

# Practically Reframing Rights: Culture, Performance, and Judging

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This Essay explores “cultural performance” and legal process.<sup>1</sup> More particularly, the Essay speaks to legal advocates not about crafting doctrinal arguments but about some of the problems and possibilities of shifting the cultural frameworks of decisionmakers — frameworks that color how those decisionmakers understand hard evidence and social context in cases. In doing so, this Essay weaves a layered story of a pending United States Supreme Court case into an account of a multi-faceted Hawaiian hula dance performance, tying both to a developing LatCrit praxis.<sup>2</sup>

We start with a story of indigenous Hawaiians.

## I. *RICE V. CAYETANO*

At this writing, the Court is in the process of deciding *Rice v. Cayetano*,<sup>3</sup> probably the most important Hawaiian rights case ever. *Rice* puts at risk all of the federal and state Native Hawaiian programs designed to repair continuing harms to the Hawaiian

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<sup>1</sup> See Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994) (describing legal process as cultural performance and legal procedures (particularly discovery) as instruments for shaping competing narratives about larger controversy); see also *infra* section IV (discussing role of “cultural performance” in meaningful decisionmaking).

<sup>2</sup> See *infra* note 26 and accompanying text (stating that developing LatCrit praxis infuses strategic social-legal action with critical theoretical insights). I write as a third generation Japanese American (sansei), born in Hawai‘i. I am not a Native (or indigenous) Hawaiian. I also write as an Asian American working in communities to build bridges between Asian Americans and Hawaiians. Part of that work is, by invitation, “Hawaiian rights” litigation addressing land and water issues. Some of it involves assisting extra-legal attempts to reconcile Hawaiian justice grievances against the federal and state governments and against “settlers” to the islands.

<sup>3</sup> *Rice v. Cayetano*, 120 S. Ct. 1044 (2000), *rev’d* 146 F.3d. 1075 (9th Cir. 1998); see also *infra* Coda II (explaining Supreme Court’s decision).

people<sup>4</sup> resulting from the now acknowledged, U.S.-aided, illegal overthrow of the sovereign nation of Hawai'i in 1893. This illegal overthrow led to the confiscation of Hawaiian land and the destruction of Hawaiian culture.<sup>5</sup> *Rice* raises issues of: (a) political status contrasted with racial status (in applying equal protection doctrine); (b) historical acuity versus historical myopia in multiracial settings; (c) legal norms of self-determination vis-à-vis equality; (d) international human rights rather than domestic civil rights, and; (e) colonialism and conquest vis-à-vis sovereignty and liberation. By raising issues of political status, historical consciousness, self-determination, human rights and colonialism, *Rice* plays out in compelling fashion socio-legal themes central to foundational Lat-Crit theory.<sup>6</sup>

So, who has a stake in this "Hawaiian" case? Certainly the indigenous Hawaiian communities have a stake, particularly those struggling to deal politically as well as socially with the consequences of U.S. colonialism, including Hawaiians' highest rates of poverty, unemployment, incarceration, serious illness, and home-

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<sup>4</sup> See, e.g., National Historic Preservation Act § 4006(a)(6), 16 U.S.C. § 470a(d)(6) (1994 & Supp. IV 1998) (providing particular protection to properties with cultural and religious importance to Indian tribes and Native Hawaiians); Native Hawaiian Education Act, 20 U.S.C. §§ 7901-7912 (1994 & Supp. IV 1998) (establishing programs to facilitate education of Native Hawaiians); Drug Abuse Prevention, Treatment and Rehabilitation Act § 4106(d), 21 U.S.C. § 1177(d) (1994) (giving preference to grant applications aimed at combating drug abuse among Native Americans, classification that expressly "includ[es] Native Hawaiians"); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994 & Supp. IV 1998) (extending protection to American Indian and Native Hawaiian burial sites); Workforce Investment Act of 1998 § 166, 29 U.S.C. § 2911 (1994) (supporting employment and training programs for Native Hawaiians and other Native Americans); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994 & Supp. IV 1998) (pledging to protect and preserve Native Hawaiian faiths as subset of religions described in statutory heading as "Native American"); Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701-11714 (1994 & Supp. IV 1998) (creating number of programs aimed at improving health care for Native Hawaiians); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act § 4577(c)(4) (1994) (giving preference to grant applications aimed at combating drug abuse among Native Hawaiians and other Native Americans); Cranston-Gonzales National Affordable Housing Act § 958, Pub. L. No. 101-625, 104 Stat. 4079, 4422 (1990) (providing preference for Native Hawaiian in HUD housing assistance programs).

<sup>5</sup> See TOM COFFMAN, *NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII* (1998).

<sup>6</sup> See, e.g., Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); Colloquy, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997).

lessness in their homeland.<sup>7</sup> Also Native Americans have a stake because they perceive that Rice-supporters, such as amici Robert Bork and Abigail Thernstrom,<sup>8</sup> are endeavoring to fry bigger fish, including all nontribal American Indians, especially those that are beneficiaries of government programs. Latinas/os and LatCrit theorists — those linking contemporary legal strategies concerning immigration, language, citizenship and political participation with earlier anticolonial, Chicano self-determination movements in the U.S. — also have a stake.<sup>9</sup> And finally, African Americans, Asian Americans, white Americans, women, gays, and lesbians that are combating the pervasive conservative “retreat from justice” in law and politics have a stake in *Rice*.

The *Rice* case is about a white American rancher's efforts to invalidate a Hawaiians-only election of trustees to the Office of Hawaiian Affairs (“OHA”).<sup>10</sup> OHA is an entity created by the Hawai`i Constitution (through an amendment in 1978) to represent Hawaiian people in dealings with the state and its control as trustee over “ceded lands.”<sup>11</sup> Ceded lands comprise roughly one-third of the entire lands of Hawai`i. They are former Hawaiian government and royal lands taken by the U.S. upon annexation of Hawai`i as a territory in 1900 following illegal overthrow of the Hawaiian government in 1893 by U.S. military-backed American businessmen.<sup>12</sup> Upon statehood in 1959, the U.S. turned over most of the ceded lands to the new state in trust. One of the five classes of trust beneficiaries, set forth in the federal statehood act and in the

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<sup>7</sup> See, e.g., LUCIANO MINERBI ET AL., NATIVE HAWAIIAN AND LOCAL CULTURAL ASSESSMENT PROJECT 15 (1993).

<sup>8</sup> See Brief for Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner, *Rice v. Cayetano* (U.S. filed May 27, 1999) (No. 98-818), available in 1999 WL 345639 [hereinafter Brief for Amici Curiae Center for Equal Opportunity].

<sup>9</sup> See RODOLFO F. ACUÑA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES (1996).

<sup>10</sup> I have provided legal counsel to, and represented in litigation, two current OHA trustees, Haunani Apoliona and Collette Machado.

<sup>11</sup> See HAW. CONST. art. XII, §§ 5-6 (establishing board of OHA trustees and defining their powers).

<sup>12</sup> See 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, § 1, 107 Stat. 1510, 1513 (1993) (expressing Congress's “commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people” and urging President to support reconciliation efforts, in sections 1(4) and 1(5)).

Hawai'i Constitution, is "native Hawaiians."<sup>13</sup>

OHA was created in 1978 to represent Hawaiians' previously ignored legal interest in the ceded lands trust and the revenues it generated.<sup>14</sup> OHA's assets now exceed one-half billion dollars, and OHA's trustees spend that money on programs addressing social, economic, and cultural needs of Hawaiian people. In addition to these functions, some Hawaiian communities view OHA as a transitional entity toward some form of Hawaiian sovereignty.<sup>15</sup> Indeed, the state, as a result of its breach of fiduciary duties, is currently negotiating with OHA for the transfer of lands and over \$300 million as reparations (and legal settlement). The transfer and settlement will generate land and additional monetary assets, in the eyes of some, for Hawaiian self-governance.<sup>16</sup>

Rice, the American rancher plaintiff, is arguing that Native Hawaiian is purely a racial category and that OHA's Hawaiian-only voting restriction is subject to invalidation under the encompassing strict scrutiny equal protection standard of review for racial classifications as set forth in *Adarand Constructors, Inc. v. Peña*.<sup>17</sup> Further, Rice is contending that Hawaiians cannot claim the Native American exception from strict scrutiny review, recognized by the Court in *Morton v. Mancari*,<sup>18</sup> because Hawaiians are not a formally recognized "Indian tribe." In 1974, *Mancari* deemed Native American to be a "political" designation (reflecting a special sovereign-to-quasi-sovereign relationship), rather than a "racial" one, even though race clearly was integral to the designation. The Court located federal authority for that special relationship in the Constitution's

<sup>13</sup> See Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). Section 5(f) of the Admission Act establishes a public land trust on certain lands (and the proceeds from those lands) granted or conveyed to the State of Hawaii by the United States under sections 5(b) and 5(e). See *id.* The State of Hawaii holds the section 5(f) trust lands for five purposes. See *id.* One is "for the betterment of the conditions of native Hawaiians." *Id.*

<sup>14</sup> See, e.g., H.B. 2207, § 2, 1997 Haw. Laws 329 (allocating revenues to OHA).

<sup>15</sup> Others view OHA as little more than a state agency beholden to prevailing political powers in the state. See HE ALO • HE ALO (FACE TO FACE): HAWAIIAN VOICES ON SOVEREIGNTY (Hawai'i Area Office of the American Friends Serv. Comm., 1993); Samuel P. King, *Hawaiian Sovereignty*, HAW. B.J., July 1999, at 6, 7-8.

<sup>16</sup> See generally *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446 (Haw. 1987), cert. denied, 484 U.S. 898 (1987) (describing legislative mandate for OHA and effect of land transfer).

<sup>17</sup> 515 U.S. 200, 224 (1995).

<sup>18</sup> 417 U.S. 535, 554-55 (1974).

enumeration of federal power over "Indian tribes."<sup>19</sup>

Both the federal district court for Hawai'i<sup>20</sup> and the Ninth Circuit<sup>21</sup> unequivocally rejected Rice's arguments. They recognized that, even without formal tribal status, indigenous Hawaiians are similarly situated to Native Americans. Both are first peoples in the U.S., both suffered forms of colonial/imperial conquest, and both are now the beneficiaries of a special trust relationship with the government because of this "political" status. Therefore, the lower courts held that Hawaiians, like Native Americans, should be considered "political" minorities in the U.S. for purposes of equal protection analysis.<sup>22</sup> Pursuant to *Mancari*, both courts recognized that the rational basis rather than strict scrutiny standard of review applies and upheld the OHA voting restriction.

During the pending appeal, OHA supporters are developing additional arguments grounded in critical theory. They are maintaining that through entities such as OHA, Hawaiians are not asserting civil rights (to be deemed equal to others in the U.S.). Rather they are asserting international human rights: not the right to be equal but the right to self-determination; not a right to

<sup>19</sup> *Id.* at 552 (quoting U.S. CONST. art. I, § 8, cl.3, which grants Congress power to regulate commerce "with the Indian tribes"). Neither *Adarand* nor the Court's Native American cases following it held that *Adarand* overruled *Mancari*. See *United States v. John*, 437 U.S. 634 (1978); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977). But cf. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 564-65 (1996) (attempting to distinguish these cases).

<sup>20</sup> See *Rice v. Cayetano*, 963 F. Supp. 1547, 1555 (D. Haw. 1997), *aff'd*, 146 F.3d 1075, (9th Cir. 1998), *rev'd*, 120 S. Ct. 1044 (2000).

<sup>21</sup> See *Rice*, 146 F.3d at 1082. But see *infra* Coda II (discussing Supreme Court's decision, which reversed Ninth Circuit's ruling).

<sup>22</sup> Both courts also rejected Rice's Fifteenth Amendment argument. The Ninth Circuit Court of Appeals stated:

If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be. Put in another way, the voting restriction is not primarily racial, but legal of political. Thus, we conclude that Rice's argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

*Id.* at 1079. However, the Supreme Court reversed the Ninth Circuit based on the Fifteenth Amendment. See *Rice*, 120 S. Ct. at 1060; see also *infra* Coda II (explaining Supreme Court's decision).

monetary compensation, but a right to reparation in order to reconnect spiritually with land and culture; not a right to full participation in the U.S. polity, but some form of governmental sovereignty.<sup>23</sup>

So why did the Court grant certiorari? Why did the conservative Center for Equal Opportunity support the certiorari petition and Bork, Thermstrom, and several other conservative groups file amicus briefs? Why did the U.S. Solicitor General, after much discussion, file a strong brief in support of OHA's position?<sup>24</sup> And why did the U.S. Department of the Interior, recently, in connection with the case, formally acknowledge a special trust relationship between the federal government and Native Hawaiians?<sup>25</sup>

Given this Court line-up, two questions emerge: what members of the Court might be key to the *Rice* decision? And through what cultural lens will they process "facts and context"?

The first question reaches beyond simple vote counting or identifying swing votes along a liberal-conservative continuum. It speaks to who, through powers of insight and conviction, might persuade others on the Court and in the public. The second question is epistemological, and it sharpens the first. It asks how the decisionmakers' cultural framework might shape their understandings of Hawaiian political history and, more importantly, contemporary Native Hawaiian claims and government responses. In terms of LatCrit praxis,<sup>26</sup> the second question asks how a decisionmaker's cultural framework might appropriately be tweaked, and perhaps transformed, through and beyond the legal process, to generate new understandings of "facts and context" relevant to

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<sup>23</sup> See Draft of Brief for Amici Curiae Japanese American Citizens League of Hawaii, Honolulu Chapter (JACL-Honolulu), Eric Yamamoto, and the National Asian Pacific American Legal Consortium (NAPALC) (not filed, on file with author) [hereinafter Draft of Brief for Amici Curiae JACL-Honolulu].

<sup>24</sup> See John Yaukey, *Advocate Bork Files Brief in OHA Case*, HONOLULU ADVERTISER, July 31, 1999, at A1, A5.

<sup>25</sup> See *id.*

<sup>26</sup> See Enrique Carrasco, *Introduction to Panel Three: Intellectuals, Awkwardness, and Activism: Towards Social Justice Via Progressive Instability*, 2 HARV. LATINO L. REV. 317 (1997); Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 HARV. LATINO L. REV. 349 (1997); Laura M. Padilla, *LatCrit Praxis to Heal Fractured Communities*, 2 HARV. LATINO L. REV. 375 (1997). See generally Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) (discussing critical race praxis).

cases. To explore these questions, we begin by considering cultural transformation and legal process.

## II. CULTURE AND LEGAL PROCESS

Some attorneys in *Rice* identify Justices O'Connor and Kennedy as likely swing votes. Others look at Justice Ginsburg as a potentially key persuader. These are, of course, surmises. No one, even Court insiders, can safely predict how justices will cast their vote. "[O]bjective, value-neutral" doctrinal analysis leading to "inevitably correct" answers is rarely possible, because complicated social and political value judgments usually are pivotal.<sup>27</sup>

At the same time, merely assessing decisionmakers "values and interests" often leads to fuzzy conclusions. Broad ideological labels, like liberal and conservative, are at best crude analytical shortcuts. Often they are misleading. Indeed, Cass Sunstein's assessment of recent Court decisionmaking concludes that constitutional cases tend to be decided more on the particulars than overarching principles.<sup>28</sup>

Another reason for the difficulty of prediction is that so many factors interact in judicial decisionmaking, including how judges interpret hard evidence, assess credibility and construe prior case holdings. An individual judge's acts of interpretation, assessment and construction do not occur in a vacuum or according to fixed mental processes. Rather those acts are affected significantly by the decisionmaker's "cultural framework" — that amalgam of perceptions, beliefs and practices that psychologists and anthropologists tell us serve as a lens through which people process (and come to understand) information about their social and political world.<sup>29</sup>

Culture is not simply shared practices or values. It is a "system of inherited conceptions expressed in symbolic forms by means of which [group members] communicate, perpetuate, and develop their knowledge about attitudes toward life." Although in crucial

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<sup>27</sup> See generally KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

<sup>28</sup> See RICHARD A. POSNER, *OVERCOMING LAW* (1995); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

<sup>29</sup> See generally JEROME BRUNER, *THE CULTURE OF EDUCATION* (1996); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1989).

respects multidimensional, shifting, and regenerating, a group's culture "provides the framework, the anchor, in which a range of choices and values can be considered and evaluated."<sup>30</sup>

That framework, forged in social settings, "shifting and regenerating," is susceptible to continual change as cultural conditions change. Those changes in framework and their influence on perceptions and actions often occur subconsciously. For "[c]ulture transmits beliefs and preferences not as explicit lessons but as what seems to be a part of a person's rational ordering of society. In most instances, people fail to recognize the influence of cultural experience on racial beliefs or the ways those beliefs shape their actions."<sup>31</sup>

For the pending *Rice* appeal then, a threshold praxis inquiry is what cultural lens (or framework), what amalgam of perceptions, beliefs and practices, will likely shape justices' understandings of Hawaiian history and contemporary conditions and government responses to historical injustice? Or, more specifically, what cultural framework will likely influence whether the Court deems Native Hawaiians a "political" rather than "racial" minority for purposes of equal protection analysis? While this latter question is of paramount legal import, the inquiry it generates is heavy in social and historical interpretation, assessment and construction.

If, through their cultural lens, in good faith, decisionmakers see Hawaiians as just another brown group, no different from any other racial group save for skin color, then *Rice* prevails and, very likely, OHA and other Native Hawaiian government programs fall.<sup>32</sup> If their cultural framework enables decisionmakers to turn a blind eye to Hawaiian history (and the significance of the loss of Hawaiian nationhood) or to reduce race to an abstraction ("we are all one race — American"), the material conditions of Hawaiian life will be profoundly and adversely impacted.<sup>33</sup> Similarly, if deci-

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<sup>30</sup> ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 91 (1999).

<sup>31</sup> *See id.*

<sup>32</sup> This is, in effect, the argument advanced by amici Bork and Thornstrom. *See* Brief for Amici Curiae Center for Equal Opportunity, *supra* note 8.

<sup>33</sup> *Cf.* John Hope Franklin, *As for Our History*, in *RACE AND HISTORY: SELECTED ESSAYS*, 1938-1988, at 49, 69-70 (1989) (describing pervasive, if uncertain, influence of historical conceptions on social action). Franklin stated:

No one can say with certainty just what influence historical conceptions have had on the minds of men, nor can one accurately predict the impact of such concep-



sionmakers see Hawaiians and think only of "lovely hula hands and white sand beaches," if they look with jaundiced eyes at Hawaiians' enduring struggles to reclaim land, reinvigorate spirituality, and restore self-governance and see nothing resembling Native American experiences, then OHA and its voting limitation will likely be trivialized as "racial preferences" that discriminate against white Americans like Rice.<sup>34</sup>

But what if the Justices interpret, assess, and construct through a different cultural lens, a lens that highlights the present-day consequences of the loss of nationhood<sup>35</sup> and that allows deep appreciation of connections between Hawaiian land, culture and governance? If we assume, as I do for this Essay, that such a lens might significantly, and appropriately, help shape decisionmakers' understandings of "facts and context," then new praxis questions arise: How do non-Hawaiian, nonindigenous American justices acquire that cultural framework? More particularly, what kind of cultural transformations might be needed and how might those transformations be engendered?

I have no sweeping answers to these complex questions. Indeed, each situation for each person will likely be different. Nevertheless, in the remainder of this Essay, I begin to unravel some of those complexities and open up transformational possibilities. This brings us to our second story.

### III. JURISTS-IN-RESIDENCE: EXPERIENCING KAHO'OLawe

My law school has the good fortune of having a Justice visit the school for a week every other February. A different Justice spends the week as the Jurist-in-Residence, teaching law classes, meeting

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tions on human relations in the future. But historical traditions have controlled the attitudes and conduct of peoples too often to permit a denial that history has been an important instrument in shaping human affairs.

*Id.*

<sup>34</sup> The *Rice* case involved only a white American plaintiff. See *Rice v. Cayetano*, 963 F. Supp. 1547, 1548 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 120 S. Ct. 1044 (2000). If, however, decisionmakers find Hawaiians to be simply another racial group, as distinguished from a "political minority," then Hawaii's nonwhite racial groups, for instance African Americans or Asian Americans, would be allowed to assert discrimination claims.

<sup>35</sup> The indicia of loss of nationhood (as distinguished from the harm or unequal or discriminatory treatment) include the loss of control over government structure, voting, economic, educational and justice systems, language, and land usage. See Draft of Brief for Amici Curiae JACL-Honolulu, *supra* note 23.

with faculty and students and talking with judges and other members of the state bar. The Justices talk about judicial decisionmaking, past Court decisions, lawyering ethics, and, sometimes, personal history. The students, in return, engage in rigorous exchanges and often share something special of Hawai'i's many cultures. This coming year Justice Scalia will participate in the program. Justices Ginsburg, Kennedy, and Stevens participated in the recent past.<sup>36</sup>

What does any of this have to do with the *Rice* case? Nothing directly. The Court accepted certiorari in *Rice* long after the last Jurist-in-Residence program two years ago. And the justices do not discuss federal or state cases even potentially appealable to the Court. No one at the school, and no one in the state bar or judiciary, ever attempts, or has attempted, through the program to influence a pending case.

Yet justices, as most people, live as members of society. Electronic media, journalism, popular culture, arts, literature and social interactions, and personal experiences affect, in part, their cultural frameworks. Those frameworks, I have suggested, help shape how they interpret hard information, assess credibility and construe ambiguous concepts, how they perceive and order a complex, dynamic social and legal world. Writing of the linkage of legal justice to judicial understandings of African American experiences, Wendy Scott Brown put it eloquently:

[R]esolving factual issues and doctrinal inadequacies [or ambiguities] does not rest solely on the strength of evidence or the persuasiveness of argument. The lack of knowledge and appreciation for the concrete experience of the powerless and oppressed hinders the judiciary's ability to construct just solutions . . . . Resolution, therefore, requires border crossing to begin the process of uncovering and then reforming judicial cultural biases.<sup>37</sup>

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<sup>36</sup> See Sean Clark, *Justice in the School*, 22 MALAMALAMA, July-Dec. 1998, at 10. The Jurist-in-Residence is organized every other year by Judge Myron Bright of the U.S. Circuit Court of Appeals for the Fifth Circuit, in conjunction with the William S. Richardson School of Law, University of Hawai'i at Manoa.

<sup>37</sup> Wendy Scott Brown, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER, RACE & JUST. 315, 344 (1999). I would substitute the word "limitations" for "biases" at the end of the quoted passage in the text.

Consider the border crossing possibilities, the transformative potential, of a multifaceted hula dance program performed by a multiracial group of law students and faculty during the Jurist-in-Residence program two years ago.<sup>38</sup> The students chose the songs, choreographed the hulas, wrote the narration, rehearsed, sewed outfits, made flower and leaf leis, and performed hulas to ancient Hawaiian chants and contemporary Hawaiian songs.<sup>39</sup> And they did so with a spirit of generosity, as an act of cultural sharing. Yet, this simple act was experienced on many levels by performers and audience in the music auditorium.<sup>40</sup>

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<sup>38</sup> The Hawaiian art form of hula, or dance, plays an important role in recounting history and in perpetuating the indigenous culture of Hawai'i. In its purest form, the hula is a type of storytelling. Through intricately placed hand and feet motions, as well as calculated facial and body expressions, a hula dancer, with precision, power, and grace, can physically depict a traditional Hawaiian legend, or describe the events of a day (like the birth of a child, or the coronation of a king), or convey a political message. Through this performative storytelling, hula helps pass from generation to generation deep understandings of history, culture, and identity, as the stories and their meanings are conveyed by hula teacher to student and by students to audiences.

For example, the hula "Aia lā 'o Pele i Hawai'i," describes the epic of Pele, goddess of fire and the volcano. Pele, a story intermeshing spirituality, kinship and environment, teaches anew each time it is performed. A hula student learns much more than just the physical motions of the hula; the student must study the language, history and culture, as well as the dance movements, to gain a both intellectual and visceral understanding of the performance. When a hula dancer performs a hula for an audience, the spirit of that hula story as well as its particulars are shared.

<sup>39</sup> Hula is performed in two general forms: hula kahiko (ancient hula) and hula 'auana (modern hula). Hula kahiko is performed to the accompaniment of Hawaiian chanting and beat drumming of the traditional Hawaiian ipu (gourd) or pahu (wooden drum). It is the formal hula, demanding great concentration. Hula kahiko is considered traditional because, prior to western contact in Hawai'i, all hula were performed in this fashion. Prior to the performance, the kumu hula, or hula teacher, choreographs the often powerful dances, drawing on historical and cultural knowledge, and rigorously trains the dancers. During the performance, the kumu hula chants the Hawaiian lyrics of the chant and provides a beat for the hula dancers. Traditional hula attire is worn during a hula kahiko performance. For women, traditional hula attire includes a pā'ū (knee-length skirt), and a matching blouse. For men, a malo (loincloth) or pā'ū are appropriate. Hula dancers adorn themselves with traditional leis made from the palapalai (fern), 'ōhi'a lehua (a native flower), or other greenery.

Hula 'auana is an informal style of hula. It is a hula performed to the accompaniment of nontraditional instruments such as the 'ukulele, guitar, piano, and bass and to singing. The hula 'auana movements are often flowing in contrast to the generally stronger, sharper movements of the hula kahiko. With the arrival of nontraditional musical instruments to Hawai'i, the Hawaiian style of music changed. The hula also adapted. Hula 'auana is most popular for the beautiful attire often worn during the performance. Because the style is informal, hula dancers may be creative in their movements and attire.

<sup>40</sup> I was one of the musicians for the performance. My vantage point was thus one of participant-observer.

To feel some of what brought tears to students eyes, animated smiles on Justice Ginsburg's and Judge Myron Bright's faces and prompted the school's dean to say that this "is one of my proudest moments," I share with you a bit of the actual hula performance. That performance blended chanting, singing, guitars, dances, flowers, and narration. Its theme was Kaho`olawe. Sense as you read.

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You just heard Koa Paredes (hula teacher and law student) open with a traditional oli ho`okipa, or welcoming chant, that gives greetings. Now, Hālau Kaleipaukūpua`enaikalā would like to present ho`okupu or gifts of lei to the justice and judge. Koa will accompany this ho`okupu presentation with a traditional oli lei, or lei chant. [Leis presented].

[Narration with Hawaiian guitars playing and thirty dancers walking silently on stage and taking their dance positions]. Centuries ago, when the first canoes of Polynesian explorers arrived from Tahiti and the Marquesas Islands, they landed at Kaho`olawe, the smallest of eight main islands in the Hawaiian archipelago. These first Hawaiians dedicated the island to Kanaloa, god of the sea. Kaho`olawe was viewed as the physical embodiment of Kana-loa, and the god's mana, or spiritual power, was held within the island's rich soil. Also known as Kohemālamalama, or "shining birth canal," the island has been a center of religious, cultural, historical — and now political — importance to Native Hawaiians.

For hundreds of years the island was fruitful and supported thriving Hawaiian communities that were adept at astronomy, navigation, fishing, and adz-making. During the 1800s, after Europeans and Americans began settling Hawai'i, the island's population dwindled and private ranching became dominant.

Through a lease with the Kaho`olawe Ranch Company, the U.S. military began its use of Kaho`olawe as a practice target for aerial bombs in the 1920s. Subsequently, during World War II, the U.S. government took control of the island, banned all civilian access, and closed fishing areas. In a 1953 executive order, President Eisenhower set the island aside for massive target practice by navy bombers. The bombing of Kaho`olawe continued unabated for

over half a century, causing untold damage to the hundreds of cultural sites and fragile environmental resources.

During the 1970s, a group of young Native Hawaiians from the islands of Moloka'i and Maui started an organization dedicated to stopping the bombing and reclaiming Kaho'olawe for Hawaiian people. They formed the "Protect Kaho'olawe 'Ohana (family)," or PKO. As an integral part of the Hawaiian political and cultural "Renaissance," this passionately committed group began a campaign to raise awareness about the destruction of their sacred 'āina (land). In January 1976, nine set foot on the island, engaging in a act of peaceful civil disobedience.

Although the Coast Guard quickly escorted the protestors to nearby Maui and eventually cited several for trespassing, PKO continued its landings on Kaho'olawe's shores. The controversy escalated. An archeological survey of the island found thirty sites eligible for the National Register of Historic Places, and PKO filed a federal lawsuit against the Navy alleging violations of environmental and historic preservation laws.

But the bombing continued, and the protest intensified.

In early 1977, PKO leader George Helm, along with Kimo Mitchell, returned to the island to search for two others. Attempting to paddle-surf back to Maui seven miles away, Helm and Mitchell were lost at sea. Their deaths marked a critical point in PKO's struggle to reclaim Kaho'olawe, and the Navy's bombing of the island.

Three years later, the PKO and Navy settled the lawsuit. The Navy agreed to survey Kaho'olawe's resources, to begin clearing unexploded ordnance, and to allow PKO limited island access for religious and cultural activities. It also granted PKO stewardship over part of the island and agreed to diminish Navy bombing. In 1990, President Bush halted altogether the bombing of Kaho'olawe.

Five years ago, on May 7, 1994, the U.S. transferred title to Kaho'olawe to the state and established a joint venture among the federal and state governments and PKO to oversee restoration of the island. The lengthy multimillion-dollar restoration process is underway. And the island is visited regularly by Hawaiian cultural practitioners and by multiracial groups, supervised by PKO, to work on restoration of religious, cultural, and natural sites.

Koa chose this story as the theme for today's performance to share this unique part of Hawai'i's history with our visitors and as a way to express our hope for Hawai'i's future.

[Narration at the beginning of the first hula segment]. To begin our hula performance, the hālau (hula group) will perform a hula kahiko – a dance in the ancient style — that was written for a ceremony celebrating the return of Kaho'olawe to the people of Hawai'i in 1994. The chant tells of the origin and beauty of Kaho'olawe, as well as its desecration by military bombing. This chant calls to the island, the "shining birth canal," to begin its rebirth. [Thirty dancers move powerfully and gracefully to Koa's reverberating chant and the pounding beat of a single ipu (gourd drum)].

[Narration at the beginning of the second hula segment]. The second hula will be a hula 'auana, or modern hula, entitled, "Aloha Kaho'olawe," performed by law students Arleen Watanabe and Kanoe Kunishima. Then, the men of the hālau will perform an old Hawaiian favorite entitled "Kaho'olawe." This song is a love story that compares the beauty of Kaho'olawe to a loved one. The women will follow with "Mele o Kaho'olawe, a much-loved mele aloha 'āina, or song that speaks of one's spiritual love for the land. This mele was composed by Uncle Harry Kūnihi Mitchell, a respected leader in the protect Kaho'olawe movement, whose son Kimo was lost at sea.

He aloha no Kaho'olawe (A loving tribute to you, Kaho'olawe). [Hula to three songs follow accompanied by Hawaiian guitars and singing in Hawaiian language].

[Closing]. The hula is one important way we can all deepen our understanding of and appreciation for Hawai'i, its history, land, and people. Mahalo. Thank you for allowing us to share our love of hula with you today. We leave you with a special treat — a final song entitled "K•pa'a" danced by Koa. The song calls to us all, "E k•pa'a kākou ma hope o ka 'āina!" We must all stand firm on the land.

#### IV. TRANSFORMATION?

What impact might this deeply engaging cultural performance have had on a justice and judge's cultural lenses for understanding "facts and context" years later in a case not then contemplated? Perhaps none at all. Yet, might the performance have begun or

furthered an altered or expanded way of knowing about “being Hawaiian” — influencing how decisionmakers might more meaningfully (or accurately) interpret, assess and construct? Might it have stimulated a continuing process of cultural translation? Later, through a refocused lens, might history and contemporary conditions reveal Native Hawaiians as indigenous peoples in the U.S., whose struggles and government treatment are most aptly characterized as “political” rather than “racial”? Answers are speculative. But these and other questions themselves yield insights.

Did you, as reader, without experiencing the sights, sounds and smells, find the hula performance engaging? As presented here in very limited fashion, did the performative acts collectively in some small way open your senses, your perceptions, to a broader, deeper understanding of Hawaiian history (and indeed Hawaiianness) and the stakes in *Rice* — an understanding you may have missed from a straight informational lecture or traditional legal brief? Can you imagine if you had been present, the potential for some kind of cultural transformation, beyond intellect, at a visceral level, that might later help shape how you interpret, assess and construct? Possibly. If so you, why not others? Why not justices and judges?

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So what praxis insights might we draw about the salience of intercultural film, poetry, song, dance, language, literature, fine arts, spiritual meditation and historical storytelling in crafting larger legal strategies? In what settings? For what audiences? Over what periods of time? With what limitations, risks, and transformative potential?

Consider, in a very different setting, the efforts in Germany to employ “music as a force for healing wounds of the Holocaust and of the Middle East today.”<sup>41</sup> Monetary reparations by the German government and Swiss banks for Holocaust survivors and their families have been, for some, significant steps toward atonement. Yet, for many Jews, the wounds remain deep and complex. What, beyond money, might help people to feel things in a different way, to see one another in a somewhat brighter light, and maybe even to help transform buried anger and distrust? In August 1999, 170

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<sup>41</sup> Roger Cohen, *Israelis Join Germans in Concert at Buchenwald*, N.Y. TIMES, Aug. 31, 1999, at E1.

musicians from the Bavarian State Orchestra and the Israeli Philharmonic — including Palestinians, Lebanese, Syrians, Israelis and Germans — played a path-breaking joint concert beneath the hill of Buchenwald, the former Nazi concentration camp. They played Gustav Mahler's Symphony 2, the "Resurrection," just hours after many of them together visited the Buchenwald site. The concert followed days of post-rehearsal discussions about history, identity and communication facilitated in part by Palestinian scholar and musician Edward Said.

For a violinist from Lebanon, "the first two days it was rather tense, because I think we all had stereotypes about the other nationalities . . . . But as we talked and played, these ideas tended to fade." For others the process was about transforming relationships broken by history. "This concert was about the past . . . . It was about showing that even the past symbolized by Buchenwald can be overcome, and the Germans whose forebears murdered Jews can sit now with Israelis and play the music of Bohemian-Jewish-Austrian-German composer." And for still others, the larger question was not whether, but how, we reconcile? "The issue, in the end, in the Middle East, is how to be together." How do we accept and then move beyond the history, the words of apology and even monetary reparations to transform the spirit? As the director of the Berlin State Opera said, "music is an ideal form."<sup>42</sup>

Consider also Sharon Hom's LatCrit III presentation about and demonstration of a multilayered cultural performances.<sup>43</sup> She encouraged us, and by extension decisionmakers, in contemplating the potential and problems of "human rights" rhetoric and practice across differing cultures, to hear, literally and figuratively, in differing registers. And she encouraged us not so much by telling us as by impelling us to listen in that way. She played a protest-rock recording of a Chinese rock star, sung in Mandarin, with unusual (to western ears) chord patterns and melody lines, while she voiced over her interpretation and insights in English, all backed visually by Chinese lyrics on a large overhead screen. That translating, head-and-spirit, border-dissolving performance both challenged

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<sup>42</sup> *Id.* (internal quotation marks omitted).

<sup>43</sup> See Sharon K. Hom, *Lexicon Dreams and Chinese Rock and Roll: Thoughts on Culture, Language, and Translation as Strategies of Resistance and Reconstruction*, 53 U. MIAMI L. REV. 1003, 1006-17 (1999); see also *supra* Part IV (describing role of "cultural performances" in meaningful decisionmaking).



and touched people in the room. A profoundly different way of knowing about "rights" and what it means inter-culturally to be "human." Transformative? Perhaps, for some. Openings for transformation? I think so, for many.

So, with these cultural performances in mind, we end where we began, with questions informed by a developing LatCrit praxis. How might cultural justice performances strategically (and ethically) be deployed throughout the legal process to create openings for transformation? How and when might they contribute to altering decision-makers' (and potentially larger society's) cultural lenses for assessing, for judging? And, in acting strategically, how can we critically recast the role of cultural performance in practically reframing rights?

E kupa`a kakou ma hope o ka `aina.

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#### CODA I

After I submitted this Essay for publication, the Court heard oral argument in *Rice*. Many Native Hawaiians, including several OHA trustees, traveled from Hawai`i to Washington D.C. to attend. Set forth below are two excerpts from the official hearing transcript. (The transcript does not list the questioning Justices' names, but it is clear from context that Justice Ginsburg is the speaker in the second excerpt.) The questions and comments of the Justices appear to reflect more than simple differences of opinion. They appear to suggest significantly differing cultural lenses for processing and comprehending complex facts and context.

In light of this Essay's praxis theme, ask yourself this question as you read the excerpts: To what extent, if at all, might different cultural justice experiences have generated differing interpretive lenses for viewing understanding colonial history, cultural genocide and reconstructive efforts of indigenous people in North America and Hawai`i?

One Justice posed a hypothetical to illustrate that OHA's voting requirement unlawfully discriminated on the basis of race. It addressed ostensible Hawaiian discrimination against Tahitians. The framing and language of the hypothetical suggested a cultural lens blind to history and present-day political and social conditions,

including a lack of recognition of how racial categories, like political ones, are socially constructed.<sup>44</sup>

QUESTION: May I ask on the racial discrimination point, supposing there is a citizen of Hawaii who has the same racial makeup as the native Hawaiian, he came, however, from Tahiti or some place else, and is a citizen of the State, has exactly the same race as the others, but he's denied the vote. Would he be denied the vote on account of race?

....

QUESTION: Well, I — even if the Tahitian is of the same race, I mean, the fact that you give special privileges to some people of one race, though not to all people of that race, would not make it any better, would it?<sup>45</sup>

The second justice's comments reflected a sharply contrasting cultural lens, one that appreciated the complex history of American colonial expansion, land confiscation and cultural destruction as well as the significance of current efforts to restore aspects of lost nationhood. The comments responded to Rice's argument that technically Hawaiians should not be considered a Native American "tribe" and, therefore, could not be accorded "political minority" status, like American Indians under *Morton*.

QUESTION: [O]ne part of it I don't understand. Hawaii wasn't organized into many tribes, but it did — it was a kingdom. It was a sovereign kingdom, with its language and culture, and even cuisine, and the United States had a large hand in destroying that sovereignty, and indeed Congress passed this Remorse Resolution [1993 Hawaii Apology Resolution] recognizing that the United States was in large measure responsible for the destruction of the sovereignty of these people. So if the idea of tribal sovereignty, restoring some of the dignity that was lost as a result of what this Nation did, works for Native Americans, I don't understand why it doesn't also work for people who were a sovereign nation, who were stripped of their sovereignty, whose land was taken without

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<sup>44</sup> See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

<sup>45</sup> Oral Argument on Behalf of Petitioner, *Rice v. Cayetano*, 68 U.S.L.W. 3288, (U.S. Oct. 6, 1999) (No. 98-818), *available in* 1999 WL 955376, at \*5-\*6.

their consent and without any compensation. The analogy seems to me quite strong.<sup>46</sup>

Quite strong, indeed.

## CODA II

As this Essay was going to press, the Supreme Court decided *Rice v. Cayetano*,<sup>47</sup> reversing the lower courts and declaring OHA's Hawaiians-only voting requirement violative of the Fifteenth Amendment's ban on racial discrimination. As feared, it also opened the door to suits to invalidate all government-connected Native Hawaiian programs. From the perspective of many, the Court majority, led by Justice Kennedy, just did not "get it."<sup>48</sup> The majority's view of the history of Native Hawaiians is highly selective and sanitized. It views OHA's voting requirement simply as a racial preference for Native Hawaiians.

As I commented elsewhere with Chris Iijima:

The Court's decision grossly distorted the history of Hawai'i. Nowhere did it mention U.S. colonialism in 1898, in Hawaii or in the Philippines and Puerto Rico. Nor did the Court acknowledge the destruction of Native Hawaiian culture through the banning of Hawaiian language, or the current effects of Native Hawaiian homelands dispossession: high rates of poverty, homelessness, and incarceration . . . . The Court never specifically referred to whites, even though Rice's claim was implicitly one of "reverse discrimination" against whites. And nowhere did the Court discuss the vibrant Native Hawaiian sovereignty movement that gave birth to OHA.

Perhaps most astonishing was the Court's dismissive treatment of two hugely significant facts. First, there was little mention of the extraordinary U.S. Congressional Apology Resolution of 1993, in which the U.S. government acknowledged its complicity in the illegal overthrow of the Native Hawaiian government in

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<sup>46</sup> *Id.* at \*12.

<sup>47</sup> 120 S. Ct. 1044 (2000).

<sup>48</sup> See Eric K. Yamamoto & Chris Iijima, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty — Again*, 3 COLORLINES, Summer 2000 (visited Apr. 25, 2000) <<http://www.colorlines.com>> (on file with author) (describing reactions to Court's opinion).

1893 and committed the U.S. to future acts of reconciliation. Second, the decision failed to mention that OHA and its voting limitation were created by an overwhelming vote of Hawai'i's multiracial populace.

....

What emerges from the Court's historical account is a simple story of "reverse racial discrimination" against Freddy Rice. In this view, Hawaiians had a rough go of it, as did immigrant groups, but the playing field now is pretty much leveled. U.S. colonization supposedly left no scars; therefore "privileges" for Native Hawaiians are not only undemocratic, they are illegal.<sup>49</sup>

In their dissent, Justices Ginsburg and Stevens excoriated the majority for this distortion of history — for its failure to get it:

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of . . . Hawai'i. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear . . . that Hawai'i's election scheme should be upheld.<sup>50</sup>

Reflecting Justice Ginsburg's insightful comments at oral argument, and underscoring the importance of the viewer's cultural lens for seeing and making sense out of social "facts," the dissent concludes:

[I]t is a painful irony indeed [for the majority] to conclude that native Hawaiian people are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government — a possibility of which history and the actions of this Nation have deprived them.<sup>51</sup>

The tensions in the Court's opinions highlight the significance of this Essay's thematic questions: How might cultural justice performances strategically be deployed throughout the legal process to create openings for transformation? When might they contrib-

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<sup>49</sup> *Id.*

<sup>50</sup> *Rice*, 120 S. Ct. 1044, 1062 (2000) (Stevens, J., dissenting).

<sup>51</sup> *Id.* at 1066.

ute to altering decision-makers' (and potentially larger society's) cultural lenses for assessing, for judging? The search continues.