

“Got Race?” *The Production of Haole
and the Distortion of Indigeneity
in the Rice Decision*

Judy Rohrer

Haole in Hawai‘i is a social assemblage produced in multiple ways through vectors of power operating in terrains of law, space, time, culture, history, politics, and representation. One of the dominant contemporary productions of haole (white people, whiteness) is that of victim, unfairly discriminated against by state policies that benefit Native Hawaiians (Kānaka Maoli) and by a local culture characterized as “anti-haole.” The issue of state discrimination or “reverse racism” came to a head with the Supreme Court decision in *Harold F Rice v Benjamin J Cayetano*, 528 US 495 (2000), hereafter referred to as *Rice*. The case was front-page news in Hawai‘i, and closely watched in the rest of the country as well. Framed by the dominant discourse (molded by the media, lawyers, politicians, and so forth), the case appeared to be about Native Hawaiians (asking questions about who they are and what rights they have), and not about haole (assuming there are no questions as to who they are and what rights they have). Yet I contend that the case really was about the haole, since white subjectivity is constructed through the law as much, and often more, by what is *not* said and *not* regulated than what is. Ultimately, *Rice* cleared more space for haole in Hawai‘i by taking it away from Kānaka Maoli through a denial of their legal claims and a disappearing of their extralegal witness and mo‘olelo (stories, histories).

The *Rice* case illustrates how Western law renders indigenous claims inarticulable by racializing native peoples, while simultaneously normalizing white subjectivity by insisting on a color-blind ideology. The inherent contradiction in these two positions—race matters/race does not matter—is played out in the frictions surrounding the *Rice* decision and is evidence of the cracks in the hegemony of Western law that complicate any easy

binary of colonizer–colonized. Using *Rice* as a case study, I explore how the Western legal framework is set up to accept the teleological narrative of development, problematize native identity, and naturalize white subjectivity. I then broaden the lens to explore the ways *Rice* points to an epistemological disconnect between Western notions of the production of knowledge and indigenous articulations of the same.

Harold “Freddy” Rice, a fifth-generation haole, and his lawyer, John Goemans, filed the lawsuit in 1996. Rice charged that the Hawaiians-only voting restriction for trustees of the Hawai‘i State Office of Hawaiian Affairs (OHA) constituted unlawful racial discrimination, in violation of the Fourteenth and Fifteenth Amendments. Federal District Court Judge David Ezra and the US Ninth Circuit Court of Appeals decided against Rice, ruling that the OHA restrictions were based on a special trust relationship between the Hawaiian people and the state, and therefore did not constitute racial discrimination. Rice and Goemans appealed to the US Supreme Court,¹ which decided *Rice v Cayetano* on 23 February 2000. In a 7–2 ruling, the court held that the Hawaiians-only voting restriction violated the Fifteenth Amendment’s ban on voting restrictions based on race. The two dissenting justices were John Paul Stevens and Ruth Bader Ginsburg.

COMPETING NARRATIVES OF HAWAIIAN HISTORY

What lay at the core of the Court’s decision was a battle of conflicting histories. Indeed, justice struggles through claims of rights are, first and foremost, struggles over collective memory.

—ERIC K YAMAMOTO AND CHRIS K IJIMA,
“THE COLONIZER’S STORY”

The *Rice* case was indeed largely founded on a struggle over collective memory. Two divergent historical narratives vied for recognition, one emphasizing colonization and its impacts, and the other highlighting Americanization and “development.” Within the colonization narrative, Kānaka Maoli have suffered and continue to suffer the devastating impacts of the illegal overthrow of their nation and US colonization. Justice requires somehow redressing these wrongs. The Americanization narrative represents the same history through the teleological trope of development (in which “development” is assumed to be a natural process) and the rhetoric of “civilization.” In this section I look first at the clashing his-

torical narratives in Justice Anthony M Kennedy's opinion and Justice Stevens's dissent for what they illuminate regarding the production of haole. I then turn to Harold Rice's own narrative for the ways he tries to place himself comfortably at home in Hawai'i, mobilizing pieces of both narratives in a destabilization that highlights the asymmetries of colonial processes and their narration.

The first paragraph of Justice Stevens's dissent makes it clear that he saw the case in terms of conflicting histories:

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii. 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 to me that Hawaii's election scheme should be upheld. (*Rice v Cayetano* 2000, 527–528)

Justice Stevens pointed to some of those “glittering generalities” in his dissent, including a reinscription of precontact feudalism; the construction of haole as settlers rather than immigrants; the centering of the plantation experience and its appropriation in shoring up the discourse of meritocracy in Hawai'i; and the intimation that Queen Lili'uokalani was responsible for her own overthrow. The majority decision constructs Hawai'i's history as one of positive Americanization and development brought about thanks to enterprising haole. In support of this view, Justice Kennedy wrote that his purpose was to “recount events as understood by lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue” (*Rice v Cayetano* 2000, 10). His historical account then can only be told through a Western legal framework. What is spun is “a remarkable narrative, essentially retelling the favorite American fairy tale of how the white man ‘civilized’ the savage—this time in the context of Hawai'i” (Iijima 2000, 98).

The haole is the natural agent of Kennedy's history. Starting with Captain Cook, the lofty goals of discovery, trade, religious conversion, and agricultural industry propel haole to the islands. Colonization is misrecognized as primarily the individual acts of enterprising white men, and the “natural” outcome of an encounter between the so-called civilized and uncivilized. In a glaring example of constructing and maintaining a normalized status for haole, Americans and Europeans are recognized by Kennedy as “settlers” (*Rice v Cayetano* 2000, 501), whereas the “people of many different races and cultures” who came to work on plantations

are “immigrants” (*Rice v Cayetano* 2000, 506). As far as the Court is concerned, immigrants may come from “many different races and cultures,” but they are not white. Chris Iijima noted:

There is . . . one group never referred to nor described as an “immigrant” group. That group is constructed differently from immigrants because throughout the opinion it is assumed to be the rightful and natural heir to the land of Hawai‘i. It is not insignificant that the Court refers to the Tahitians as the first Polynesian settlers of Hawai‘i and consistently also refers to white immigrants as settlers. This latter group—apparently never immigrants—consists of white missionaries and other “settlers.” Their descendants are implicitly constructed in this way as the natural heirs to Hawai‘i. In other words, these “nonimmigrants” are the ancestors of Freddy Rice. (2000, 103)

Not only does this reliance on telling a certain story of the immigration of laborers and the settlement of haole allow for the naturalization of the haole as leader, but it also sows the seeds of a belief in meritocracy. This belief is then mobilized against Hawaiians who somehow fail to measure up to the immigrants who pulled themselves out of the plantations, through discrimination, and up by their bootstraps. Kennedy wrote, “Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present” (*Rice v Cayetano* 2000, 506). Note how this sentence simultaneously assumes and marks a host of immigrants as racialized Others.

As Kennedy’s statement indicates, the centering of the plantation narrative as the key to understanding Hawai‘i politics conceals a narrative of colonization. The statement about (nonwhite) immigration is offered as background for understanding Hawai‘i’s demographics, the material necessary to construct contemporary Hawai‘i as a multicultural land of harmony and equal opportunity. This racial harmony construct in turn makes “discrimination” against haole look even more odious.

Intimating that Queen Lili‘uokalani was responsible for her own overthrow bolsters the narrative of seamless Americanization. Kennedy wrote that the queen, upon attempting to “promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects,” was “replaced . . . with a provisional government” (*Rice v Cayetano* 2000, 505). This retelling of events makes the queen appear undemocratic and obscures the violence of her overthrow. After briefly noting that President Cleveland opposed the overthrow, Ken-

neddy wrote simply that “the Queen could not resume her former place, however, and in 1894, the provisional government established the Republic of Hawaii. The Queen abdicated her throne a year later” (*Rice v Cayetano* 2000, 505). Since this all appears to have happened in a vacuum, we are left to assume that Queen Lili‘uokalani was just not up to the task of ruling. Since she could not rule, it follows that Americans should take over and lead the islands into democracy.

Justice Stevens’s dissent goes quite a way in deconstructing the Kennedy opinion, opening space for alternative stories, and thereby destabilizing the haole as the normative subject of the law. Stevens was incensed by what he described as the “wooden” approach of the majority to the elements in the case (*Rice v Cayetano* 2000, 547). He chided them for their lack of understanding of the unique history of Hawai‘i:

It is a painful irony indeed to conclude that native Hawaiians 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. (*Rice v Cayetano* 2000, 535)

Stevens’s dissent continuously refers to native Hawaiians as “indigenous” or “aboriginal” and brings colonization back into the picture by discussing the “history of subjugation at the hands of colonial forces” (*Rice v Cayetano* 2000, 529). In this way it disrupts the majority’s developmental narrative, which comfortably places haole as “natural” leader in Hawai‘i and turns the OHA voting requirements into unfair retribution.

Justice Stevens reminded the Court of the origins of the Office of Hawaiian Affairs and the content of the federal Apology Resolution—two significant legal events that go almost completely without mention in the majority opinion. He twice pointed out that the office itself, as well as the OHA trustee voting requirement, was established by a vote of the entire electorate of the state (*Rice v Cayetano* 2000, 544, 546). This undercuts the claims of “reverse racism” on which the case is built, by making it harder to construct a disgruntled minority acting with intention to discriminate against the majority. In fact, haole and other non-Hawaiians voted in the requirements Rice was complaining about. Further, Stevens found in the 1993 Apology Resolution ample evidence of federal involvement in the overthrow and the need to recognize the federal trust relationship with native Hawaiians (*Rice v Cayetano* 2000, 533).

The Apology Resolution (US Public Law 103-150, 28 November 1993)

was signed into law by President Clinton on the one-hundred-year anniversary of the overthrow of the monarchy and is an official apology from the US federal government to the Hawaiian people.² Bringing the Apology back in destabilizes arguments relying on “special rights” rhetoric because it establishes that, in fact, the federal government does have a “special” relationship with Native Hawaiians based on their indigenous status and US involvement in the overthrow of the kingdom. This resonates with Eric K Yamamoto and Chris K Iijima’s contention about *Rice* as a struggle for collective memory (2004). If the violent history and impacts of colonization are denied (as the Americanization narrative tries but never completely succeeds at doing), haole is dehistoricized. If haole is dehistoricized, any limitations on haole legal subjectivity seem unfair, and thus haole is cast as a victim of discrimination. In a dehistoricized Hawai‘i, everyone “naturally” has equal opportunity and equal claim to everything.

Harold Rice’s historical narrative is far less seamless than Kennedy’s and far less critical than Stevens’s. In an interview with Naomi Sodetani, Rice wore his contradiction on his sleeve, smuggling colonization back in, however unwittingly. Rice’s statements exemplify the uneven quality of colonial processes creating unpredictable convergences, conflicts, and disconnects between and within variant subjectivities. Proud of his (male) ancestors, he spoke at length about how they supported the monarchy. He claimed that his great-grandfather, H P Baldwin, was against the overthrow and that his great-great-grandfather, William Hyde Rice, “was a good friend of (King) Kalākaua, and helped him to write the Bayonet Constitution” (Sodetani 2003). (Rice seemed oblivious to the impossibility of Kalākaua writing a constitution that was forced on him through threat of violence.) He further reported that his great-great-great-grandfather, William Harrison Rice, gave up his American citizenship, “pledged his loyalty to the king and became a Hawaiian citizen” (Sodetani 2003).

Rice proudly asserted that, given this history, Hawaiian activist Keanu Sai told him that he was a Hawaiian citizen (since his ancestors never relinquished their Hawaiian citizenship), and therefore he had no standing to sue the state. He seemed to like this determination, claiming that “if I had to make a choice, a citizen of U.S. or citizen of Hawai‘i, I’d never think twice, I’d be a citizen of Hawai‘i” (Sodetani 2003). The statement is not disingenuous. It is clear from his interviews that he is quite knowledgeable about, acculturated to, and supportive of Hawaiian culture. More cultural hybrid than straight haole, his aesthetics are local/Hawaiian, yet filtered through a US constitutional framework.

Ann Laura Stoler's work on the processes of colonization helps put Rice's autobiography into a larger context. While her writing is mainly about European colonization, some elements are comparable to US processes. Stoler, like Anne McClintock (1995), Sally Engle Merry (2000), James Clifford (1997), and others, is critical of a methodology that assumes a fixed polarity between "colonizer" and "colonized" where the colonizer has complete power and control. Stoler has argued that "colonialism was not a secure bourgeois project. It was not only about the importation of middle-class sensibilities to the colonies, but about the *making* of them" (1995, 99; emphasis in original). "Cultural competencies" and "sexual prescriptions" were continually altered in attempts to maximize profit and stabilize colonial rule (Stoler 1995, 113). New subjectivities are made and others remade through colonial processes that destabilize a neat colonizer–colonized binary. Harold Rice is material evidence.

Take the example of a challenge from Lilikalā Kame'eiehiwa about how it is that Rice is fifth-generation and there was no intermarriage with Kānaka Maoli until the generation of his children (Kame'eiehiwa and Spivak 2003). Kame'eiehiwa attributed this to racism, and yet we know that haole "sexual prescriptions" during those five generations varied widely enough to make any easy attribution of cause difficult. There certainly was a discourse of the "eugenic peril," as Stoler called it (1995, 181), of blood mixing circulated primarily by missionaries in the first decades after contact in an attempt to stem the high rate of sexual intercourse between haole men and Hawaiian women. This discourse faded in light of an increasing incidence of intermarriage, especially to ali'i (chiefs, royalty)—motivated in varying degrees by a desire to inherit land and gain political power. Here sexual prescriptions get remodeled and bright racial divisions get blurred. Where Rice's ancestors stood with regard to those dynamic discourses is difficult to assay without intensive historical research; furthermore it is doubtful they all had the same take on the matter.

Rice has reconciled his dissonant positions—Hawaiian national versus champion of US constitutional rights—through an articulation of aloha for the Hawaiian people. In a statement that parodies itself Rice avowed, "I wish the best for the Hawaiians. If anything, I'm pro-Hawaiian. . . . most of my friends are Hawaiian" (Sodetani 2003). He has asserted that he is playing a positive role in history, following in the footsteps of his ancestors (his language reminds me of the "tough love" rhetoric in circu-

lation in the 1980s). Talking about the case, he said, “It was good for Hawaiians, and certainly good for the state. Got everybody thinking. Hawaiians took advantage of being able to play the part of victim and get entitlements based on race. They stepped over the line. The Rice decision made everyone step back” (Sodetani 2003). Through this patronizing framework, Rice’s statements echo the Americanization narrative of Hawaiian history. Regardless of the overthrow (which his great-granddad opposed), Hawaiians ought to be treated like everyone else and ought to act like everyone else (“everyone else” measured by the naturalized haole standard). The palpable material and psychological impacts of colonization are nothing more than Hawaiians “playing the part of victim.” The Hawaiian Kingdom functions on the level of nostalgia for him; it has no real relevance anymore.

Rice’s cultural hybridization makes it difficult for him to ignore Hawai‘i’s history of colonization. He attempts to find ways to fold that history into the Americanization narrative that triumphed through Kennedy’s retelling in the Supreme Court decision. In Kennedy’s story, haole were courageous settlers who built a meritocracy, democracy, and racial paradise out of a repressive monarchy. Even while his case made use of this easy narrative, Rice’s family history destabilizes it; it breaks down the colonizer–colonized duality and opens space for the question of Native Hawaiian collective identity.

NATIVE HAWAIIAN COLLECTIVE IDENTITY

Identities are the names we give the different ways we are positioned by, and position ourselves within, the narratives of the past.

—STUART HALL, QUOTED IN
Race, Nature, and the Politics of Difference

The bloody mess of who counts as Hawaiian is fraught with histories of contested entitlement and colonial dispossession. Hawaiian racial definitions have been thoroughly bound-up with struggles over land and identity.

J KĒHAULANI KAUANUI,
Rehabilitating the Native

One of the key controversies in the *Rice* case involved multiple, often conflicting, definitions of Native Hawaiian collective identity, including

“race,” “tribe,” “Hawaiian nationals,” “wards of the state,” “political entity,” and “indigenous peoples.” These identity definitions are fashioned through discourses of blood, ancestry, history, legal documentation, and culture. The knot only became more tangled in the course of the case: Rice argued race; the state argued anything but race (including “tribe-like”); the majority contended ancestry was proxy for race; the minority argued ancestry (decoupled from race) and indigeneity—and Kanaka Maoli independence activists were forced to watch from the sidelines. No one in the courtroom represented them and many of their arguments fell outside legal discourse anyway.

The key thread to follow in unraveling the controversy over Kanaka Maoli identity and opening up an understanding of how haole is normalized in the process is the race thread. The case was framed around race and ultimately decided on grounds of racial discrimination, requiring that we descend into what Kauanui called the “bloody mess” of the racialization and deracination of Hawaiian identity (2000, 11). Two main strands running through Kanaka Maoli racialization are made visible in *Rice*: the violence of the imposition of a Western legal racial identity on an indigenous people in a colonial process; and the specific use of blood quantum measurements to contain and control identification.

Precontact Kānaka Maoli did not think in terms of race,³ and certainly never asked to be “raced” (this is the crux of the argument against using the Western racial label of “native Hawaiian”). Virginia R Dominguez wrote a fascinating article about the US obsession with racial taxonomy, especially as evidenced through the census and its imposition on Hawai‘i (1998). She indicated that King Kalākaua was interested in trying to understand US practices of racial categorization but never adopted them, continuing to use nationality (which had been adopted by previous ali‘i) as the premier system of population classification:

So the nonadoption of racial taxonomy may not have been accidental. What we do know for sure is that “race” and “color” remained elusive as principles of classification and modes of reference at least into the 1880s. Everything changed the minute the United States annexed Hawai‘i in 1898. The very next census—of 1900—blatantly classified the population by “color.” (Dominguez 1998)

Dominguez went on to track the mapping of racial categories onto Hawai‘i’s people by continental bureaucrats for whom Hawai‘i was “just one more place to adapt, recategorize and incorporate within the racial

taxonomy [of the US government],” no matter how ill-fitting that taxonomy might be. She traced how US census categories have fluctuated with changing political, social, legal, and scientific positions, and how that has meant a proliferation and splitting of categories for racialized “others,” while maintaining the “naturalness and unfragmentability of ‘whites’” (Dominguez 1998). In Hawai‘i, this overlay at the point of annexation meant that, all of a sudden, “white” was a “natural” category by official standards (one of the few categories that literally counted), whereas “Hawaiian” did not even appear in the taxonomy.

One of the ways haole racialized Kānaka Maoli even before the official importation of racial taxonomy was through representation, first as sometimes noble but definitely savage, then as inherently lazy and infantilized, and from the 1920s until the recent backlash, as unfortunate victims deserving government charity, which also meant regulation through government bureaucracies. These representations fed the legal categorization of Kānaka Maoli. Haunani-Kay Trask wrote, “Who we believe ourselves to be is often *not* what the colonial legal system defines us to be. This disjunction causes a kind of suffering nearly impossible to end without ending the colonial definitions of who we are” (1993, 135). A primary goal of decolonization, then, is (re)discovering community-based definitions of one’s group and trying to make a place for them in neo- or post-colonial societies.

Rona Tamiko Halualani has written about the violent and delimiting nature of legal colonial definitions imposed on an indigenous population. She sees law and governance as “violent technologies of struggle and identification that exceed the textuality of identity representations. Legal definitions of identity, for instance, are activated and supported by militarization, courts of law, and state administrations and result in material consequences like the denial of indigenous identification for cultural rights and entitlements (land, benefits) and racial (mis)recognition as a means to negate one’s formal claim to indigeneity” (2002, 38). Many Kanaka Maoli scholars mark the establishment of the technology of blood quantum as a measurement of Hawaiinness in 1920 as pivotal in the legal racialization of Hawaiians—a textbook example of the violence of colonial identities.

Turning now to the issue of blood quantum for Native Hawaiian identity, I analyze the history of blood measurement for Hawaiians, how this fits with Native American experience, Justice Kennedy’s assertion that ancestry is “proxy for race,” and documentation requirements. Blood

quantum measurements were instituted through the 1920 federal Hawaiian Homes Commission Act (HHCA). In effect these rules have contained and controlled Kānaka Maoli identification and simultaneously transferred power and property to haole. The definitions set up in this act and brought forward in subsequent laws played a critical role in the majority's decision in *Rice*.

J Kēhaulani Kauanui has done the most work on blood quantum and has painstakingly laid out how the racialization and deracination of Kānaka Maoli via blood is intricately and insidiously tied to the ongoing project of colonization. The HHCA hearings, Kauanui pointed out, showed a shift from consideration of Hawaiian entitlements to a bureaucratized concern with “rehabilitation” that constructed Hawaiians as a racialized beneficiary class, at the same time as it protected white property interests. The Hawaiian Homes Commission Act was the first to institute a blood quantum system of classification for Kānaka Maoli, setting up a category called “native Hawaiian” consisting of those with 50 percent or more blood traceable to pre-1778 inhabitants. Eligibility for approximately 200,000 acres of ceded land set aside by the act for “Hawaiian homesteads” was based on this classification, which became the legal standard of Hawaiian identity for both federal and state policy. As Kauanui argued, “The blood quantum policy is racist because it works to redefine Hawaiian identity from a genealogical link to the land to a mathematical fraction. It also works towards the end of lowering the numbers of ‘authentic’ Hawaiians, and thus dispossessing other Hawaiians from the land bases entitled” (2000, 53–54). Similarly, Trask wrote, “Imposed systems of identification are instituted to separate our people from our lands and from each other in perpetuity . . . the white people who created our classification hoped that Hawaiians of 50 percent or more blood quantum would eventually die out, thus leaving our lands and revenues not to Hawaiians of less than 50 percent blood but to the state and federal governments” (1993, 135).

The blood quantum standard did violence by redefining Hawaiian identity as separate from genealogy, fortifying the myth of the vanishing Hawaiian, and insuring that property continued to accumulate in the hands of haole. It also firmly established the haole as the normative citizen in Hawai‘i—and this was decades prior to statehood. Through the processes of deracination, the closer the Hawaiian subject was to the haole, that is, the more her blood had been whitened, the more assimi-

lated or "civilized" she was assumed to be, and therefore the greater her potential for citizenship. On the other hand, those who were at least half Hawaiian were considered almost helplessly backward and often, paradoxically, in need of saving through the rehabilitative magic of homesteading. "The less Hawaiian one is, the more competent, capable, assimilable, and citizen-like she or he is, which in turn regrid[s] a position of normative whiteness ironically through the articulation of a part/mixed Hawaiian identity in the HHCA hearings" (Halualani 2002, 72).

Kauanui discussed the way Hawai'i legal processes and discourses have triangulated the inassimilable Asian "outsider" with the whitened (and therefore dispossessed) Hawaiian, and the unquestioned, normative haole. She cautioned against "selective assimilation," which confers "franchise rather than sovereign recognition" (Kauanui 2000, 78). Native American scholar David Wilkins also pointed to the problems with forced inclusion for Native Americans: "While most racial/ethnic groups and women faced a *forced exclusion* from the American social contract, Indians, from the 1880s, faced a *forced inclusion* into the American polity. However, it was an inconsistent and ambivalent inclusion at best. Most of the actions by federal policymakers from the nineteenth century to the 1970s were aimed at 'Americanizing' and 'civilizing' Indians" (2002, 192; emphasis in original).

Along similar lines, Native American scholar Eve Marie Garrouette, in her insightful book *Real Indians: Identity and the Survival of Native America* (2003), laid out the minefields, contradictions, and varying consequences of navigating legal definitions of Native American identity. She quoted Jack Forbes on the reversal of hypodescent for natives,⁴ quipping that modern Americans "are always finding 'blacks' (even if they look rather un-African), and . . . are always losing 'Indians'" (Garrouette 2003, 48). A policy of forced inclusion, no matter how ambivalent, can "vanish" native peoples in a literal whitewash; their claims are thereby silenced or made illegitimate. If there are no "real" Indians or Hawaiians, there can be no obligations toward them, no claims from them.

The assumption of high blood quanta for native peoples was made evident in Justice Breyer's concurrence in *Rice*. The Office of Hawaiian Affairs required voters either be "native Hawaiian," as defined by 50 percent blood, or "Hawaiian," a broader category forged after the Hawaiian Homes Commission Act to include anyone with pre-1778 ancestry (usually eligible for fewer benefits). Breyer found the state's definition of "Hawaiian" too broad to be "reasonable" because it could include some-

one with less than one five-hundredth original Hawaiian blood (assuming nine generations since 1778). In his concurrence he wrote:

There must . . . be some limit on what is reasonable, at least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—goes well beyond any reasonable limit. (*Rice v Cayetano* 2000, 527)

For Breyer, it seemed obvious that the class was too broad. No “reasonable” person would consider someone with such “diluted” blood to actually be Hawaiian. Their Hawaiianess, he claimed, would be based on “luck” (disqualified for being arbitrary) and “interest” (disqualified for being antidemocratic). He presumed “that genealogy is the arbitrary modality of identity when it would seem that blood quantum is not only arbitrary, it is abstract and restrictive” (Kauanui 2002, 119). Breyer argued that he was “unable to find any Native American tribal definition that is so broad” (*Rice v Cayetano* 2000, 526)—but he must not have looked very hard.

Garrouette wrote that while two-thirds of Native American tribes use blood quantum in their definitions for membership, the remaining one-third use other requirements often requiring some sort of lineal descent, but also criteria based on residency, community participation, vote, parental enrollment, and the maintenance of annual contact (2003, 15). The Cherokee, for example, have no blood requirement at all. Tribal membership is open to any who can show a “legal-historical relationship” to the tribe through an ancestor listed on the Dawes Rolls.⁵

Garrouette told the story of Cherokee tribal member and registrar, R Lee Fleming, registering a girl who was 1/2048 Cherokee. Fleming talked about how the Cherokee Nation is now on its third constitution—none of which has had a blood requirement. He emphasized that it is the “legal-historical relationship” between member and tribe that is important. “People might find this standard surprising if they don’t understand the whole context of how it was created, and our tribe’s history. But our reasons for crafting it were sound reasons, reasons that come from who we are as people” (Fleming quoted in Garrouette 2003, 33). Many Hawaiian activists, including Jonathan Kamakawiwo‘ole Osorio and J Kēhaulani Kauanui, echo Fleming’s sentiment. “If being a descendant of a Native makes one Native, what if anything does blood quantum have to do with

who we are?” (Osorio 2001, 361). “Blood quantum classifications have consistently been used to enact, substantiate, and then disguise the further appropriation of native lands while they obscure and erase a discourse of specifically Hawaiian sovereignty and identity as a relation of genealogy to place” (Kauanui 2002, 110).

The HHCA definition of native Hawaiian was carried forward, amended, and rearticulated in subsequent legislation, including the state’s Admission Act and the 1978 amendment to the state constitution that created the Office of Hawaiian Affairs. Looking back on this legal history, the majority in the *Rice* decision was able to find multiple instances where “race,” “ancestry,” and “peoples” were used seemingly interchangeably to define Hawaiians and native Hawaiians. The majority exploited this untidiness, affirmatively answering the question, “Got race?” In perhaps the most destructive and controversial statement in the *Rice* decision, Kennedy wrote, “Ancestry can be a proxy for race. It is that proxy here” (*Rice v Cayetano* 2000, 514). Thus, ancestry was easily dismissed as nothing more than a cover for racial difference. Kauanui countered:

It is not that the state is using ancestry as a proxy for a race; it is that *blood quantum inherently mobilizes racial categories as a proxy for ancestry*. For many Hawaiians, what this case highlights is the necessity for insistently articulating discourses of genealogy, with their attendant notions of responsibility to place and to descendants, as a basis of Hawaiian discourse of sovereignty. (2002, 120; emphasis mine)

It was through the imposition of blood quantum percentages that Hawaiians were legally racialized and severed from identity claims based on the more fluid concepts of genealogy. Kennedy’s statement is so destructive because it causes the historical processes of racializing Hawaiians via blood quantum to disappear, and then denies the materializations of those processes. *Rice* can be read as evidence of the white historical amnesia that “races” a people, forgets it raced them, and then denies the material impact of that racialization when it becomes the ground on which that people begin to make claims. Halualani talked about this amnesia with regard to the Hawaiian Homes Commission Act when she wrote, “Blood and its seemingly objective markings could specify difference in the same moment it wiped away the structured dispossession of Hawaiians, a process of historical forgetting that is achieved just as a moral claim of rehabilitation emerges. By this logic, blood economizes land allotments in line with citizenship” (2002, 63).

In the *Rice* case, race as proxy for ancestry is taken from simply “economizing” Hawaiian rights to invalidating them. No longer does it seem permissible, even for those who can document their 50 percent blood to the authorities, to claim state or federal entitlements. Any claims to a “special relationship” or “trust” are trumped by the race card, in this case played *against* racialized neocolonial subjects unable to give indigeneity or aboriginality weight on the (color-blind) scales of justice.

Justice Stevens, in his dissent, strongly objected to Kennedy’s claim that ancestry was a stand-in for race. While he admitted that this might sometimes be the case, he was steadfast that it was not in this instance:

The distinction between ancestry and race is more than simply one of plain language. The ability to trace one’s ancestry to a particular progenitor at a single distant point in time may convey no information about one’s own apparent or acknowledged race today. Neither does it of necessity imply one’s own identification with a particular race, or the exclusion of any others “on account of race.” The terms manifestly carry distinct meanings. (*Rice v Cayetano* 2000, 539)

Stevens was careful to use the language of “indigenous status” or “aboriginal people,” yet he did not address race as a fiction of colonization. He continued within a framework that assumes that race is an objectively knowable, pre-political, “natural” attribute.

Another significant aspect of the use of blood quantum for Hawaiian entitlements is that it has put Hawaiians in a situation of having to legally document their identities (so well described by Halualani in the third chapter of her 2002 book). This is an incredibly fraught position for many, not just because of the violence of having to “prove” themselves to the state, but also because of all the ways it reintensifies the violence of colonization. First of all, traditional Kanaka Maoli culture was oral, not written. As bell hooks reminded us, “The burden of proof weighs heavily on the hearts of those who do not have written documentation, who rely on oral testimony passed from generation to generation. Within a white supremacist culture, to be without documentation is to be without a legitimate history. In the culture of forgetfulness, memory alone has no meaning” (1992, 193). Second, when written records started being kept, the processes were extremely haphazard, random, and biased. Missionaries were the first to keep records and they had their own ideas about racial taxonomy—and, as Dominguez has illustrated, even the dominant taxonomy was in flux. Birth certificates misclassified parents, only listed one

racial category when they were multiple, or only listed a category for one parent. Names were frequently misspelled. Records were often lost or destroyed in fires. Third, the bureaucracy that now exists and is putting records into an electronic database is completely overwhelmed, prone to frequent error, and very hard to navigate. Some have made it their life's project to try and document their family's history. Some cannot even talk about it, it is so painful.

Hawaiian interviewees walk us through the painful, private memories of locating identity documents. They reconcile the writing over of their names and raced identities, tragically reducing family genealogies to blood verification. Hawaiians also negotiate competing versions of their histories as told by family members versus what the formal documents reify as the concrete truth. (Halualani 2002, 83)

Again, this is a situation shared by many Native Americans who have to document their blood for tribal, federal, or state law. Many are resentful of having to "prove" their identities when there is no such requirement for any other racial group. One of Garrouette's interviewees said with tongue-in-cheek that he is enrolled in the Ojibwe tribe and is also "part white, but I don't have the papers to prove it" (Garrouette 2003, 29).

Neither do haole have "papers to prove it." Haole are never asked to document their identities in order to claim space in Hawai'i and have never experienced the structural violence of racialization (this is substantially different than being culturally marked as haole, even when this marking leads to violence). The *Rice* case was about eliminating any benefit that might come from having documentation of a Hawaiian identity.

COLOR-BLIND IDEOLOGY AND NATURALIZING THE HAOLE

The *Rice* decision was perhaps the first time that the Fifteenth Amendment has ever been invoked to protect the rights of a white male.

—ERIC K YAMAMOTO AND CHRIS K IJIMA,
"THE COLONIZER'S STORY"

The Supreme Court found that the OHA voting regulations violated the Fifteenth Amendment guarantee that the right to vote would not be "denied or abridged" on account of race. The majority based its decision on a color-blind reading of the law that ignored institutional, historical, and racial inequality (including racialization and inequality produced by

the law itself) in order to construct the myth of an “equal playing field” or meritocracy. Color-blind legal analysis thus served to reinscribe institutionalized racial inequalities and hierarchies, including white power and privilege, by pretending they do not exist, by being “blind” to them.⁶ In an important article establishing the connection between whiteness and property, Cheryl Harris wrote, “Colorblindness is a form of race subordination in that it denies the historical context of white domination and Black subordination. This idea of race recasts privileges attendant to whiteness as legitimate race identity under ‘neutral’ colorblind principles” (1993, 1768–1769). I would expand “Black” to encompass all nonwhite racializations, since color-blind ideology is applied to other racialized groups as well, though in very different ways.

Color-blind ideology emerged over the most recent “post-civil rights” decades as part of the conservative backlash against political claims and assertions by people of color, particularly those focusing on affirmative action. “Thus, at the very historical moment that race is infused with a perspective that reshapes it, through race-conscious remediation, into a potential weapon against subordination, official rules articulated in law deny that race matters” (Harris 1993, 1768). Charles Gallagher’s study of white racial formation corresponds with this assertion. It highlights the influence of legal thinking in racial formation and the reactionary move to imagining whiteness as a “liability” that drives color-blind ideologues: “The racially charged and politically conservative environment of the late 1980s and 1990s has reinterpreted whiteness as a liability. The cultural mythology that has become today’s commonsense understanding of race relations is a definition of society that is colorblind. The ascendancy of color blindness as the dominant mode of race thinking and the emergence of liberal individualism as a source of white entitlement and racial backlash was a central finding in my work” (Gallagher 1997, 9). The law, according to this ideology, has become too color positive; it has made race matter. This perception drives the notion that white people are being disadvantaged, and therefore the law must be reigned in to a “neutral,” color-blind state.

Employing a Foucauldian analysis of the shift to a color-blind racial discourse illuminates how this discourse can seem both new and renewed at the same time. Similar to the shift between the discourses of a “symbolics of blood” and an “analytics of sexuality,” in the discourse of “colorblind” racism there are “overlappings, interactions and echoes” (Foucault 1978, 149) of the discourse of “color” racism. To maintain the racist status quo,

the rhetoric needed to shift from one where color is relevant to one where it is not, but the former continues to “haunt” the latter. Stoler is interested in Foucault’s analytic concern with the “tension between rupture and reinscription, between break and recuperation in discursive formations” (Stoler 1995, 61). She wrote, “What concerns him is not modern racism’s break with earlier forms, but rather the discursive bricolage whereby an older discourse of race is ‘recovered,’ ‘modified,’ ‘encased,’ and ‘encrusted’ in new forms” (Stoler 1995, 61). We might think of color-blind ideology as a “new,” “encrusted” form of racism.

Two specific examples of this color-blind ideology at work are the related matters of Justice Kennedy’s calling Harold Rice “Hawaiian” and Rice’s calling himself “Hawaiian at heart.” Both of these incidents highlight the friction between an empty, disconnected, color-blind ideology and local island culture’s racial and ethnic embeddedness. Kennedy stirred up a huge controversy by matter-of-factly declaring early in his decision that Rice was “a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term” (*Rice v Cayetano* 2000, 499). One assumes that the declaration that Rice is Hawaiian followed from the practice of naming people by their states, regions, or cities of residence, (eg, someone who lives in California is a Californian; in the Midwest, a Midwesterner; in New York, a New Yorker). These are geographic and cultural signifiers more than anything else. This system breaks down in Hawai‘i because a “Hawaiian” is not a residential category, but a racialized, indigenous identity.

No one in Hawai‘i, not even the conservative *Honolulu Advertiser* or Harold Rice,⁷ could concur that it is “well-accepted” to consider a haole a Hawaiian. The statement only served to illustrate the enormous gap between Kennedy’s ignorant presumption and the reality of social relations and histories in the islands. Far from being color-blind, Hawai‘i could be called color-cognizant. Racialized ethnic discourse is intrinsic to local culture, not primarily as a foundation for discrimination or intergroup conflict, but more in recognition of the different histories and cultures that come together in the islands. To impose on Hawai‘i a discourse that is “blind” to these histories and these distinctions, a discourse that gives everyone equal claim to being “Hawaiian,” is itself a haole act—the product of a foreign culture and ideology, an act of ignorance and arrogance.

While Harold Rice is perceptive enough to not deem himself “Hawaiian,” he does feel comfortable with the “Hawaiian at heart” label (Rolo

1999). In fact, in an interview with Anna Loomis, he credited his Hawaiianess for the relative lack of backlash against him: “I think one of the reasons that I was able to come out popular in the *Rice v Cayetano* case is that I grew up with Hawaiian cowboys, and played with their kids. . . . And even today, half the people I associate with are Hawaiian. . . . And so my body language and my . . . what I exude out to the public is, um . . . not anti-Hawaiian” (Loomis 2001, 17). Here, as in the Sodetani interview, he struggled to represent himself as anything but an “anti-Hawaiian” haole. In this statement, he seemed almost to want to say that he “exudes” Hawaiian, but he pulls himself back.

Because it is so important to Rice to not be seen as “anti-Hawaiian,” he strongly holds to a discourse in which justice and merit are color-blind. In this framework, he can be against “discrimination” but not against Hawaiians. “The case was not about OHA, was not about Hawaiians, it was about discrimination in the voting box. Just happened to be OHA. And the people who know me, and any Hawaiian that talks to me knows that. Just instinctively they know that I’m not against them” (Loomis 2001, 17). Rice hopes people instinctively know he is “pro-Hawaiian” or “Hawaiian at heart.” It frustrates him to think otherwise. Just as he used Keanu Sai’s statement to legitimize his standing as a Hawaiian national, he used interactions with other Hawaiians to show how Hawaiian, how not-haole, he is. He told a story about an old Hawaiian woman who was mad at him over the case. He claimed that her comment was: “Well, Freddy, at least it wasn’t some *haole* that did this!” (Loomis 2001, 17).

Following color-blind logic, Rice believes Hawaiians should not get special entitlements: “Hawaiians are just as capable as anybody of doing well in today’s world. They have the intelligence and ability and the advantage of this being their home, so they don’t need the help” (Sodetani 2003). According to Rice, Hawaiians have not been disadvantaged by colonialism. In a bitterly ironic twist, he contended that Hawaiians actually have the advantage because they are at “home”—a home his ancestors and other haole have controlled for over a century. And then, in an essentializing gesture that goes even further, he stated, “Frankly, I’ve never run into a Hawaiian who wasn’t smarter and more capable than me. I sort of kid that’s why us haoles have to push and work so hard—we don’t have the talent. I mean, if I could play music and sing like these Hawaiians, I wouldn’t have to be so pushy, I’d be more happy, content” (Sodetani 2003).

Rice’s comments reveal contradictions rooted in his having grown up

in Hawai'i. He somehow wants to acknowledge indigeneity (Hawaiians being "at home"), while at the same time erasing colonization and declaring a level playing field with a home team advantage. He wants to be a Hawaiian national based on his ancestry but not to recognize a Hawaiian nation with claims against the US government. He wants to be seen as supporting Hawaiian language and culture at the same time his case opens up challenges to programs that do just that. Rice's paradoxical positioning highlights the dehistoricizing of color-blind ideology, which enables white subjectivities to be normalized while indigenous articulations of subjectivity fail to be recognized at all.

WESTERN LEGAL DISCURSIVE FRAMEWORK AND INARTICULABLE POSITIONINGS

Haole residents presumed their absolute natural right to Hawai'i by practicing their legal and citizen rights from "home." In so doing, private (white) sovereign residency was normalized while a Hawaiian subject position was racially marked and structured existing through its constructed difference: signs of prehuman, non-Christian ways, and the absence of a capitalist system of land production.

—RONA TAMIKO HALUALANI,
In the Name of Hawaiians

The inability of the courts to hear arguments that do not conform to a Western legal framework is undeniably evident in Kennedy's dramatic closing statement in *Rice*:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: *The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.* (*Rice v Cayetano* 2000, 524; emphasis mine)

This statement is problematic on so many levels: history is reduced to a fate overpowering hopeless primitives; the impacts of colonization are reduced to "dismay"; justice is twisted into "political consensus"; and "shared purpose," which is the apparent remedy to the "dismay," is supposed to come from a constitution written centuries ago by nonindige-

nous men in another nation, on a remote continent. Kennedy's statement elides any question of Kānaka Maoli indigenous identity, neatly capturing them as citizens of the United States bestowed with the esteemed "heritage" of the US Constitution. It is to this heritage, not the constitutions of the Kingdom of Hawai'i or their own culture and genealogies, that Kānaka Maoli are patronizingly advised to turn.

In this section I first turn to the Mashpee trial, perhaps the most famous example of indigeneity on trial, for the light it sheds on *Rice*. The Mashpee's desire to find a way to claim resources and recognition through the law leads me to a discussion of the Native Hawaiian Recognition Bill (known as the "Akaka bill" after Daniel Akaka, one of Hawai'i's senators proposed the legislation) as a direct response to the *Rice* case driven by fear over a loss of resources. The Akaka bill highlights the tension between those Kānaka Maoli who hope to find recognition and protection in US law, and those who want nothing to do with it.⁸ The Mashpee case and the Akaka bill, along with *Rice*, further illustrate the ways in which legal discourse renders indigenous people's identities, histories, and epistemologies unrecognizable. In the last half of this section I explore indigenous articulations outside and beyond Western law. Indigenous articulations of identity and epistemology are necessary to a critique of modernity (including whiteness), although that critique is not their main purpose.

It is useful to look at the infamous 1976 Mashpee case as a similar instance of indigeneity on trial while whiteness consolidates power behind the scenes. In this case, the self-identified Mashpee filed suit in federal court for possession of land they argued had been wrongly transferred to the Cape Cod town of Mashpee under the 1790 Indian Nonintercourse Act. The suit made non-Indian residents nervous, as the 16,000 acres in question constituted about three-quarters of the town (Garrouette 2003, 61). Lawyers for the town charged that the Mashpee were not a tribe and therefore had no claim. It seems the Mashpee could call themselves anything they wanted until it started interfering with property. The differences from *Rice* are significant. The Mashpee were proactively trying to use the law, whereas the Office of Hawaiian Affairs (which represented the state and not Kānaka Maoli) was defensively trying to protect itself against the law. The Mashpee were trying to find a way into the box labeled "tribe," whereas OHA and many Kānaka Maoli were trying to find a way out of the box labeled "race."

The similarity of the cases is that both required an indigenous population to define itself in western legal discourse in order to accrue benefits

from a Western judicial system. “In order for the state to hear their claims . . . these Indians were forced to speak in a formalized idiom of the language of the state—the idiom of legal discourse” (Torres and Milun 1990, 628). So the Mashpee tried very hard to look like a “tribe,” while OHA tried very hard to make Kānaka Maoli *not* look like a “race.” It was the fuzziness of those terms, and the strictures of the legal discourse that disallowed better-fitting self-originating concepts, that proved the downfall of the Mashpee and OHA. Ironically, one of the ways OHA tried to buck “race” was to argue “tribe,” to the consternation of many Kānaka Maoli who did not want anything to do with either categorization.

The Mashpee trial degenerated quickly into a battle over cultural authenticity, as the all-white jury settled on culture as the defining ingredient of Indianness. Lawyers for the town successfully convinced the jury that one was either Indian or one was not and that, given the evidence of assimilation by the Mashpee (miscegenation and adoption of American cultural practices), they surely were not. Martha Minnow (quoted in Iijima 2000, n4), Cheryl Harris (1993, 1764–1766), James Clifford (1988, 277–346), Eve Marie Garrouette (2003, 61–81), Michael J Shapiro (2002, 35–36), and Gerald Torres and Kathryn Milun (1990) all regard this case as key in demonstrating the law’s inability to allow for the “negotiated,” “mutable,” “historical” quality of identity. “The tragedy of power was manifest in the legally mute and invisible culture of those Mashpee Indians who stood before the court trying to prove that they existed” (Torres and Milun 1990, 649).

The paradox highlighted by *Rice* is that, while many Hawaiians believe they need to reject or move beyond government programs or monies provided based on their racialization, the specter of *Rice* threatens to take away that racialization, and thus governmental programs or grants based on it, before other structures are in place. Kauanui has expressed the concern that “in light of the legal logic in the *Rice* case, which reduces Hawaiians to ‘equal’ American citizens, it may seem necessary to hold onto any and all marks of distinction, no matter how tainted by colonial relations” (2000, 6). Similarly, Osorio has warned that *Rice* “could initiate a trend to divest the Kānaka Maoli of entitlements that, at this point, represent one of the few hedges against massive poverty and homelessness” (2002, 254). Osorio’s book makes it strikingly clear that Western law is unable to deal with the sovereignty of indigenous peoples—and yet, because of the power of the law, indigenous peoples (including himself) continue to

struggle with the tension between wanting to reject the law and wanting to be recognized and protected by it, like the Mashpee.

It is just this tension that has come to a head in the struggle over the Akaka bill, which was a direct result of the *Rice* decision. In brief, the Akaka bill purports to shore up government funding for Hawaiian programs by establishing some limited federal recognition of a vaguely defined Hawaiian “sovereign entity.” Those who wholeheartedly support the bill, including the Office of Hawaiian Affairs, tout it as granting the sovereignty Kānaka Maoli have been fighting for. Those who stand adamantly opposed argue that it is just “another form of genocide,” a sort of deal-with-the-devil because it forces Hawaiians into an extremely compromised relationship with the US government similar to that of Native Americans. Many Hawaiians position themselves somewhere in between these positions. Some acknowledge the limits and dangers of the bill, but believe it can serve as a stopgap measure. What is clear is that the bill keeps the discussion of Hawaiian identity squarely within a Western legal framework. Kauanui, who opposes the bill, has advocated a different path entirely: “For many Hawaiians, *Rice v Cayetano* makes it all too clear that the discursive apparatus of liberal citizenship, equality, and ‘race’ cannot address issues of collective inheritance and native title. Attention must now turn, insistently, to non-racialized discourses of genealogy, with their attendant notions of responsibility to place and descendants” (2000, 189). If Kānaka Maoli, like the Mashpee, were rendered “mute and invisible” by legal discourse, they can be seen, and heard, surfing other discursive oceans.

INARTICULABLE POSITIONINGS AND MOVES BEYOND WESTERN LAW

What many indigenous peoples are struggling for is explicitly *not* civil rights as citizens of the colonizing nation, nor the federally determined tribal rights of recognized Native American nations. Yet if westerners cannot place them in these boxes, we have difficulty knowing where to put them. Perhaps it is our failure to acknowledge the particular colonial histories of indigenous peoples that are nearly, but not quite, subsumed within our nations. The *Rice* case, Mashpee trial, and Akaka bill in different ways illuminate the power of the law and legal discourse to seduce indigenous people into trying to bend and fold their subjectivities to fit in

a flattened, rigid slot rather than pursue Kauanui's "non-racialized discourses of genealogy."

Colin Perrin's work helps us understand a piece of the dynamic by illuminating a problem of recognition particular to the indigenous Other. In a 1995 article he described the particular anxiety of the nonindigenous in defining indigenous peoples as citizens of both an indigenous and modern nation. They represent "an otherness which can never be," an "ambivalent in-between" because of the "undecidability of their place and time" (Perrin 1995, 57, 66). Perrin wrote, "Indigenous peoples attest less to a formative and exclusionary violence of modernity and the nation, and more to its failure. They evoke the memory of 'something that never ceases to be forgotten' and as such their insistence is, at the same time, an insistence of the postcolonial: the dislocated expression of a colonialism which can neither be remembered nor forgotten; the paralyzed and anxious persistence of an excess which cannot quite be consigned to the past" (1995, 74). As Perrin suggested, the problem is one of historical memory of colonization, but it is more than that. It is temporal and spatial, and as many are now arguing, epistemological.

In an article about teaching in Aotearoa New Zealand, Alison Jones described resistance from Pākehā (white) students to admitting the "possibility of margins to their knowing" (2001, 286). Jones, who is Pākehā, often team-teaches with a Māori instructor. She has found that the Māori teacher is often treated as a "native informant" who is expected to "colour-in" the whole picture for the Pākehā so that they then can feel they have "absolute knowledge" (Jones 2001, 284). Jones posed the question: "Do we have a cultural incapacity to recognize that we assume we can know (everything)?" (2001, 288). She suggested instead that we must allow for "the possibility of not-knowing, of non-mastery" (Jones 2001, 289). Yet this is decidedly *not* a possibility within many Western discourses; the Mashpee and Kānaka Maoli make this clear in the case of legal discourse, and many other scholars following a Foucauldian tradition have similarly exposed this quality of medical and academic discourses.

Let us turn for a moment from the struggle of the West to understand or "place" indigeneity, to what indigenous scholars have to say about their epistemologies and politics. Indigenous scholar Taiaiake Alfred has articulated a distrust of Western law similar to that of Kauanui, including a suspicion of the Western concept of sovereignty. He wrote, "The challenge for indigenous peoples in building appropriate post-colonial gov-

erning systems is to disconnect the notion of sovereignty from its western, legal roots and to transform it” (Alfred 2001, 28). People must reconnect and create relationships to land, culture, and community, not follow Western notions of rights, blood, and status. The tools of struggle, the tools for reconnection, he has argued, are rooted in one’s own culture. Too many indigenous peoples are, in his words, “like tumbleweeds,” easily manipulated by the dominant culture (Alfred 2003).

Similarly, Garrouette’s book ends with a call for a “radical indigenism,” which is more about practice, relationship, and traditional knowledge than strict definitions or legal documentation. She has argued, “In our communities we *already possess* the resources to meet the challenges of identity that confront us, and to do so without damaging those communities” (Garrouette 2003, 143). Native Hawaiian scholar Noenoe Silva has articulated a related position with regard to Kānaka Maoli: “to fully recover, we have to go beyond the nation and nationalism, which are, after all, constructs of the West. We must recuperate a definition of ‘lāhui’ that will truly provide for Kanaka control over the ‘āina [land], and that will give birth to social and political institutions that are good for us” (Silva 1999, 209).

Walter Mignolo called these articulations “border thinking from the perspective of epistemological subalternity” (2000, 9). Citing examples from Gloria Anzaldúa, Vine Deloria Jr, and Rigoberta Menchu, among others, he analyzed how they make explicit the “tension between hegemonic epistemology with emphasis on denotation and truth, and subaltern epistemologies with emphasis on performance and transformation” (Mignolo 2000, 26).

Mignolo invoked Michel Foucault’s concept of genealogy, the union of “erudite knowledge and local memories,” as helpful toward conceptualizing the tension between disciplinary and subaltern knowledges. Genealogies, Foucault wrote, “entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledges against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge and some arbitrary idea of what constitutes a science and its objects” (1980, 83). One of the limits of Foucault’s genealogy, in contrast with Mignolo’s “border thinking,” is that it is predicated on a struggle between “local, discontinuous, disqualified, illegitimate knowledges” and scientific knowledge. It assumes a contest. “Genealogy should be seen as a kind of attempt to emancipate historical knowledges from subjection, to render them, that is, capable of opposition

and of struggle against the coercion of a theoretical, unitary, formal and scientific discourse" (Foucault 1980, 85). But, what if these knowledges are not about "opposition and struggle"; what if they exist irrespective of Western positivistic scientific discourse, not necessarily in competition with it? What if, as Osorio has suggested, indigenous discourse and performance simply enable an internal communication and discussion?

This limitation of Foucault's model comes from not being able to grasp the difference or "excess" of indigeneity that Perrin has described. Indigenous knowledges may be "subaltern," but they are subaltern with a difference, a difference tied to colonization. Stoler criticized Foucault for "short-circuiting empire": "colonialism was clearly outside Foucault's analytic concern, to him a byproduct of Europe's internal and permanent state of war with itself, not formative of those conflicts" (1995, 28).

Mignolo wrote that he wants to "avoid a Eurocentric critique of Eurocentrism" because postmodern theories are "blind to colonial difference. They are blind not to colonialism, of course, as an object of study, but to the epistemic colonial difference and the emergence of border thinking as a new epistemological . . . dimension" (Mignolo 2000, 37-38). It is "colonial difference" that is a blind spot for Foucault, Justice Kennedy, and Harold Rice. And it is border epistemologies, emerging from the "wounds of colonial histories, memories, and experiences" (Mignolo 2000, 37), that will transcend colonial difference:

The transcending of the colonial difference can *only* be done from a perspective of subalternity, from decolonization, and, therefore, from a new epistemological terrain where border thinking works . . . border thinking can only be such from a subaltern perspective, never from a territorial one. . . . Border thinking from a territorial perspective becomes a machine of appropriation of the colonial difference/a/nces [*sic*]; the colonial difference as an object of study rather than as an epistemic potential. Border thinking from the perspective of subalternity is a machine for intellectual decolonization. (Mignolo 2000, 43)

Kennedy's decision sought to deny colonial difference, to whitewash Hawai'i's history with a developmental narrative that centers the haole. The Office of Hawaiian Affairs struggles to find a way to capture colonial difference in Western legal discourse. *Rice* seeks to romanticize colonial difference as the source of essentialized, depoliticized intelligence, happiness, and petrified cultural tradition. All of these moves normalize haole subjectivity by problematizing, assimilating, or exoticizing Kanaka Maoli

subjectivity, and ignoring the fundamental meaning of colonial difference. For those of us trained in Western thinking, refusing to recognize the “margins of our own knowing”—trying to capture, categorize, contain, know, and even become Kānaka Maoli—simply reproduces haole.

Notes

1 It is significant that the lawsuit received significant support from the righting Campaign for a Color-Blind America (Rees 1999).

2 The text of the law is quite strong. Its declaration reads:

The Congress -

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

(4) expresses its 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

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

3 The word *lāhui* is often translated as “race” by scholars, but assuming an easy equivalence is but one example of the violence of translation. *Lāhui* had and has many meanings including “nation” and “people.” It came to stand in for “race” when that Western concept was imported (Silva 2003).

4 Hypodescent—also known as the “one drop rule”—legally classifies anyone with “one drop” or more of black “blood” as black.

5 The Dawes Rolls were taken between 1899–1906 by federal commissioners and are themselves problematic because of the inconsistent way those who applied for the rolls were denied or accepted and because many actively resisted registration (Garrouette 2003, 20–22). See also Sturm 2002.

6 I cannot use the metaphor of “blindness” to signify unknowing without

noting its ablest assumptions. I do not intend to reify constructions of disability as lack or incompleteness. I use it here because of the preexisting terminology of “color-blindness.”

7 The *Advertiser* responded to Kennedy’s claim in a 2 March 2000 editorial with the retort “Well-accepted where? Certainly not in Hawaii.”

8 For more background on the Akaka bill, please see “Precarious Positions: Native Hawaiians and US Federal Recognition” (Kauanui 2005).

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Abstract

This paper is part of a larger project that explores haole (white people, foreigners) as a colonial form of whiteness in Hawai'i—as a dynamic social assemblage. Haole was forged and reforged in over two centuries of colonization, and it must be understood through that history. I use the recent Supreme Court decision in *Harold F Rice v Benjamin J Cayetano*, 528 US 495 (2000), as an entry point into the interrogation of haole. Framed by the dominant discourse, the case appeared to be about Native Hawaiians (asking questions about who they are and what rights they have), and not about haole (assuming there are no questions as to who they are and what rights they have).

The *Rice* case illustrates how Western law renders indigenous claims inarticulable by racializing native peoples, while simultaneously normalizing white subjectivity by insisting on a color-blind ideology. The inherent contradiction in these two positions—race matters/race does not matter—is played out in the frictions surrounding the *Rice* decision and is evidence of the cracks in the hegemony of Western law that complicate any easy binary of colonizer–colonized. Through an analysis of *Rice*, I explore how the Western legal framework is set up to accept the teleological narrative of the development, to problematize native identity, and to naturalize white subjectivity. I then broaden the lens to explore the ways *Rice* points to an epistemological disconnect between Western notions of the production of knowledge and indigenous articulations of the same.

KEYWORDS: indigeneity, whiteness, colonization, Hawai'i, law, critical race theory