultimately ended in the replacement of all the trustees appointed during the Waihe`e/Cayetano years and the convening of grand juries against three trustees, two of whom had been powerful Democratic Party legislators in the 1980s.[6] Although the investigation was sparked when concerned Native educators protested the trustees' micromanagement of the school, the very public examination of every single member shamed and alarmed the Hawaiian community at large, which feared that the most powerful Hawaiian institutions surviving from the Kingdom would be torn apart and devoured by the State of Hawai`i.

For Hawaiian nationalists, the Cayetano administration has not been kind. The governor has gone out of his way to threaten Hawaiian entitlement programs. When his original appointee to head the Department of Hawaiian Home Lands became too effective, securing the return of more than 16,000 acres appropriated by the State from Hawaiian Homes inventory, Cayetano replaced him—the week after the governor won a closely contested re-election. After his re-election, Cayetano became even more vocal about his opposition to Hawaiian entitlements, arguing that he himself is Hawaiian at heart but that, as governor, he cannot protect the interests of one group over any other group of citizens. He has even insisted that the revenues due the Office of Hawaiian Affairs are an unfair obligation the State cannot afford to pay.

As Hawaiians have amplified their calls for self-government, the State of Hawai`i has ratcheted up the political stakes by threatening Native Hawaiian resources through a discourse on American principles of equal protection and access under the law. Certainly, the broken promises and failed protections of the trust relationship between America and Native Hawaiians have contributed to the rise of the sovereignty movement, as has the relative political displacement of Native Hawaiians with the rise of the Asian Democrats in the 1960s. However, as much as the sovereignty movement has focused on redressing past grievances with America, it has also insisted on defining what it means to be Hawaiian.

III. THE SOVEREIGNTY MOVEMENT IN HAWAI`I

Ka Lahui Hawai`i (KLH), the elder organization in the sovereignty movement at sixteen years, is, in 2003, also the largest, with close to 20,000 citizens. KLH's constitution is based on a nation-within-nation model similar to that of several Native American governments that have treaty relationships and Federal recognition with the United States. At

[6] A circuit judge dismissed indictments for the fourth time in the case on grounds that State lawyers had presented evidence in a way that prejudiced the indicting grand jury (Advertiser, 26 November 2000).

the same time, KLH has sought international support through the Unrepresented Peoples Organization (UNPO) and has worked together with other Natives to craft a Declaration of the Rights of Indigenous Peoples within the United Nations.[7]

Assessment of KLH's political success is difficult because KLH appears to have more influence and credibility outside Hawai`i than within. KLH representatives to world and indigenous councils enjoy recognition and respect for carrying on a determined, non-violent sovereignty movement for more than a decade, but, surprisingly, KLH has never been much of a political force within the Hawaiian Islands. This is surprising not only because KLH boasts a comparatively large membership but also because its political aim—to create a sovereign Native government with the United States—has legal precedence and addresses the fears of may Hawai`i residents that Hawaiian sovereignty threatens their rights as American citizens. From its inception, KLH has limited its land claims to former Crown and Government Lands of the Kingdom. In the minds of KLH citizens and sympathizers, the return of these lands would be a significant first step in repairing the relationship between the United States and the Hawaiian people, would provide a suitable land base for the Native nation, and would steer clear of any threat to private land holdings in Hawai`i.

Those ceded lands, however, represent more than 90 percent of the lands in the State's possession, and many politicians besides the current governor have insisted that the State is financially dependent on the revenues those lands generate. Critics of the State's land use have long asserted that the State of Hawai`i does not employ those lands judiciously, allowing certain favored corporations and individuals to lease highly productive properties at bargain rates.[8] Be that as it may, few people in the sovereignty movement imagine that the State of Hawai`i will surrender its control of ceded lands without some kind of legal or political challenge.[9]

Perhaps for that reason, not many public officials even acknowledge the existence of KLH. Clearly, the organization possesses few of the

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[7] Trask, *supra* note 5, 75.

[8] S.C.T. Faludi, Broken Promise: Hawaiians Wait in Vain for Their Lands, *The Wall Street Journal*, 9 September 1991, A1.

[9] I am a plaintiff in the Office of *Hawaiian Affairs v. Housing Finance and Development Corporation et al.* in the First Circuit Court. This suit, continued since 1996, seeks to enjoin the State of Hawai`i from selling or exchanging 5f trust lands, also known as Ceded Lands, until the sovereignty over those lands can be determined. In 1995, the State sought a summary judgment from Federal Judge Healy and was denied. Plaintiffs' "Closing Argument" (December 17, 2001) reprinted in the *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 490-541.

attributes (a disciplined cadre, overwhelming numbers, or even the ability to influence a public election) that marks a political player.

If citizenship in KLH offers something other than an opportunity to be politically active and empowered, it is a sense of identity based on ancestry rather than on the nation-based citizenship created by the Kingdom of Hawai`i during the reign of Kamehameha III. As such, KLH follows a logical, historical pattern of Native Hawaiians' identifying as an ethnic group or race.[10] The political treatment of Hawaiians as a race is traceable in the development of American law and administration in the Hawaiian Islands, beginning with the 1920 Hawaiian Homes Act and ending with the Apology Law in 1993.

In fact, the proposed federal legislation known as the Native Hawaiian Federal Recognition Legislation (S-344), before the US Congress in 2003, is also a part of this historic process designed, in part, to protect previous Federal and State laws administering trust benefits on behalf of Native Hawaiians. Those who supported this bill generally view Hawaiians as an ethnic group whose identity is fostered by and through ancestry. Those who opposed the bill made up a large spectrum of political opinion, from people who oppose anything resembling affirmative action in America to Hawaiian nationalists who insist that nothing short of the reestablishment of the Kingdom will resolve the ongoing dispute over Hawaiian self-determination.

IV. THE RIGHTS OF HAWAIIAN NATIONALS

On November 8, 1999, a Hawaiian national, Lance Larsen, initiated arbitration proceedings against the Hawaiian government with the PCA at The Hague. Hilo police arrested Larsen in 1998 and incarcerated him for nearly a month after he objected to his arrest for driving an automobile that was not registered and licensed under State law. Larsen had been ticketed and fined on numerous occasions and had refused to appear in court because he "does not recognize the laws of the United States or its political subdivision, the State of Hawaii, as valid within the Hawaiian Kingdom."[11]

Larsen's attorney, Ninia Parks, filed an original complaint for injunctive relief in the United States District Court for the State of Hawai`i, alleging that the Hawaiian government was allowing the unlawful imposition of

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[10] Using the term *race* for ethnicity may strike some as offensive. I do not use race to imply a different species, but as an interchangeable term with *ethnicity* or *ancestry*.

[11] See "Notice of Arbitration to Initiate Recourse to Arbitral Proceedings in Compliance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State," available at http://www.alohaquest.com/arbitration/log.htm.

American domestic law within the territorial jurisdiction of the Hawaiian Kingdom over his person. Federal Judge Samuel King dismissed the case on February 5, 1999, submitting all issues to binding arbitration "between the Hawaiian Kingdom and Mr. Larsen at the Permanent Court of Arbitration at The Hague in the Netherlands."[12]

Eventually, Larsen's action brought the Council of Regency of the Kingdom of Hawai`i, represented by David Keanu Sai, into a plea before the PCA asking the Court to define the duties and obligations that the Kingdom, through its Council of Regency, has toward its subject, Lance Larsen. Both parties in the arbitration, held in December 2000 at The Hague, stipulated that Larsen's rights had been violated by the actions of the occupying power, the United States, and the appeal for arbitration was to enable an international tribunal to direct the Kingdom's government concerning the scope of its obligations to its subject under the laws of occupation.

The Council of Regency of the Kingdom of Hawai`i has been in existence since 1996. Its creation and membership came about subsequent to the formation of the Perfect Title Corporation in 1995, a Native-owned land title abstracting company.[13] Perfect Title alleged that

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[12] See "Memorial of the Hawaiian Kingdom Government," available at: http://www.alohaquest.com/arbitration/log.htm.

[13] Perfect Title was formed on December 10, 1995, to investigate (and confirm or reject) all claims to fee-simple titles consistent with Kingdom law for its clients and to register valid titles with the Kingdom's Bureau of Conveyances. All the partners in Perfect Title agreed that the business would be operated in "strict compliance to the business laws of the Hawaiian Kingdom as noted in the Compiled Laws of 1884 and the Session Laws of 1884 and 1886" (Government Memorial, *supra* note 12, 66).

Noting that a legitimate Bureau of Conveyances was in absentia because of more than a century of American occupation, a second company, the Hawaiian Kingdom Trust Company (HKTC), was formed on December 15, 1995, to act for and on behalf of the Hawaiian Kingdom government until the absentee government was reestablished and fully operational. Acting for the absentee government, the trustees of the HKTC have gradually assumed the roles of agencies and ministries of the Kingdom's government. In its memorial to The Hague, the Council of Regency states, "The 1880 Co-partnership Act requires members of co-partnerships to register their articles of agreement in the Bureau of Conveyances and that a Registrar shall superintend said bureau. This statute places an obligation on members of co-partnerships to register, and at the same time this statute places a corresponding duty on the Department of the Minister of the Interior to assure compliance with the statute. Logic and necessity dictated that in the absence of an executor of this department that a registered co-partnership could assume the departments duty" (Government Memorial, *supra* note 12, 69).

In this manner, the trustees of the HKTC, the only registered company representing the interests of the Kingdom, appointed David Keanu Sai to the Council of Regency on February 27, 1996, one day after he formally relinquished all his interest in HKTC and Perfect Title. On March 1, 1996, Regent Sai formally proclaimed that the Office of the Regent and its delegates would replace HKTC as the agency empowered to issue patents in fee-simple or enter into lease negotiation between the government and qualified individuals.

all land conveyances had to be legal under the laws of the Kingdom of Hawai`i, originating with the legislative establishment of the Board of Commissioners to Quiet Land Title on December 10, 1845. Subsequent legislation (the Mahele and Kuleana Act) in 1848 and 1850 devised the method for determining and awarding title among the people, chiefs, and *Mo`i* (King) of Hawai`i. Perfect Title maintained that American occupation had initiated new policies and laws inconsistent with Kingdom practices and that land conveyances after 1886 were legally unsound.

In essence, the Council of Regency asserts that there was no overthrow of the Queen in 1893 and no legal annexation of the islands in 1898. Rather, the Kingdom of Hawai`i, a recognized state in the "Family of Nations," has been suffering a prolonged occupation that, according to international law, binds the occupying United States to uphold and honor the laws of the Kingdom. Believing that it was obligated to follow Kingdom regulations wherever possible, Perfect Title found that because it could not register land claims and title changes with a Registrar for the Bureau of Land Conveyances under the Department of the Minister of the Interior, as called for by statute, it was "necessary and logical" to create an Acting Minister of the Interior, or Regent. Keanu Sai, one of the original partners in Perfect Title, assumed this position and appointed an acting Council of Regency. It is this council, along with the attorney for Lance Larsen, that appeared before the PCA in December.

The PCA's willingness to hear the case gives credibility, if not standing, to the Council of Regency.[14] More importantly, because the World Court in The Hague does not concern itself with non-nations or the rights of indigenous peoples, the PCA appeared to believe, on some level, that the Kingdom has standing as well. This is significant because the Council of Regency's principal claim is that law has created a legitimate Hawaiian state and that only law or conquest can extinguish that state. In short, the Council of Regency seeks to protect the rights of Hawaiian as nationals, not as colonized indigenous peoples. Thus, it is tracing a Hawaiian national identity that is also based on a particular read of history, one in which nation-states are founded and survive not only by the existence of a people and their sovereignty over a national territory but also by the formation of law and recognition by other nations.

V. SELECTING HISTORICAL EVENTS

KLH and the Council of Regency rely on different historical events to elaborate their legal positioning. For KLH, the significant historical event centers on the overthrow of the Queen in 1893, the formation of

[14] In April 2001, the PCA declined to continue its involvement, citing the absence of the United States in the proceedings and pointing out that the Court had no power to proceed without the presence of all the parties. The Court did not deny the legitimacy of either the Kingdom or the Council of Regency as is representatives.

the republic in 1894, and the subsequent annexation by the United States in 1898. According to KLH's read of history, the United States participated in the conspiracy against the Queen and her subjects and therefore owes reparation for the damage done to Native Hawaiians by the Americanization of the Hawaiian Islands. The fact that annexation changed the political status of every ethnic group in Hawai`i is not particularly important to this analysis because the real harm was done to Native Hawaiians, to their language, to their education and economic prospects, and to their sense of identity. In effect, annexation improved the political status of both American and Asian residents by the awarding of full citizenship, although this occurred immediately for the Americans and only eventually (and begrudgingly) for the Asians.

American, European, and Asian immigrants achieved something from annexation that they did not have before, American citizenship, but Hawaiians "achieved" that same citizenship at the expense of being forced to forsake their own. Accordingly, the very formation of a national entity in 1840 under the rudiments of Euro-American constitutions victimized the Native Hawaiians, consigning them to unfamiliar and inferior roles as wage laborers. Caucasian newcomers proceeded to transform the economic and social systems, marginalizing the Native both demographically and symbolically.

The Council of Regency reads the legal history of Hawai`i quite differently and centers its attention on the legal formation of the Hawaiian Kingdom in 1839 and 1840. It argues that Kamehameha III enunciated the essential rights of the Hawaiian subject to land and participation in government and solidified the Native position by securing international recognition of his government in 1843. In fact, the Council of Regency holds that the last legitimate lawmaking body in the Kingdom was the legislature of 1886, before a small group of armed Caucasian nationals and foreign residents forced the Bayonet Constitution on King Kalakaua in 1887.

The Council of Regency also holds that the subsequent overthrow in 1893 and annexation in 1898 did not actually occur, citing international laws addressing the recognition and rights of nation-states at the turn of the century. In sum, the Council of Regency believes that annexation did not occur because it did not *legally* occur and that the descendents of Hawaiian nationals have a case to make before the World Court that its sovereignty can and should be restored.

Between these two very potent yet oppositional points of view are numerous disagreements not only on strategies for obtaining sovereignty but also in what exactly constitutes the Hawaiian nation and what role law plays in legitimizing and protecting nationhood. The ideological differences between these two formulations make fruitful discussions between them extremely difficult and compromise most improbable. One very important difference concerns the definitions of *nationality*.

VI. NATIONALS OR RACE?

The KLH constitution declares that citizenship is bonded to ancestry. No person without Hawaiian blood can be a citizen in KLH. Even though non-Natives may apply for honorary citizenship, they are not allowed to vote or to run for office. For historical reasons, KLH has, from its inception, also had to deal with the issue of blood quantum. Because many original citizens of KLH were also actual or potential beneficiaries of the Hawaiian Homes Act of 1921 (HHA), citizenship in KLH is defined by two categories, Native Hawaiian and Hawaiian. Native Hawaiians, with a blood quantum of 50 percent or more, must be represented by one half the KLH legislature, and the other half can be represented by citizens of any blood quantum.[15]

There is no indication that these categories have ever presented any sort of problem for KLH citizens. One reason may be that although the vast majority of people of Hawaiian ancestry do not qualify for HHA benefits, they have never begrudged the entitlement to those who do, especially because, in many cases, beneficiaries are close relations and because of the view that those who do qualify tend to suffer the most from poverty.[16] In 1993, Mililani Trask, a founder and former *Kia`aina* (governor) of KLH, acknowledged that the federal government did not have the right to determine who was a Native Hawaiian with the 1921 legislation. However, having done so, it has no right to undo the blood quantum requirement without Native consent. KLH's position is that because the Federal government provides land for fifty-percenters based on a qualification it had no right to make, it must now provide land for the rest of the Hawaiians as well, rather than insist that all Hawaiians share the 200,000 acres set aside in the Act.

KLH has consistently sought to protect Hawaiians from the ravages of Federal and State laws, which, as Mililani Trask put it, "have always had assimilation as their primary goal."[17] One important ideological foundation for Mililani Trask and KLH is that the melting pot policies seeking to undermine a Native identity and replace it with a homogeneous society need to be resisted at every turn. Natives are natives by blood, location, to a lesser extent by language, and by less quantifiable criteria as social values. Hawaiians must feel Hawaiian, necessitating a demonstration of *aloha* and *kokua* (helpfulness) to other Hawaiians. They cannot be selfish, self-aggrandizing, or bent on capital accumulation without attracting a certain suspicion that they are not

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[15] Ka Lahui Hawai`i, *The Sovereign Nation of Hawai`i: A Compilation of Materials for Educational Workshops on Ka Lahui Hawai`i* (Honolulu: Ka Lahui Hawai`i, 1993), 15.

[16] H. De Cambra, (ed.), *He Alo A He Alo Voices on Hawaiian Sovereignty* (Honolulu: American Friends Service Committee, 1993), 114.

[17] *Id*.

completely Hawaiian. As long as one has the blood, the koko, no one is beyond remission. Therefore, Hawaiian is also a behavior, although ancestry is paramount.

Assertions of Hawaiian cultural behavior are scattered throughout the KLH constitution, from the preamble statement that Hawaiians are strong believers in the *Akua* (gods or God) to the sections on land that identify Hawaiians as taro growers and fisherman and pledge the government to the protection of heiau and other sacred sites.[18] The constitution, therefore, not only asserts a Native-Hawaiian claim to sovereignty but also seeks to defend what the framers felt were fundamental Hawaiian codes and values. This defense is not purely ideological. State laws dealing with issues such as *ahupua`a* (land segments from mountain to sea) gathering rights proclaim Native rights to access public land, through private lands if necessary, for subsistence of all kinds, including fishing and shellfish gathering and flower, timber, and herb gathering in the forests. Since 1996, several legislative bills have sought to challenge and compromise the exercise of these rights in favor of more western legal notions of private and public property.

The Council of Regency defines its citizens or subjects as descendents of actual Hawaiian subjects in 1886. For the council, it is a simple matter of law. The descendents of those who conspired against the Queen and government in 1893 are as fully enfranchised (although theoretically landless) subjects of Kingdom as a full-blooded Native Hawaiian whose family never left the archipelago.[19] The Kingdom, the council argues, was a multiethnic government, even though subjects of Hawaiian ancestry were clearly in the majority. A wide ideological chasm separates the council from KLH because neither ancestry nor behavior exclusively defines the Hawaiian subject. Kingdom law was unflaggingly liberal, allowing residents of any country the right to apply for full citizenship. As such, it is doubtful that such a model of nationhood could have much appeal to those Hawaiians who believe that "being Native" needs to be defended from an overwhelming "mainstream" culture (and from its laws).

KLH citizens, such a formula had already proven a historic disaster for Native Hawaiians. After all, haole subjects had initiated and maintained the laws and plantation economy that had weakened the traditional culture. Also, haole subjects led the conspiracies in 1887 and 1893 to overthrow the government. Not only do their descendents not deserve a place in a Native nation, many believe, but also their very presence

[18] Ka Lahui Hawai`i, *supra* note 15, 10-12; Trask, *supra* note 5, 39.

[19] The penalty for treason or conspiracy to commit treason was forfeiture of lands (Penal Code of the Kingdom of Hawai`i).

would always be potentially dangerous for Native citizens. According to one writer, haole should never again take leadership roles in the nation.[20]

The council would say that the subject's ethnicity is irrelevant as far as the law is concerned. Interestingly, though, the council's news organ, The Polynesian, took the time to calculate the number of Native Hawaiians versus non-native descendents of Kingdom subjects, pointing out that under Kingdom law Native Hawaiian voters would enjoy as overwhelming a majority today as the did in 1886.[21] Presumably forewarned by their painful political lessons with Americans over the past century, Hawaiian subjects today could easily control legislation and political appointments and even change the requirements of citizenship to make it more difficult for anyone but Native Hawaiians to exercise political power. It would simply be a matter of making law.

Once can easily see why these two groups talk past each other; indeed, they barely speak to each other. Both groups believe substantially disparate histories. It is not as simple as a disagreement over strategies for achieving sovereignty; they see much more essential things very differently. Furthermore, their disagreements over strategies stem from and lead to very separate claims. Whereas KLH aims at recovering the ceded lands and is willing to settle for controlling those lands within the American federation, the council stands for nothing less than what the law (in its view) allows. It demands independence.

VII. KU`E/KU`OKO`A: RESISTANCE AND INDEPENDENCE

Ironically, the Council of Regency can proffer a sovereignty argument very conservative in its claims and still be viewed as the most radical of activists groups. In truth, little is radical about asserting that the rights of a people can be best protected by a national government framed by constitutional law and recognized by other states. This assertion was first made in Hawai`i by the visiting British captain Lord Byron, who addressed a gathering of *Ali`i Nui* (Great Chiefs) in Honolulu in 1825. Lord Byron recommended that a system of laws commensurate with those of civilized nations be adopted, including recognition of the King as the head of state, a system of taxation, and jury trials. Over the next fifteen years, missionary advisors to Kamehameha III, Rev. William Richards in particular, devised a code of laws that Kamehameha approved in 1839 and 1840, establishing constitutional government in the Kingdom.

Over the next half-century, the Kingdom's government moved quickly to transform the traditional subsistence-based culture of the Kanaka Maoli

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[20] L. Kame`eleihiwa, *Native Land and Foreign Desires—Pehea La e Pono Ai?* (Honolulu: Bishop Museum Press, 1992), 326.

[21] Kau`i.P. Goodhue and David K. Sai, *The Polynesian XXI*, (October 2, 2000), 1,3.

to a plantation economy thoroughly dominated by haole landowners and investors, many of them former missionaries and their descendents. As the Kanaka population imploded in the nineteenth century from perhaps 200,000 in 1800 to fewer than 40,000 by 1896, the survivors lost ground economically because of legislation and judicial decisions favoring the sugar agribusinesses over traditional subsistence. Not only land but also water resources gradually accrued to the sugar planters, to the detriment of Native taro growers and subsistence farmers.

The Kingdom's foreign policy also favored the growth of sugar through the government's active recruitment of Asian labor (the Masters and Servants Act) and reciprocity treaties with the United States to ensure a spectacular demand for sugar in the 1870s and 1880s. The legislatures that passed the Masters and Servants Act in 1850 and the Reciprocity Treaty in 1875 were composed entirely of native-born and naturalized subjects of the Kingdom. They were signed into law by Hawaiian kingdom whose every stated intention was to preserve the nation's independence. Even more startling is the fact that even though Native Hawaiian electors outnumbered Caucasian electors by more than five to one in this period, they generously elected haole candidates. In the 1880s, Caucasians were never less than 50 percent of the legislative assembly.[22]

Such a history prompts various responses from KLH and the Council of Regency. For the council, this history demonstrates a true nation-state at work, with a thriving economy, a high rate of literacy (78 percent by the 1880s), an independently minded electorate, and a legal system protecting the rights of all its nationals. This was a democratic nation with liberal naturalization laws that, until 1887, did not discriminate on the basis of race. Even more telling is that Natives evidently were willing to vote for haole candidates, even over Native ones. Most important to the Council of Regency, the Kingdom had codified laws that protected the economic rights of the ancient maka`ainana (substance farmers and fisherman), even while the government approved policies enabling the growth of sugar and haole control of lands.

Furthermore, the Council of Regency's position is that Kingdom law, if scrupulously followed, could result in a massive redistribution of land to Native Hawaiians. Contrary to popular understanding and scholarly analysis,[23] the 1848 *mahele* (division and sharing) of the Kingdom's lands did not permanently dispossess the vast majority of maka`ainana (people of the land, non-chiefs). The mahele set out to divide the vested interests of the three "estates" of the nation. The first two estates—the

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[22] Jon K. Osorio, *Dismembering Lahui: A History of the Hawaiian Nation to 1887* (Honolulu: University of Hawai`i Press, 2002), 369-370.

[23] See generally Jon J. Chinen, *The Great Mahele: Hawai`i's Land Division of 1848* (Honolulu: University of Hawai`i Press, 1958); L. Kame`eleihiwa, *Native Land and Foreign Desires—Pehea La e Pono Ai?* (Honolulu: Bishop Museum Press, 1992).

King's (*Mo`i*) and the Chiefs' (*Konohiki*)—were divided between 1848 and 1850. At the same time, the Kuleana Act of 1850 encouraged the Native tenants (maka`ainana) to claim allodial title to the lands they inhabited and farmed. Although the Kuleana Act expired in 1850, with maka`ainana land awards at that point totaling less than 1 percent of the Kingdom's 4.2 million acres, the Council of Regency claims that the right of maka`ainana to receive fee-simple titles to their vested rights in the land was unequivocal in Kingdom laws and continued after the expiration of the Act.[24]

In 1894, the Supreme Court of the Republic of Hawai`i declared that maka`ainana who failed to make claims during the two-year act had surrendered any further right to land (Dowsett v. Maukeala). The Council of Regency asserts that this Court's finding contradicted Kingdom law and practice because every deed issued during and after the mahele bore the caveat "subject to the rights of Native Tenants." Therefore, the descendents of maka`ainana who did not make land claims, or whose claims were either lost or denied by the Land Commission in 1850, are still eligible, the council believes, to divide out their interest in the lands of Hawai`i and claim allodial titles. This can only happen, they say, under the laws of the Kingdom of Hawai`i. Furthermore, this distribution would involve all lands, even those purchased or awarded as fee-simple lands, because all "interests were subject to the rights of native tenants to divide their vested interest in fee-simple."[25]

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At a symposium at the Center for Hawaiian Studies following The Hague arbitration hearing, Keanu Sai, one of the Council of Regency's acting ministers, praised the work of Rev. William Richards for helping to create the nation's legal framework and successfully pursuing international recognition, which are the bases for Native Hawaiian legal claims today. Believing that the laws themselves substantiate the essential and historic rights of the Hawaiian subjects, Sai and the Council of Regency do not seem particularly concerned with what shape the nation would take when the laws of the Kingdom are reestablished.

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[24] Government Memorial., *supra* note 12, 19.

[25] *Id.*

[26] *Id.*

However, they are clear that under foundational Kingdom law, the Native subject would have land rights that would not be legally available to subjects who are not descendents of the aboriginal race. They see no other distinction between Native and non-native subjects.

Such distinctions are much more important to KLH supporters and citizens. The analysis of historian Lilikala Kame`eleihiwa, a citizen and outspoken supporter of KLH, is that western laws contributed to the confusion encouraged by American missionaries whose racist views of Hawaiians continually asserted the Kanakas' inferiority to Caucasians.

The issue of racism is a central departing point for many Hawaiians who seek a sovereign nation that is exclusively native. Religious and political conversions, they believe, were fulminated by a people who conceived of themselves as racially superior to Natives throughout the world and whose "service" to Hawaiians in the nineteenth century cannot be separated from their ambitions to govern them.[27] Although American law and social discourse today may contradict the notions of the nineteenth century, many indigenous writers and political leaders feel that conceptions of racial superiority are masked by the more recent assumption that western ideas should be as universal.[28]

A wide range of Native writers insist that Euro-American discourses on indigenous ways come preequipped with certain assumptions that make their discourses untenable. One is a presumption of Euro-American cultural superiority. Only the most insensitive of white people (and who will listen to them?) will boldly assert that superiority, but western ideas and values dominate the cultural and social landscape of contemporary Hawai`i. KLH citizen and university professor Haunani-Kay Trask has devoted much of her scholarship and teaching to questioning the hegemony of the western academy over Hawaiian history, politics, economics, and social analysis. Her essays include provocative subjects such as the prostitution of Hawaiian culture (especially hula) by the tourist industry in Hawai`i, the ongoing economic imperialism of western nations in the Pacific, the assumption of expertise by haole academics on Native subjects, and the denial of Native Hawaiian rights to self-determination.[29] Trask also fiercely defends the notion that Hawaiians and other Native peoples have powerful cultural connections to the land and nature that are antithetical to rampant capitalism. On this, she and fellow professor Kame`eleihiwa agree.

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[27] My own work in this area (see Jon K. Osorio, *Dismembering Lahui: A History of the Hawaiian Nation to 1887* (Honolulu: University of Hawai`i Press, 2002) clearly indicates that the triumph of the Bayonet Constitution in 1887 was part of a steady, systematic process by which an overwhelming and racist discourse devalued and diminished Native culture, voters, legislature, and finally, the King.

[28] Trask, *supra* note 5; M. Meyer, *Native Hawaiian Epistemology: Contemporary Narratives*. D.Ed. diss., (Harvard University, Cambridge, Mass., 1998).

[29] Trask, *supra* note 5, 113-122.

These cultural connections, coupled with the doubt that haole could really appreciate living in a society that encourages consensus and community over naked self-interest, is one reason for KLH's insistence that only Kanaka Maoli be enfranchised. Their perspective rests on the belief that Hawaiians are unique, that their uniqueness is a positive addition to the diversity of human races and cultures, and that maintaining this uniqueness requires resisting (ku`e) assimilation into America.

The Council of Regency seems unconcerned about whether Hawaiians are culturally distinct. It is enough, they argue, that their nation be independent (ku`oko`a). Independence, in the style of any other state in the world, would guarantee that the citizens of the Hawaiian nation could structure their society as they pleased. With control of the Government lands from the mahele and with Native Hawaiians renewing their claims to private lands, an independent government could allow Hawaiians to live as they want.

How independent, though, is any government today? One criticism of the nation-state model is that, as a political entity, it seems designed to facilitate things such international trade, capital expansion into previously "underdeveloped" regions, and rapid transformations of the environment. The idea that it protects the wealth and the distinction of a national group may be truer in some cases than in others. In the case of Native peoples, national governments have yet to demonstrate either the ability or willingness to protect a society that does not want its lands mined and drilled, its forests penetrated with highways, and its people educated to fulfill a destiny as wage laborers.

Furthermore, is it a good idea for Hawaiians to claim a kind of immunity from colonialism based on a nineteenth-century constitution and a few words of recognition by a British diplomat and a French diplomat? Should not national identity mean more than that? Should not national identity mean more than that? Should we Hawaiians acquiesce to the colonization of other Native peoples because they themselves did not perform these legal rituals?

VIII. SOME INITIAL CONCLUSIONS

The strategies of both KLH and the council require their own articles of faith. One side places that faith in the rituals of law; the other believes in the power and importance of ancestry and ethnic distinction. Their opposition to each other strongly resembles the opposition of

maka`ainana to legislation in the 1840s that made room for foreigners to become citizens, secure political office, and purchase land.[30]

Between 1845 and 1850, the Kingdom's legislature and the Privy Council received and stored dozens of petitions from their Kanaka subjects. A few score of individuals signed some, but other petitions bore the signatures and marks of thousands. Essentially, all the petitions said the same thing. They appealed to the King and the legislature not allow foreigners to become subjects, not to make them councilors and chiefs in the Kingdom, and not to sell them lands. Many petitions expressed the maka`ainana's fear that the foreigners would replace their chiefs and them as the Lahui (the nation) and they would be left to "drift from one place to another."[31]

The maka`ainana fears have certainly been justified in history. One could say that their perspicuity means little, a simple recognition that they were doomed. After all, the government's response, signed by Kamehameha III and Minister of the Interior Keoni Ana (John Young Jr.), dismissed the maka`ainana, saying that little could be done to prevent foreigners from coming ashore. The only government strategy that made sense was to incorporate haole into the Kingdom by allowing them to become citizens, own land, and share a stake in the Kingdom's future.

This is where we find the heart of the disagreement between KLH and the Council of Regency. Allowing haole citizenship did not make haole loyal to the Kingdom in the same way that Natives were loyal, and for the maka`ainana of the 1840s, that loyalty was important, not just politically but also socially and culturally. One petition drafted by a Native representative in the 1845 legislature put it very succinctly: "We are divided among ourselves. An independent race according to our own nature, the foreigners despise us and we hear them revile us to our faces. Who indeed would agree to making ali`i of the white-skinned people? We are as God made us, brown skinned, as was his wish. He furnished this race with the mind and the land, the chiefs and the people, and all things. These things remain that we should seek with all our strength" (Kingdom of Hawai`i 1845).

The maka`ainana 150 years ago saw and appreciated the distinction between themselves and haole. That is no less true today. Although intermarriage, loss of language, and myriad changes as a result of western education, commerce, and consumption may have transformed the Native culture, a strong sense of uniqueness persists. Moreover, despite the very powerful and popular notion in contemporary America

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[30] See generally L. Kame`eleihiwa, *Native Land and Foreign Desires—Pehea La e Pono Ai?* (Honolulu: Bishop Museum Press, 1992); Jon K. Osorio, *Dismembering Lahui: A History of the Hawaiian Nation to 1887* (Honolulu: University of Hawai`i Press, 2002).

[31] Jon K. Osorio, *Dismembering Lahui: A History of the Hawaiian Nation to 1887* (Honolulu: University of Hawai`i Press, 2002).

that racial distinctions are unsavory leftovers from nineteenth century Euro-American imperialism and slavery, Hawaiians are insistent that those racial distinctions used by Europeans and Americans to justify their political control have nothing to do with indigenous people determined to maintain some semblance of national identity.

This is why the Council of Regency's model of independence, basically recreating a 130-year-old kingdom, raises an important issue. What, after all, is the point of resurrecting a government that did not address the most critical issues of its people? On the other hand, the Council of Regency is quite correct that nothing short of a national government can protect Hawaiians from lawsuits, judicial review, and future federal legislation and review that could as easily withdraw entitlements as award them and reverse federal recognition an any time.

Between these two initiatives for sovereignty exists, perhaps, some common strategy, but this is difficult to see. It appears that the Council of Regency is looking for an easy solution to a terrible cultural knot. The problem is, what connections do race, nationhood, and law have to one another? The Council of Regency thinks that the issue can be easily settled by making the other two subject to nothing more than the law. By dividing ancestry from national membership, the law does not need to speak to the issue of racial difference. KLH, however, understands that for Native Hawaiians that racial difference is and always has been paramount. Few Hawaiians think that their own government victimized the Native people when the Queen surrendered to the overwhelming strength of the Unites States. Most Hawaiians understand that a very small number of haole, using the unwritten power of a large nation and the faith that Kanaka had in law,[32] succeeded in convincing the Queen and most of her people not to fight in 1893 or in 1898, when America "annexed" Hawai`i.

Perhaps our faith in laws, constitutions, and the right of nations to exist betrayed our people at the turn of the last century. Perhaps we should have fought then. Perhaps we should fight now. Perhaps the fight is all we have left to demonstrate our kinship and devotion to our Lahui. If that is the case, the nation shall have to continue to strengthen itself, by struggle and by sacrifice, if it is to demonstrate to its people that it is worth defending. It will also need to show that a Hawaiian nation would be different and would construct a different society than the one we presently occupy. Otherwise, what is the point of spending one's life in pursuit of Lahui rather than simply looking for ways to make wealth?

Clearly, a simple change in government will not create the nation. That nation is created of people who are today testing themselves against the most potent, omnipresent culture of materialism ever seen in the world.

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[32] Jon K. Osorio, "What Kine Hawaiian Are You?" *Journal of the Contemporary Pacific, special edition* (August), 2001.

Perhaps we would have a less vulnerable state if we brought back the Kingdom, but without a Lahui of determined, educated, and loyal individuals, what would be the point of an independent Hawai`i? The Council of Regency may be successful in its appeal before the World Court, but it will never secure an independent government without its Native citizens, and it will never secure those citizens until it demonstrates that it can and will fight for them to be Hawaiians.

IX. LAW, HISTORY, AND OTHER FAITHS

Perhaps it is inevitable that the differences among Native Hawaiians should become more apparent at the moment American ideological and legal opposition to reparation to Kanaka Maoli is reaching new heights. After all, we Hawaiians can hardly be unaffected by portrayals of us as unreasonable and whining, looking for a handout, and refusing to cooperate with the rational globalism dominating modern American ideology. To return to the *Rice v. Cayetano* case, Keanu Sai is apparently not alone in his belief that the problems of race and ethnicity in the United States can be dealt with as a matter of law. Like Sai, the US Supreme Court counts the law as the most important, most sacred of institutions, more crucial than justice and transcendent over history. In other words, history is background to the fundamental practice of making and interpreting law because, in the Justices minds, only law truly protects the nation.

Of course, history can be made and interpreted too. Moreover, history is a necessary context for understanding law. That America has had to amend its constitution specifically to protect its citizens' civil rights is revealing of America's own racist past. Without those amendments, could the republic have survived the social traumas of slavery and apartheid? Does not the continued intercession of the Supreme Court imply an ongoing need to mediate between Caucasian and other Americans? Is it not ironic that in the last census almost 98 percent of the American people continued to identify themselves as a single ethnic group and in Hawai`i more than 20 percent of its people counted themselves as multiethnic (*Advertiser*, 20 March 2001), yet the Supreme Court feels the need to speak to the issues of race and fairness here?

Hawaiians have had a remarkably different experience with race than Americans. In fact, Americans wrote the first laws in Hawai`i discriminating against Asians, disenfranchising them in the Bayonet Constitution of 1887 and continuing that policy of exclusion under their republic. For us Hawaiians, who have willingly (lovingly) mixed our genes with every ethnicity that has ever visited these islands, American fascination with race and determination to legislate and adjudicate ethnic relationships are curious, even bizarre.

This may be what really distinguishes Hawaiians from Americans. Americans look to law to define and protect their nation's fragile sense of racial diversity. Hawaiians have never needed laws to promote racial diversity and cannot now place their faith in law that discounts ancestry as either an irrelevant or unwarranted emblem of identity. To do so would entail relinquishing the last vestige of that which makes us Hawaiian in the first place. As to the necessity of law's existence, there is, perhaps, less disagreement. Even as the Council of Regency proclaims the importance of recognizing Kingdom constitutions, few other sovereignty will contest the importance of having a constitution in the first place.

The Reinstated Hawaiian Government, with at least 4,000 members under the leadership of long-time activist Henry Noa, elected representatives and nobles in 1999, following the laws of the 1887 Bayonet Constitution. Noa argues that because the Queen swore to uphold this constitution in 1892, it was, and continued to be, the law of the land until the 1999 Legislative Assembly amended it. Noa challenges the Council of Regency and its right to represent the Hawaiian nation without being elected. KLH, too, has always contended that rival sovereignty initiatives have no legitimacy without constitutions and elected officials. If we are to understand how a Hawaiian national being has managed to survive, surely we must begin by understanding how virtually every nationalist group uses and argues law in presenting its particular political case, but also how omnipresent law is in those sensitive areas that most determine our values and identities.

Something is remarkably optimistic about the ways in which small, patriotic Native groups vulnerable to many things, including hopelessness, grasp the mechanics of law and the potions of history and contend with one another for shaping the national spirit. We have certainly changed in may ways, but in our rapt absorption with, and our refusal to concede, either law or history to anyone, we demonstrate how very like our nineteenth –century ancestors we are.

This means that some common ground may exist after all. Certainly all the major sovereignty initiatives have proclaimed a faith in law and the electoral process. This, in itself, is a telling reminder that our world has changed, and significantly. Once crucial aspect of law is that it enables contending and competing groups within a society to coexist, compensating for the lack of faith between them by requiring that they place their faith in law instead. Even if law may betray the weak and helpless more often than it does the powerful, it may be the only platform from which one group, no matter how small, may fearlessly stake out its right to exist and to endure.

However, placing faith in law requires that we acknowledge a layer of authority other than custom and tradition. This is an ideological razor's edge for nationalists who see sovereignty as a protector of "the Hawaiian

culture." Law involves compromise, and tradition can be so uncompromising. Nevertheless, Hawaiians have already made the concession to trust in law. Perhaps that should be the first thing on which we can agree. We will certainly dispute many things: our read of history, the importance we attach to ancestry, how we will live, and how we will treat Americans and foreigners. Because we do not see these things the same way now, let us fashion laws that will enable us to act together in spite of it all.

Among all the conversions the Kanaka Maoli accepted from America, the one that proved most unreliable was the implicit promise accompanying the introduction of western laws—that justice is possible. More than 160 years later, our willingness to drape our future onto a legal frame demonstrates profound understandings of law and history. Regardless of the fact that law has changed the Native and may have created a being that is not entirely like his ancestors, law has also been made a part of our being, adopted and adapted to our view of ourselves and the world. Our experience with colonialism makes us wise in our understanding of the limits and promise of law. We do understand the significance of bending to its authority. In a world where other faiths are so carelessly deployed against one another, humanity itself should prefer that a genuine faith in history and law be desirable, useful, and meaningful to all. That the imperialist can convey this message as credibly as the conquered is doubtful.